



# The Nomination of Judge Neil Gorsuch to the U.S. Supreme Court:

A Threat to Women, Workers and All Those Who Face Discrimination

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## **About the National Partnership for Women & Families**

At the National Partnership for Women & Families, we believe that actions speak louder than words, and for 46 years we have fought for every major federal policy advance that has helped women and families.

Today, we promote fairness in the workplace, reproductive health and rights, access to quality, affordable health care, and policies that help women and men meet the dual demands of their jobs and families. Our goal is to create a society that is fair and just, where nobody has to experience discrimination, all workplaces are family friendly, and no family is without quality, affordable health care and real economic security.

Founded in 1971 as the Women's Legal Defense Fund, the National Partnership for Women & Families is a nonprofit, nonpartisan 501(c)3 organization located in Washington, D.C.

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# Introduction

On January 31, 2017, President Donald Trump nominated United States Court of Appeals for the 10th Circuit Judge Neil Gorsuch to a seat on the U.S. Supreme Court. Though Justice Antonin Scalia, the seat's previous occupant, passed away nearly a year before the end of President Barack Obama's second term, Senate leaders kept the seat open by refusing to confirm President Obama's Supreme Court nominee.

Throughout the 2016 campaign, candidate Trump pledged repeatedly that he would appoint Supreme Court justices in the mold of Justice Scalia and who would vote to overturn the landmark abortion rights decision, *Roe v. Wade*. The late Justice Scalia fought fiercely to undermine social and legal progress – from civil rights to health care, equal pay to environmental protections, abortion rights to voting rights. Through his jurisprudence, Justice Scalia attempted to shape an America that was less fair for women and people of color, less protective of the rights of the powerless and less tolerant of difference. President Trump's pick to succeed Justice Scalia is no different.

Supreme Court justices have unparalleled power to interpret and apply laws that affect, for both good and ill, the lives of millions of people for generations. All Supreme Court nominees require unsparing scrutiny and consideration by the Senate and by concerned citizens. The National Partnership for Women & Families has reviewed Judge Gorsuch's jurisprudence and legal writings to better understand his judicial approach toward the well-established constitutional rights and laws that protect women, workers and their families. What we found is alarming. While not a comprehensive review, this report highlights some of the cases that are most troubling in key areas of the law that impact women.

In case after case, Judge Gorsuch has found ways to interpret the law to narrow women's reproductive rights and side with corporations over people. While on rare occasions he found for individual plaintiffs, Judge Gorsuch overwhelmingly stood on the side of corporate defendants, whether the issue was sex discrimination or worker safety. Especially disturbing was his decision to support a for-profit corporation's right to rely on religious objections to deny its employees insurance coverage for contraception. He has also ruled to undermine the rights of immigrants and LGBTQ individuals, among others. Moreover, it is clear that Judge Gorsuch would be a staunch foe of abortion rights. Judge Gorsuch cannot be relied upon to be fair to regular people who seek to vindicate their rights in court.

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Finally, Judge Gorsuch's appointment takes place at an unprecedented moment in U.S. history. A minority of voters elected a president who demonstrates little respect for the Constitution, for the judiciary and for the separation of powers. President Trump has repeatedly and publicly taunted and denigrated federal judges who ruled against him and questioned the constitutionality of his executive orders. It is likely that the Supreme Court will be called upon to review the constitutionality of this president's actions. These times call for judges who will be fiercely protective of the Constitution, of the prerogatives of the judicial branch and of judicial independence. Judge Gorsuch has not demonstrated such independence.

In short, Judge Gorsuch's elevation to the Supreme Court would be devastating for all who care about women's health and rights and about stopping discrimination.

# About Judge Neil Gorsuch

Judge Neil Gorsuch has served as a judge on the U.S. Court of Appeals for the 10th Circuit since 2006, when he was appointed to the bench by President George W. Bush. Before becoming a judge, Gorsuch spent more than a decade as a litigator, first representing mostly corporate clients for a private law firm, Kellogg, Huber, Hansen, Todd, Evans & Figel, and then as a political appointee in the U.S. Department of Justice under President George W. Bush, where he oversaw cases in the Antitrust, Civil, Civil Rights, and Environment and Natural Resources divisions.

Before entering private practice, Judge Gorsuch clerked for Supreme Court Justices Anthony Kennedy and Byron White and for D.C. Circuit Court of Appeals Judge David Sentelle. He holds a Bachelor of Arts from Columbia University, a Juris Doctor from Harvard Law School and a Doctor of Philosophy from Oxford University, where he was a Marshall Scholar.<sup>1</sup>

Judge Gorsuch has advocated for politically conservative views since his days as a conservative columnist for his college newspaper.<sup>2</sup> Judge Gorsuch has been a member of the Republican National Lawyers Association<sup>3</sup> and a listed expert for the Federalist Society, an organization that promotes conservative ideologies and “originalist” legal analyses throughout the judiciary.<sup>4</sup> Over the last decade, more than two-thirds of Judge Gorsuch’s law clerks on the 10th Circuit have been men.<sup>5</sup> By contrast, roughly 46 percent of federal clerks nationally are women.<sup>6</sup>

At just 49 years of age, Judge Gorsuch would be the youngest appointee to the Supreme Court since Justice Clarence Thomas. If confirmed to this life-tenure post, Judge Gorsuch would be positioned to shape Supreme Court jurisprudence for decades to come.

# Going Backward on Reproductive Rights

At the behest of President Trump, conservative organizations handpicked Judge Gorsuch as a reliable vote against reproductive rights. Judge Gorsuch has held that corporations – which he deems “people” – should be able to deny women birth control coverage, effectively giving employers veto power over their employees’ reproductive health decisions. Moreover, Judge Gorsuch has sought to undermine access to reproductive health care by siding with anti-abortion politicians and against Planned Parenthood, which is a vital health care provider and serves many of the most marginalized people. Finally, Judge Gorsuch has consistently criticized the Supreme Court’s abortion jurisprudence, suggesting that he would make room for abortion opponents to legislate the right to abortion out of existence. When it comes to reproductive rights, Judge Gorsuch would take our country backward.

## Contraception

When Congress passed the Affordable Care Act (ACA) in 2010, it sought to eliminate disparities in health care costs for men and women. Recognizing that contraception is an essential health care service for women – enabling them to protect their health, plan their families and improve their economic security – the ACA requires insurance plans to provide contraceptive coverage without cost sharing.

In 2013, Judge Gorsuch joined the majority of an en banc 10th Circuit panel in holding that for-profit corporations could use religion to discriminate and deny women access to contraception. In *Hobby Lobby Stores, Inc. v. Sebelius*, the 10th Circuit held that closely held for-profit corporations could likely exclude contraceptive coverage from their health care plans, despite the ACA’s requirements, if providing coverage conflicted with their religious beliefs.<sup>7</sup> In creating this exemption, the court held that for-profit corporations are legal “persons” capable of holding religious beliefs under the Religious Freedom Restoration Act (RFRA).<sup>8</sup> The majority, including Judge Gorsuch, also held that promoting gender equality and public health through the contraceptive coverage benefit did not constitute compelling government interests under RFRA.<sup>9</sup> Furthermore, the court inappropriately accepted, as a religious belief, the plaintiffs’ false assertion that some forms of contraception are “abortifacients.”<sup>10</sup> As the dissent pointed out, the question of contraceptives’ mechanism of action is a factual question that should be based on scientific evidence, not an assertion of faith.<sup>11</sup>

In a separate concurrence, Judge Gorsuch wrote that he would go even further by granting standing not just to corporations, but also to the individual business owners themselves.<sup>12</sup> Moreover, his position that it is not for courts to decide whether a burden is too attenuated to be substantial<sup>13</sup> is a dangerous invitation for entities to discriminate using religious justifications.

The 10th Circuit decision was upheld by a closely divided Supreme Court in *Burwell v. Hobby Lobby*.<sup>14</sup> In a blistering dissent, Justice Ruth Bader Ginsburg warned that the five-justice majority created an exception that would “deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage[.]”<sup>15</sup> In addition to contraception, she warned, the decision also threatened to allow corporations to claim religious exemptions to all kinds of medical care: “Would the exemption . . . extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids,

and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?”<sup>16</sup> In the years since the *Hobby Lobby* decision, these warnings have been borne out as individuals and entities have attempted to use religion to discriminate and skirt health, safety and anti-discrimination protections.<sup>17</sup>

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Two years later, Judge Gorsuch doubled down on his commitment to allowing institutions’ religious beliefs to trump the rights of others. Under the ACA’s contraceptive coverage benefit, nonprofit religious organizations that object to providing contraceptive coverage can opt out, and instead insurance companies provide coverage directly. When several nonprofits challenged that accommodation and lost in the 10th Circuit in *Little Sisters of the Poor v. Burwell*, Judge Gorsuch joined a minority seeking to rehear the case, arguing that even filling out a simple form expressing their objection to contraception in order to obtain the accommodation could pose a substantial burden on the plaintiffs’ exercise of religion.<sup>18</sup>

## **Abortion Rights**

In his decade on the 10th Circuit, Judge Gorsuch has not ruled directly on the issue of the right to abortion. However, it is evident that Judge Gorsuch would be a threat to abortion rights and the precedent set by *Roe v. Wade*.

By nominating Judge Gorsuch, President Trump delivered on his promise to appoint an anti-abortion justice. On the campaign trail, then-candidate Trump repeatedly stated that he was “pro-life” and that he would appoint “pro-life judges.”<sup>19</sup> He said his appointed judges would “automatically” overturn *Roe v. Wade*.<sup>20</sup> President-elect Trump reaffirmed his position after winning the election, again saying that he was “pro-life” and the judges he appointed would be “pro-life.”<sup>21</sup> He outsourced the identification of federal judges who would fit that criterion to conservative groups such as the Heritage Foundation and the Federalist Society.<sup>22</sup> Judge Gorsuch was identified through that search.<sup>23</sup> Vice President Mike Pence also vouched for Judge Gorsuch’s anti-abortion credentials at the anti-choice “March for Life,” four days before Gorsuch’s appointment: “[W]e’re in the promise-keeping business . . . President Donald Trump will announce a Supreme Court nominee who will uphold the God-given liberties enshrined in our Constitution in the tradition of the late and great Justice Antonin Scalia. Life is winning in America.”<sup>24</sup> There is no doubt that Judge Gorsuch has been vetted for and selected because of his anti-abortion views.

By his actions, Judge Gorsuch has demonstrated hostility to abortion and women’s reproductive rights.

### **SIDING WITH ANTI-ABORTION POLITICIANS**

In 2015, after videos that falsely accused Planned Parenthood of selling fetal tissue were released as part of an anti-abortion smear campaign, Utah Governor Gary Herbert ordered state agencies to withhold federal funding from Planned Parenthood for health programs such as sexually transmitted infection testing and sexual health education.<sup>25</sup>

In *Planned Parenthood Association of Utah v. Herbert*, Planned Parenthood sued to enjoin Gov. Herbert from withholding the funds. In 2016, a 10th Circuit panel ordered that Gov. Herbert be preliminarily enjoined from denying those funds. The court held that Planned

Parenthood would likely prevail on claims that Gov. Herbert’s personal opposition to abortion, and not his reaction to the videos he admitted he knew to be false, had motivated him to withhold those funds unconstitutionally.<sup>26</sup>

Neither party petitioned for a rehearing, but in a rare procedural turn, a Circuit Court judge requested *sua sponte* that the case be reheard en banc. When a majority of his colleagues declined to rehear the case, Judge Gorsuch dissented. Criticizing the court’s decision to grant a preliminary injunction, he wrote that the court had not properly assessed the governor’s motivations and implied that the governor’s motivations could be constitutional, whether or not the smear campaign videos were fake.<sup>27</sup> In her concurrence, Judge Mary Beck Briscoe asserted that Judge Gorsuch repeatedly “mischaracterize[d]” the case and criticized the “unusual procedural step” taken by Gorsuch and his fellow dissenters in calling for an en banc rehearing that neither litigant had requested.<sup>28</sup> It is evident that Judge Gorsuch took extra steps to try to get the case reheard in order to seek a better outcome for Gov. Herbert and opponents of Planned Parenthood.

### **BLOCKING ABORTION RIGHTS ADVOCATES**

In *Hill v. Kemp*, Judge Gorsuch authored an opinion dismissing the claims of abortion rights advocates in a case that challenged the constitutionality of Oklahoma’s specialty license plate program, which favored anti-abortion views.<sup>29</sup> The case involved state-authorized “Choose Life” license plates; no “pro-choice” plates were authorized under the same regulatory scheme. In addition, the revenue generated by the “Choose Life” plates was made available to groups that support adoption, but the state prohibited organizations from being eligible if they also support abortion access – or are neutral on abortion but refer patients to other places for abortion care.<sup>30</sup> The Oklahoma Religious Coalition for Reproductive Choice (ORCRC), a nonprofit organization that supports women’s access to the full range of reproductive options including both adoption and abortion, and six Oklahoma motorists who support abortion rights, sued. Writing for the panel, Judge Gorsuch concluded that the motorists were barred from pursuing their constitutional claims by the Tax Injunction Act.<sup>31</sup> He sent ORCRC’s claims back to the lower court for further consideration.<sup>32</sup> Because of Judge Gorsuch’s ruling, Oklahoma motorists who support abortion rights were denied equal opportunity to express their views, while abortion opponents were able to spread their anti-choice message with the support of the state.

### **CRITICIZING ABORTION RIGHTS CASES**

While Judge Gorsuch has not written explicitly about the right to abortion, he outlined his opposition to the right to assisted suicide or right to die – a right that some have argued is grounded in the same privacy and substantive due process rights that protect abortion<sup>33</sup> – in both a 1996 Supreme Court amicus brief and his 2006 book, “The Future of Assisted Suicide and Euthanasia.” Gorsuch’s opposition to the legalization of assisted suicide stems from his core belief that “all human beings are intrinsically valuable and the intentional taking of human life by private persons is always wrong.”<sup>34</sup> As applied in the abortion context, this language is similar to language used by abortion opponents and contrary to the bodily autonomy principles and legal underpinnings used to secure the right to abortion.

As an attorney in private practice, Gorsuch utilized this anti-abortion rights argument in a 1996 Supreme Court amicus brief opposing physician-assisted suicide. In the brief, he criticized the landmark Supreme Court decision in *Planned Parenthood v. Casey* and what he saw as “problems of legitimacy and line drawing inherent in the Court’s abortion rulings.”<sup>35</sup>

Gorsuch argued that the Court’s discussion of “the constitutional significance of ‘intimate and personal choices’ that are ‘central to personal dignity and autonomy’” in *Casey* was “no more than dicta.”<sup>36</sup> He railed against the Court’s view that the Constitution protects personal autonomy and predicted that such a right could be used to “override the conscience of health care providers”<sup>37</sup> – a view that ignores the needs of patients.

A decade later, Judge Gorsuch doubled down on his criticism of *Casey*. In *Casey*, a plurality wrote, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>38</sup> In his 2006 book, Judge Gorsuch noted that the Court’s language on “the right to define one’s own concept of existence”<sup>39</sup> might support a right to assisted suicide, but ultimately dismissed this language as “nonbinding dictum”<sup>40</sup> since it “might be employed to support a right to participate in an array of currently unlawful activities.”<sup>41</sup> Instead, Judge Gorsuch hoped that *Casey* might come to be known as “a *stare decisis* decision – a ruling, in essence, that we must respect the abortion right out of traditional deference to settled law – rather than creating any new, open-ended right to ‘define one’s concept of existence.’”<sup>42</sup> By attempting to narrow *Casey* to a *stare decisis* decision and downgrading its substantive due process language to dicta, it appears Judge Gorsuch might also be laying the foundation for a future holding that there is no constitutional right to abortion.

Finally, in his book, Judge Gorsuch argues that laws allowing doctors to prescribe lethal doses of medication to terminally ill patients would fail the equal protection test since the terminally ill deserve the same protection of law as healthy individuals.<sup>43</sup> Some analysts have noted that Judge Gorsuch’s views on equal protection and the terminally ill could logically lead to his holding that fetuses should also enjoy equal protection rights.<sup>44</sup>



# Siding with Big Corporations and Employers against Employees

While Judge Gorsuch has proven to be extremely sympathetic toward corporate plaintiffs who have alleged harm to their religious beliefs, he has not shown the same consideration to people who have alleged infringements of their rights in the workplace. Women, who too often face discrimination in the workplace, depend on the fair adjudication of anti-discrimination laws like Title VII to protect their rights. Yet Judge Gorsuch has repeatedly aligned with employers against the claims of their employees.

Judge Gorsuch has voted to deny women who have presented evidence of discrimination or harassment a chance to have their cases heard by juries, and he has repeatedly decided against plaintiffs in other civil rights cases. In dissent, he would have allowed a company to fire a truck driver for refusing to comply with an order to operate his truck in an unsafe manner. Additionally, he would have excused a company that failed to train a worker, even though that failure led to the worker's death. Judge Gorsuch has also refused to defer to federal agencies' interpretations of laws that support workers.

## Sex Discrimination

Often in discrimination and harassment cases, the finding of liability hinges on a dispute of material fact. These cases are often best decided by juries, so it is troubling that, in several cases discussed herein, Judge Gorsuch voted to deny a plaintiff the opportunity to even present evidence of discrimination or harassment to a jury.

In *Strickland v. UPS*, Judge Gorsuch dissented from a decision that the plaintiff's Title VII sex discrimination claims should proceed to a jury.<sup>45</sup> Carole Strickland, a UPS account executive, claimed she was unfairly subjected to increased oversight by her supervisor following her return from a two-week medical leave.<sup>46</sup> She presented evidence that while a male colleague "trailed [her] in almost every sales measure," he was not denied assistance, counseled or required to attend meetings about his performance as she was.<sup>47</sup> Unlike the other judges on the panel, Judge Gorsuch found the evidence insufficient to create a triable fact as to her Title VII gender discrimination claim.<sup>48</sup>

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Similarly, in *Pinkerton v. Colorado Department of Transportation*, Judge Gorsuch ended the plaintiff's chances for a jury to consider her case by siding with the majority, declining to overturn a lower court's dismissal of the plaintiff's claims.<sup>49</sup> Betty Pinkerton alleged that while she was an administrative assistant at the Colorado Department of Transportation, she was sexually harassed by her male supervisor and retaliated against in violation of Title VII.<sup>50</sup> She asserted that he asked about her breast size, whether or not she'd had breast enlargement surgery and if she ever masturbated, and told her that he liked it when she came to work in a skirt, among other things.<sup>51</sup> Just a few days after an investigator confirmed the allegations, Ms. Pinkerton was terminated.<sup>52</sup>

In his dissent, Judge David Ebel, appointed by President Ronald Reagan, contended that Ms. Pinkerton’s case was not nearly as clear cut as the majority would argue and that “when, as here, the temporal proximity is very close, and when there is also credible doubt about the plausibility of an employer’s proffered reason for adverse action, there is sufficient evidence to create a genuine issue of fact on a plaintiff’s claim, and those issues should be resolved by a jury.”<sup>53</sup> Nonetheless, Judge Gorsuch voted to refuse to allow a jury of Ms. Pinkerton’s peers to hear the facts of her case.<sup>54</sup>

## **Race and National Origin Discrimination**

Judge Gorsuch’s record of siding with employers was again evident in *Zamora v. Elite Logistics, Inc.*, a 2007 case in which a lawful permanent resident from Mexico who became a naturalized U.S. citizen was suspended and then fired after being forced to produce multiple forms of proof of his ability to work legally in the United States.<sup>55</sup> Ramon Zamora had shown proof of ability to work when he was hired, but was later subjected to multiple inquiries into his legal resident status by his employer, based on fear of an anticipated raid by the U.S. Immigration and Naturalization Service, and because Mr. Zamora’s Social Security number had been used by at least one other worker. Over several days, Mr. Zamora offered – and his employer rejected – several items of proof: a document from the U.S. Social Security Administration indicating past earnings, an application for citizenship and a naturalization certificate. Mr. Zamora’s employer was only satisfied when Mr. Zamora produced a letter from the Social Security Administration attesting that the number he provided was indeed his.<sup>56</sup>

Upon returning to work, Mr. Zamora asked for an apology and a written explanation. Instead, Mr. Zamora’s employer terminated his employment.<sup>57</sup> Mr. Zamora alleged race and national origin discrimination in violation of Title VII, and in an opinion joined by Judge Gorsuch, the closely divided 10th Circuit, sitting en banc, held that the employer’s actions did not constitute Title VII discrimination.<sup>58</sup>

## **Disability Discrimination**

In another employment discrimination case, *Hwang v. Kansas State University*, Judge Gorsuch affirmed a district court ruling against Grace Hwang, denying her disability discrimination claim against her employer for refusing to grant her extended and additional leave for medical care.<sup>59</sup> Ms. Hwang was an assistant professor at Kansas State University who was diagnosed with cancer before the start of the semester, requiring intensive treatment and time away from work. Upon request and per its policy, the university granted her six months paid leave. However, when Ms. Hwang requested additional time for prolonged treatment, the university denied her request and ultimately terminated her employment. Ms. Hwang alleged that the university violated the Rehabilitation Act.<sup>60</sup>

In his opinion, Judge Gorsuch took a hard-lined approach to Ms. Hwang’s claim, finding that because the employer’s policy gave all employees six months of leave, it was “more than sufficient to comply with the [Rehabilitation] Act in nearly any case.”<sup>61</sup> Yet other courts have recognized that whether an extended leave constitutes a reasonable accommodation should be considered on a case-by-case basis – and a per se rule regarding what is or is not a reasonable accommodation should not be applied.<sup>62</sup> Judge Gorsuch’s analysis once again worked against the employee and in favor of the employer.

## LGBTQ Equality

As Justice Ginsburg warned, the precedent created by Judge Gorsuch and his colleagues in *Hobby Lobby* – that a corporation’s religious belief can trump a woman’s access to contraception – threatens not just women’s reproductive rights, but also LGBTQ equality and the fundamental principle that religion should never be used as a license to discriminate and impose one’s beliefs on others.

Judge Gorsuch’s position in *Hobby Lobby* is one indication of how he might rule in LGBTQ discrimination cases. His record in cases involving transgender plaintiffs also indicates that he would undermine the basic civil rights of LGBTQ individuals. In fact, his past rulings on LGBTQ issues directly contradict the rulings of his sister circuits and the Equal Employment Opportunity Commission.<sup>63</sup>

In 2009, Rebecca Kastl, a transgender instructor at a community college, sued her employer for several civil rights violations when she was banned from using the women’s restroom and subsequently fired. The community college alleged that it had banned her from using the women’s room for “safety reasons.” The court, including Judge Gorsuch sitting by designation, found against Ms. Kastl, rejecting her sex discrimination claims.<sup>64</sup> Similarly, in 2015, Judge Gorsuch joined a panel that held that an incarcerated transgender woman was not likely to prevail on claims that the denial of hormone therapy and the right to be housed in an all-female facility and wear female clothing while incarcerated constituted a violation of her constitutional rights.<sup>65</sup> Other circuit courts have come to opposite conclusions.<sup>66</sup>

## Worker Safety

Judge Gorsuch’s sympathies toward corporate interests and insensitivity toward workers are further evident in his dissent in *TransAm Trucking v. Administrative Review Board*.<sup>67</sup> Alphonse Maddin, a driver employed by TransAm, was driving at night in subfreezing temperatures when the brakes of his trailer froze due to the cold.<sup>68</sup> After reporting the frozen brakes and lack of heat in the cab of the truck and waiting several hours for assistance, he was having trouble breathing and could not feel his torso or feet due to the lack of heat.<sup>69</sup> Mr. Maddin made another call to his supervisor and told him he was going to unhitch his truck to search for help.<sup>70</sup> The supervisor ordered him not to leave the trailer, “instructing him to either drag the trailer with its frozen brakes or remain with the trailer until the repairperson arrived.”<sup>71</sup> Mr. Maddin did not follow his supervisor’s instructions and instead drove off in search of assistance. Less than one week later, Mr. Maddin was fired for violating company protocol by abandoning his trailer.<sup>72</sup>

A U.S. Department of Labor administrative law judge (ALJ), an administrative review board (ARB) and a majority of a 10th Circuit panel all held that Mr. Maddin’s firing violated the Surface Transportation Assistance Act (STAA), which makes it unlawful for an employer to discharge an employee who “refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.”<sup>73</sup> The ALJ and ARB found that Mr. Maddin’s decision to reject his supervisor’s requests to stay in a freezing truck or drag the disabled trailer constituted a “refusal to operate” for safety reasons and he was thus entitled to the STAA’s whistleblower protections.<sup>74</sup>

Judge Gorsuch, however, dissented. The plain language of the statute, he argued, protected only workers who “refused to operate a vehicle” due to safety concerns.<sup>75</sup> Since Mr. Maddin did not “refuse to operate,” but operated his vehicle by driving away to get help, according to Judge Gorsuch, he was not entitled to the protections of the statute.<sup>76</sup> Judge Gorsuch also dismissed the majority’s argument that the interpretation aligned with the statute’s goal of promoting health and safety, since health and safety were “ephemeral and generic” goals.<sup>77</sup> Judge Gorsuch conceded that the employer’s decision may not have been “kind or wise,” but he nonetheless held that the truck driver’s decision to avoid serious injury was not protected by the law.<sup>78</sup>

Similarly, in *Compass Environmental v. Occupational Safety and Health Review Commission*, Judge Gorsuch dissented from a decision upholding a U.S. Department of Labor fine against a company that failed to properly train a new worker about the dangers of a high voltage line, ultimately resulting in the worker’s death.<sup>79</sup> He argued that the government had not provided sufficient evidence to show that a reasonably prudent employer in the industry would have trained its worker about the high voltage lines.<sup>80</sup> The government provided evidence that the company had identified the hazard the line posed to the deceased worker’s position and trained most of the other workers on the worksite on how to avoid it, but had neglected to train the deceased worker.<sup>81</sup> Although this evidence was sufficient for the majority, it was not sufficient for Judge Gorsuch, who would have granted the employer’s petition.<sup>82</sup>



# Disregarding Judicial Independence

In its first two months, the Trump Administration has issued a string of baldly unconstitutional executive orders. Lawyers are challenging the legality of the president's actions in courtrooms across the country, and judges have begun considering their constitutionality. The president has explicitly denigrated judges and the courts; his comments threaten the constitutional principle of separation of powers.

Now, more than ever, we need an independent judiciary – one that will stand up forcefully against the executive branch when it attempts to violate our Constitution. In his concurrence to the 10th Circuit *Hobby Lobby* decision, Judge Gorsuch wrote, “All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others.”<sup>83</sup>

Based on his legal writings, we are unable to discern where and whether Judge Gorsuch might draw the line between the Constitution and his loyalty to the president who appointed him.

# Conclusion

Based on Judge Gorsuch's legal writings and decisions, and considering the president and the threats he poses to well-established constitutional rights and legal protections, it is clear that Judge Gorsuch is the wrong choice for the U.S. Supreme Court.

If he is confirmed, Judge Gorsuch's jurisprudence would lead to an America in which any so-called religious objections could be used to shield corporations that have infringed upon people's equal rights under the law. It would lead to a nation where well-resourced employers could be permitted to defeat a person's right to present evidence of discrimination before a jury of her or his peers. It could allow corporations to excuse themselves from basic civil rights protections and safety measures. And it could send our country back to the days when women were denied autonomy over their own bodies and futures.

This nation needs a Supreme Court justice with a deep commitment to equal justice for all – not someone who will lead us backward.

## Endnotes

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- 14 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014).
- 15 *Hobby Lobby*, 134 S. Ct. at 2790 (Ginsburg, J., dissenting).
- 16 *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).
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- 18 *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315, 1316-17 (10th Cir. 2015) (Hartz, J., dissenting).
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- 20 *Ibid*.
- 21 Schultheis, E. (2016, November 30). Trump talks to "60 Minutes" about same-sex marriage, abortion and the Supreme Court. *CBS News*. Retrieved 8 March 2017, from <http://www.cbsnews.com/news/trump-promises-pro-life-justices-supreme-court-same-sex-marriage/>
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- 24 Office of the Vice President. (2017, January 27). *March for Life Remarks of Vice President Pence*. The White House. Retrieved 8 March 2017, from <https://www.whitehouse.gov/the-press-office/2017/01/27/march-life-remarks-vice-president-pence-prepared-delivery>
- 25 *Planned Parenthood Ass'n of Utah v. Herbert*, No. 2:15-cv-693, 2015 U.S. Dist. LEXIS 171249, at \*2 (D. Utah 2015). See also *National Partnership for Women & Families* (2015, August 17). Ark., Utah Take Aim at Federal Planned Parenthood Funding. *National Partnership for Women & Families Repro Health Watch*. Retrieved 13 March 2017, from <http://go.nationalpartnership.org/site/News2?page=NewsArticle&id=48533>
- 26 *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1262 (10th Cir. 2016) (finding that it is likely Governor Herbert retaliated against Planned Parenthood "to punish PPAU for the First and Fourteenth Amendment rights it has identified in this litigation[,] and finding that "Herbert admitted that the accusations made by CMP in the videos regarding Planned Parenthood and its other affiliates had not been proven and indeed were false.").
- 27 *Planned Parenthood Ass'n of Utah*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting).
- 28 *Planned Parenthood Ass'n*, 839 F.3d at 1302-03.
- 29 See *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007).
- 30 *Hill*, 478 F.3d 1236 at 1240.
- 31 *Hill*, 478 F.3d 1236 at 1262.
- 32 *Hill*, 478 F.3d 1236 at 1262.
- 33 See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 801-806 (9th Cir. 1996) (holding that the right to die has similar legal underpinnings to the right to abortion, including a liberty interest grounded in the substantive due process right in the 14th amendment).
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- 45 *Strickland v. UPS*, 555 F.3d 1224 (10th Cir. 2009).

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- 47 *Strickland*, 555 F.3d at 1227.
- 48 *Strickland*, 555 F.3d at 1231-32 (Gorsuch, J., dissenting).
- 49 *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052 (10th Cir. 2009).
- 50 *Pinkerton*, 563 F.3d at 1055.
- 51 *Pinkerton*, 563 F.3d at 1057.
- 52 *Pinkerton*, 563 F.3d at 1057.
- 53 *Pinkerton*, 563 F.3d at 1070.
- 54 *Pinkerton*, 563 F.3d at 1054-55.
- 55 *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007).
- 56 *Zamora*, 478 F.3d at 1162-64.
- 57 *Zamora*, 478 F.3d at 1164.
- 58 *Zamora*, 478 F.3d at 1164, 1167.
- 59 *Hwang v. Kan. State Univ.*, 753 F.3d 1159 (10th Cir. 2014).
- 60 *Hwang*, 753 F.3d at 1161.
- 61 *Hwang*, 753 F.3d at 1164.
- 62 *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) (stating that [disability accommodation] cases such as these "are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes").
- 63 See *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (affirming district court ruling invalidating state statute barring Wisconsin Department of Corrections from directing any funds toward transgender identity disorder on grounds that it violated the Eighth and Fourteenth Amendments of the United States Constitution). See also *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (affirming a district court judgment in favor of civilly committed person diagnosed with Gender Identity Disorder and ordering defendant treatment center to accept Gender Identity Disorder diagnosis and provide hormone therapy); *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Mar. 27, 2015) (discussing why "safety reasons" are not a legitimate, non-discriminatory justification for an employer's refusal to allow a transgender worker to use the women's restroom).
- 64 See *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493-94 (9th Cir. 2009).
- 65 See *Druley v. Patton*, 601 Fed. Appx. 632 (10th Cir. 2015).
- 66 See *Fields*, 653 F.3d at 559 (7th Cir. 2011) (affirming district court ruling invalidating state statute barring Wisconsin Department of Corrections from directing any funds towards transgender identity disorder on grounds it violated the Eighth and Fourteenth Amendments of the United States Constitution). See also *Battista*, 645 F.3d at 451-52, 456 (1st Cir. 2011) (affirming a district court judgment in favor of civilly committed person diagnosed with Gender Identity Disorder and ordering defendant treatment center to accept GID diagnosis and provide hormone therapy).
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- 68 *TransAm Trucking, Inc.*, 833 F.3d at 1208.
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- 78 *TransAm Trucking, Inc.*, 833 F.3d at 1215-16 (Gorsuch, J., dissenting).
- 79 *Compass Envtl., Inc., v. Occupation Safety and Health Review Comm'n*, 663 F.3d 1164 (10th Cir. 2011).
- 80 *Compass Envtl., Inc.*, 663 F.3d at 1171-72 (Gorsuch, J., dissenting).
- 81 *Compass Envtl., Inc.*, 663 F.3d at 1169-70.
- 82 *Compass Envtl., Inc.*, 663 F.3d at 1173 (Gorsuch, J., dissenting).
- 83 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring).1.02(a).



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