



The National Voice for Direct-Care RNs

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March 23, 2017

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

RE: Judge Neil Gorsuch
Nominee for the Supreme Court of the United States

Dear Senator Feinstein:

We write on behalf of the more than 150,000 registered nurse members of National Nurses United to urge you to vote against referring the nomination of Judge Neil Gorsuch to the full Senate for consideration. Many organizations have weighed in against Judge Gorsuch's nomination, and so we are brief, rather than exhaustive, in outlining the reasons for our very serious concerns.

Our members work as bedside healthcare professionals throughout this country. We work in every hospital setting, from small rural facilities to large urban public health systems, in prominent research hospitals affiliated with prestigious public and private universities, as well as Veterans Affairs hospitals and clinics. We care for Americans on every point of the demographic spectrum, at their most vulnerable. We provide the best care we possibly can, without regard to race, gender, national origin, religion, socioeconomic circumstances, or other identifying characteristic. Unfortunately, Judge Gorsuch has not embodied these same principals in his time on the bench. Instead, he has been consistently dismissive of Americans' rights to meaningful equality and workplace justice, and the need for robust enforcement of those rights. And he has cultivated a jurisprudence that promotes business interests at the expense of the average American. To advance his nomination to the highest court of the United States would abdicate your responsibility to provide the oversight necessary to ensure that basic legal rights are enforced evenhandedly and for the protection of all people.

Dismissive of Minority Rights

Judge Gorsuch has opposed the ideal that people who face, and who have historically faced, formal discrimination should be able to rely on the courts to enforce the Constitution's guarantee of due process and equal rights under the law. For example, in 2005, Judge Gorsuch wrote that "American liberals have become addicted to the courtroom . . . as the primary means of effecting their social agenda on everything from gay marriage" to other issues. Judge Neil Gorsuch, *National Review*, Feb, 7, 2005.

The idea that members of the LGBT community have a constitutional, as well as unalienable, right to equality is not some liberal social agenda. It is simply a call to enforce the Fifth and Fourteenth Amendments of the United States Constitution. In fact, it is the Constitution's guarantee of minority protection from unequal treatment by an insular majority that makes our democracy a unique and precious embodiment of the principles that all people "are created equal," endowed "with certain unalienable Rights." And sadly, Judge Gorsuch's dismissive attitude toward minority rights is not just academic. It has also colored his time on the bench. *E.g.*, *Druley v. Patton*, 601 Fed. Appx. 632 (10th Cir. 2015) (Judge Gorsuch joined in ruling that a prison did not violate the rights of a transgender woman by housing her in an all-male facility, as well as denying her hormone therapy and her request to wear women's underclothing).

Privileges Business Interests Over Workers' Rights

Judge Gorsuch has also rejected the ideas that Americans have the right to be free from discrimination at work, and that this encompasses the right to reasonable accommodations. For example, in *Hwang v. Kansas State University*, Judge Gorsuch rejected a professor's assertion that his request for extended leave to deal with cancer qualified as a reasonable accommodation. 753 F.3d 1159 (10th Cir. 2014). Congress enacted the ADA not only to protect the rights of Americans with disabilities, but also to ensure that this country benefits from the full potential contribution of people who are struggling with a mental or physical condition that substantially limits a major life function. The requirement that employers provide reasonable accommodation is a key part of how the Congress designed the ADA to meet these goals. The Rehabilitation Act similarly requires employers who receive federal funds to provide reasonable accommodations to their employees.

As nurses, we see everyday how effectively patients, including many cancer patients, overcome their illnesses and return to productive work lives when properly supported. As anyone who has struggled with a major mental or physical limitation knows, leave to take care of disability-related medical needs is often the accommodation needed to make continued participation in the workforce possible. The stress of job loss on top of a devastating period of illness is not therapeutic, to say the least. Employers can often provide this accommodation with no undue hardship. For example, with a professor, a university might substitute in an adjunct or simply hold on offering a class. In fact, many universities now employ more adjunct faculty than tenured professors.¹ These non-tenure track professors are generally paid (modestly) by the class.² Many adjunct professors are so desperate to pick up enough classes to make a living that they work at more than one institution.³ In such circumstances, it would be an unusual, rather than a typical, case in which it would impose an undue hardship on an employer to allow a professor the additional leave necessary to win his battle with cancer by assigning his classes to adjunct faculty hungry for work. With such nominal accommodation, Mr. Hwang's career might have continued on track despite his battle with cancer.

Likewise, it will often be of no serious impact for a major employer to hold a position for an employee needing additional leave. For example, many retailers, frequently have near constant openings in such high turn-over positions as cashier, stock person, bagger, or cart runner.⁴ In

such circumstances, it would be very unusual for additional leave to impose undue hardship on a business. But Judge Gorsuch doesn't see it that way. Instead, he frames the question as "[m]ust an employer allow employees more than six months' sick leave or face liability"? Which he answers "[u]nsurprisingly, the answer is almost always no." 753 F.3d 1159.

Sadly, this disregard of workers' needs for accommodation is typical of Judge Gorsuch's general disregard of workers' right in favor of the idea that employers' actions should rarely be checked by the law. For example, in *NLRB v. Community Health Services*, Judge Gorsuch dissented from a decision upholding the NLRB's calculation of backpay damages for workers whose federal rights had been violated by their employer. 812 F.3d 768, 780 (10th Cir. 2016). Judge Gorsuch wanted to prioritize ensuring that the worker did not receive any net benefit from suffering this illegal action, rather than prioritizing that the employer was held accountable for its illegal action. This twisted priority carries the dangerous potential to undermine the deterrent effect of most workers' protections in the country.

Similarly, in *Little Sisters of the Poor*, Judge Gorsuch dissented from his court's denial of en banc review of a decision holding that an employer's religious interests were not substantially burdened by a requirement that it obtain an exemption from the requirement that employee health insurance includes contraceptive coverage. 799 F.3d 1315 (10th Cir. 2015). In other words, Judge Gorsuch voted in favor of prioritizing an employer's beliefs over workers' access to healthcare. Like the laws of physics, the facts of life are immutable. According to the Guttmacher Institute,⁵ there are 61 million women of childbearing age (15-44) in the United States, of which approximately 43 million are sexually active and at risk of an unwanted pregnancy if they fail to use contraceptives consistently. A report on use of contraceptives issued in 2015 by the U.S. Department of Health and Human Services Centers for Disease Control and Prevention confirms that virtually all sexually experiences women in the United States have used contraception at some point in their lives.⁶ While there is some debate over precise numbers,⁷ it is undisputed that, on average, women of childbearing age incur considerably greater out-of-pocket healthcare costs than men in that age group, in large part attributable to doctor visits and pharmacy costs, including co-pays and deductibles, associated with the 30-year family planning effort most women are faced with. Any nurse can attest to the fact that financial pressures associated with healthcare expenses have a very real impact on all but the wealthiest healthcare consumers. You do not have to be a nurse to understand that it is fundamentally unfair to burden 43 million women and their families with the threat of an exemption from coverage of an essential healthcare need.

This ideological decision to give short shrift to workers' rights in order to afford businesses carte blanche is a dominant theme in Judge Gorsuch's jurisprudence. *See also, e.g., Teamsters Local Union No. 455 v. N.L.R.B.*, 765 F.3d 1198 (10th Cir. 2014) (denying union's request to hold employer's lockout of employees unlawful because the employer had threatened to hire permanent replacement workers); *Weeks v. Kansas*, 503 F. App'x 640 (10th Cir. 2012) (held that in-house counsel was not protected by law when she was fired after taking complaints made to her by employees to the fire marshal); *Compass Env't'l, Inc. v. O.S.H.R.C.*, 663 F.3d 1164 (10th Cir. 2011) (dissented from ruling upholding a fine against a company that failed to adequately train a worker who was, as a result, electrocuted.); *Young v. Dillon Companies, Inc.*, 468 F.3d 1243 (10th Cir. 2006) (held that employee's race discrimination claim failed even though

employer's proffered reasons for termination were false).

Contemptuous of Agencies' Subject Matter Expertise

Moreover, Judge Gorsuch disinclined to defer to the obvious expertise of the federal agencies that are charged with enforcing the laws that protect American workers. He has repeatedly opined *against* affording deference to these neutral law enforcement agencies. *E.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (concurring, suggesting that it is time to reconsider the Supreme Court's earlier decision, *Chevron v. Natural Resources Defense Counsel*, which provides for deference to federal agencies' interpretations of statutes that they are charged with enforcing); *TransAm Trucking, Inc. v. Admin Review Bd., U.S. Dep't of Labor*, 833 F.3d 1206 (10th Cir. 2016) (dissenting, criticizing the majority for deferring to Department of Labor's expert opinion).

This disregard for agency expertise is particularly troubling because federal judges are generalists by design, hearing cases on hundreds of different and unrelated issues. Federal appellate judges, like Judge Gorsuch, are necessarily removed from the actual facts on the ground because they never hear evidence at all. Federal agencies, on the other hand, are not generalists and are steeped in factual understanding. These agencies specialize in enforcing one area of law, and through that law enforcement, develop deep experiential understanding of the realities on the ground.

For example, the National Labor Relations Board ("NLRB") enforces just one narrow set of federal laws: those regulating workers' rights to organize and act collectively, free from intimidation and harassment by the employer. And the NLRB investigates thousands of cases involving these laws every year.⁸ As a result, the NLRB possesses a deep, factual understanding of how workers' rights to organize actually play out in the workplace, how employers violate such rights, and the remedies necessary to protect these critical statutory guarantees of workplace freedoms. The Equal Employment Opportunity Commission ("EEOC") likewise possesses a unique understanding of realities relevant to the laws it enforces. The EEOC is the federal agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information. It investigates tens of thousands of charges of discrimination a year.⁹ And because of its decades of experience enforcing this very narrow set of laws, the EEOC has unique expertise on the realities of how discrimination manifests itself in the workplace, what worker rights these laws protect, and what these laws require from employers. Other federal agencies possess similar expertise in their special areas of enforcement.

Contrast this fact-based expertise with the experience of a federal judge like Neil Gorsuch. What does a federal judge like that, who went from an Ivy League undergraduate school, to an Ivy League law school, to a career of elite legal positions know about the realities facing American workers? Why on earth would it be appropriate for such a judge to decline to defer to the reality based expertise developed by federal agencies that have boots on the ground dealing with thousands of actual fact-based cases?

But this is exactly what Judge Gorsuch wishes to do. He would rather federal judges be free to follow their own ideological dictates, instead of deferring to agencies' reality-based expertise, regardless of how necessarily disconnected judges' independent ideas are from the realities on the ground. And in Judge Gorsuch's case, this freedom to substitute judicial intuition for agency expertise would be used to give effect to the far right ideology that workers' rights should be subordinate to business interests. *Compare Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014) (Judge Gorsuch opining that the law will rarely require employer's to provide extended leave as a reasonable accommodation); to EEOC Guidance, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016) (explaining that the law will often require employer's to provide extended leave as a reasonable accommodation). Ultimately, this ideological contempt for agency expertise stems from, and gives effect to, ideological opposition to the many federal laws these agencies enforce — the laws that Congress passed to defend workers' rights, consumer protections, and the environment all Americans depend on for a healthy quality of life.

In sum, as Judge Gorsuch's publicly expressed opinions and judicial rulings thoroughly demonstrate, he is a man driven by ideology: Minority rights should not be jealously protected by the courts, but rather subject to the political will of insular majorities. Workers' rights should be given very narrow readings so that business interests can rule the day. And federal judges should be able to substitute their ideology for actual agency expertise, to minimize the effect of federal laws that protect the average American.

Our country is better than this. The Constitution requires more from the judiciary. And as nurses, we demand more. For all these reasons, as the gate keeper to the nomination process, we urge you to use your power to prevent such a judge from being given a life time appointment to this nation's highest court by declining to advance Judge Gorsuch's nomination.

Sincerely,



Deborah Burger, RN
Co-President
National Nurses United



Jean Ross, RN
Co-President
National Nurses United

¹ Elizabeth Segran, *The Adjunct Revolt*, THE ATLANTIC, Apr. 28, 2014, available at <https://www.theatlantic.com/business/archive/2014/04/the-adjunct-professor-crisis/361336/> (noting that adjuncts now make up 76.4% of college faculty).

² Cabrillo College Federation of Teachers, *Adjunct Faculty Awareness*, Feb. 28, 2015, available at <http://www.ccfcabrillo.org/february-2015-adjunct-faculty-awareness-some-facts-we-should-all-know/>.

³ *Id.*

⁴ E.g., Krystina Gustafson, *Retail's Turnover a Plus for Economy but Challenge for Stores*, CNBC, Sept. 23, 2014, available at <http://www.cnbc.com/2014/09/23/retail-turnover-rates-on-the-rise.html> (noting that “median turnover rates for part-time retail workers jumped back up to

74.9 percent in 2013”).

⁵ Guttmacher Institute September 2016 Fact Sheet on Contraceptive Use in the United States, available at <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

⁶ Centers for Disease Control and Prevention, National Health Statistics Reports No. 86, Current Contraceptive Use and Variation by Selected Characteristics Among Women Aged 15-44: United States, 2011-2013 (2015).

⁷ The oft-cited statistic and the one Justice Ginsburg referred to in her dissent in *Burwell v. Hobby Lobby Stores, Inc.*, 537 U.S. ___, 2014 U.S. LEXIS 4505 (2014), is that women of childbearing age on average incur 68 percent higher out of pocket healthcare cost.

⁸ For example, in fiscal year 2013, the NLRB investigated 24,046 cases. See Agency Report to Congress, available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1706/NLRB%20FY%202015%20CJ%20Narrative%203-07-14%20-%20FINAL.pdf>.

⁹ For example, in fiscal year 2015, the EEOC handled over 90,000 charges of discrimination. See Agency Report to Congress, available at https://www.eeoc.gov/eeoc/plan/2017budget.cfm#_Toc442168124.