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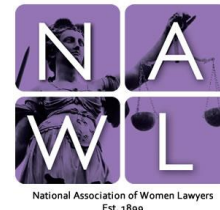
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

The National Association of Women Lawyers (“NAWL”) Committee for the Evaluation of Supreme Court Nominees (“Committee”)¹ has completed an extensive review of the qualifications and background of the Honorable Neil Gorsuch, the Presidential nominee for the United States Supreme Court to fill the vacancy created by the death of Justice Scalia.

Consistent with the stated mission of the Committee, our assessment focused on Judge Gorsuch’s personal integrity, professional competence, and judicial temperament, with “an emphasis on laws and decisions regarding women’s rights or that have a special impact on women.”² Our review of over 500 opinions, concurrences, and dissents written by Judge Gorsuch and articles and books he authored or coauthored led the Committee to conclude that Judge Gorsuch has outstanding legal ability consistent with service on the Supreme Court. Similarly, our interviews of several dozen litigants, former law clerks, former and current colleagues, and others who have interacted with Judge Gorsuch during the last three decades persuaded the Committee that he has the highest reputation for integrity and generally demonstrates a sound judicial temperament. However, the Committee’s standards require review of each nominee under several separate evaluation criteria, and the prospective nominee is found “not qualified” when “the Committee has determined that the prospective nominee does not meet the Committee’s standards with respect to one or more of its evaluation criteria - integrity, professional competence, judicial temperament or he or she does not demonstrate a commitment to women’s rights or issues that have a special impact on women.”³ Judge Gorsuch’s writings in or about several cases that implicate women’s rights or interests caused the Committee significant concern. Based on those writings, in light of the quoted language contained in the Committee’s standards, the Committee finds that Judge Gorsuch, to date, does not have a “demonstrated commitment to women’s rights or issues that have a special impact on women.”⁴ Because such a demonstrated commitment is a pre-requisite for a nominee to receive a “qualified” or “well qualified” ranking from NAWL, the Committee ranks Judge Gorsuch “not qualified.”

The key issues of concern identified through the Committee’s review of Judge Gorsuch’s writings fall into two key categories. First, the Committee is concerned by Judge Gorsuch’s expansive view of religious rights and of the rights of corporate entities, which has led him to conclude that the religious rights of individuals and corporations take precedence over women’s liberty interests,



¹ NAWL’s Supreme Court Committee is comprised of distinguished law professors, appellate practitioners, corporate counsel, and current and former federal law clerks.

² National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees, p. 1 (attached).

³ *Id.* at p. 5 (emphasis added).

⁴ *Id.*

including women's reproductive rights. Second, the Committee is concerned by Judge Gorsuch's narrow reading of the holdings in key cases where the application of substantive due process was held to protect individual liberties of women and minorities.

In our view, Judge Gorsuch has taken an overly expansive view of religious rights that unnecessarily compromises women's reproductive rights in cases where both are at issue. To illustrate the point, the Committee offers the following examples:

- In a concurring opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), Judge Gorsuch held that an expanded application of religious freedom operates to invalidate the contraception coverage mandate of the Affordable Care Act ("ACA"), limiting a woman's reproductive health choices. This opinion expanded the theory of religious rights to include corporate decision-making and, in so doing, limited the rights of women employees to make their own health care decisions.⁵
- In *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315, 1317 (10th Cir. 2015), the Tenth Circuit Court of Appeals upheld the ACA accommodation allowing religiously-affiliated non-profit organizations to submit a form opting out of birth control coverage through employer provided health plans while ensuring women could nevertheless obtain coverage from those insurance plans. In a *sua sponte* poll for rehearing, Judge Gorsuch joined a dissent from the denial of rehearing, which argued that the act of submitting the form, itself an attempt to balance an organization's religious freedom and women's access to contraception, violated the plaintiffs' religious freedom.

In another case, Judge Gorsuch favored what the majority considered an "unusual procedural move" in an attempt to reverse the entry of a temporary injunction favoring Planned Parenthood. In *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1302 (10th Cir. 2016), a Tenth Circuit Court of Appeals panel preliminarily enjoined an order issued by the Governor of Utah that would have defunded Planned Parenthood. In his dissenting opinion Judge Gorsuch continued to argue for an *en banc* hearing, despite the fact that an initial poll of the judges had failed, neither party had requested an *en banc* hearing and the litigants had agreed to a preliminary injunction in favor of Planned Parenthood.

Judge Gorsuch's writings also exhibit a reluctance to recognize precedent that applies substantive due process to protect the rights of women and minorities.⁶ In Chapter 5 of his 2006 book titled *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch argues that the portions of the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and the majority opinion in *Loving v. Virginia*, 388 U.S. 1 (1967) that rely on a due process fundamental liberty interest can be read as dicta. Judge Gorsuch's narrow reading of *Casey* and *Loving* is belied by other Supreme Court opinions that also rely on the existence of a fundamental liberty interest of protecting individual rights to maintain control over private decisions without government interference, including those of women and minorities. See, e.g., *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015) (acknowledging the right of same sex couples to marry); *Lawrence v. Texas*, 539 U.S. 558, 564, 123 S. Ct. 2472, 2476, 156 L. Ed. 2d 508 (2003) (protecting private sexual choices); *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L.Ed.2d 349 (1972) (affirming the right of unmarried individuals to possess birth control); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) (affirming the right to privacy of married couples in intimate decision making). The views Judge Gorsuch articulated in this chapter raise the concern that he interprets abortion rights as resting on little more than *stare decisis*, and that his approach to substantive due process will otherwise mirror the most restrictive views asserted by members of the modern Supreme Court.

⁵ NAWL joined in the National Women's Law Center's Amicus brief filed in the Supreme Court on appeal from the Hobby Lobby decision. That brief argued for the reversal of the Tenth Circuit opinion.

⁶ See Gorsuch, Neil, *The Future of Assisted Suicide and Euthanasia*, Ch. 5: "Casey and Cruzan: Do They Intimate a Right to Assisted Suicide and Euthanasia," (2006).

Judge Gorsuch has authored several decisions in gender discrimination cases and regarding general principles of statutory anti-discrimination law. In general, his opinions in these cases are written thoughtfully and respectfully and recognize the difficulties encountered by cisgender⁷ anti-discrimination claimants even in his opinions issuing adverse rulings. He has reached defensible positions both in favor and against women based upon the specific facts of each case. *See Strickland v. United Parcel Service*, 555 F.3d 1224 (10th Cir. 2009) (*en banc* concurrence in part and dissent in part) (finding basis for new trial on FMLA claim but not on Title VII sexual harassment claim); *Orr v. City of Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (finding factual issues regarding pretext to support a trial on FMLA and Title VII claims). Yet, on issues of law, his plain-meaning approach to statutory interpretation and his reluctance to defer to administrative agencies has caused him to reject interpretations of anti-discrimination statutes that are favorable to women. *See Elwell v. State of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012) (holding under the ADA that employment discrimination claims cannot be brought under Title II); *Almond v. Unified School District*, 665 F.3d 1174 (10th Cir. 2011) (limiting Lily Ledbetter Act's long statute of limitations to claims for unequal pay, as opposed to all compensation-based claims).

The Committee finds that Judge Gorsuch consistently displayed both a superior intellect and a comprehensive understanding of the issues with which he was presented. The Committee found his opinions well written, his analytic abilities impressive, and his judicial reasoning accessible. Interviewees also affirmed his dedication to "getting it right," while also acknowledging the impact of his deeply conservative legal perspective. Additionally, the Committee's interviewees said that the Judge is thoughtful, hardworking, highly prepared, and thorough. Most interviewees described him as an engaged boss who supported his colleagues and employees regardless of gender. With a few exceptions, the interviewees described Judge Gorsuch as intellectually capable of assuming the role of Supreme Court Justice and his temperament as appropriate for such an esteemed position. The Committee finds that Judge Gorsuch has demonstrated the intellectual and analytical talent, judicial temperament, and professional demeanor required to serve on our Nation's highest court.

Nevertheless, because the Committee has found that Judge Gorsuch has not "demonstrate[d] a commitment to women's rights or issues that have a special impact on women,"⁸ we find that he is not qualified under NAWL's standard to assume the position of Justice of the Supreme Court of the United States.

Very Truly Yours,



Camille A. Nelson, Co-Chair
NAWL Supreme Court Committee



Ramona E. Romero, Co-Chair
NAWL Supreme Court Committee

cc: The White House
Judge Neil Gorsuch

The mission of NAWL is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

⁷ However, Judge Gorsuch participated in decisions issued by panels of the Ninth and Tenth Circuits that declined to recognize transgender women as women and, as such, denied them rights that would be afforded to other women. *See Kastl v. Maricopa County Community College*, 325 Fed. Appx. 492 (9th Cir. 2009) (sitting by designation); *Druley v. Patton*, 601 Fed. Appx. 632 (10th Cir. 2015). These opinions reflect a departure from the approach Judge Gorsuch has shown in other discrimination matters involving women, and cause the Committee significant concern.

⁸ National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees at p. 5.