

**FAITH-BASED AND NONTHEISTIC ORGANIZATIONS
EXPRESS SERIOUS CONCERNS REGARDING THE NOMINATION OF
JUDGE NEIL GORSUCH TO THE US SUPREME COURT**

March 16, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned national faith-based and nontheistic organizations, including secular, ethnic, and community-based groups, share a commitment to individual liberty and the separation of religion and government — two of the tenets on which this country was founded. **We are united in our serious concerns regarding the nomination of Judge Neil M. Gorsuch to the United States Supreme Court.**

Judge Gorsuch’s decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career, demonstrate that he is a judge with an agenda. His frequent dissents and concurrences show he is out of the mainstream of legal thought and unwilling to accept the constructs of binding precedent and *stare decisis* when they dictate results he disfavors. If confirmed to the Supreme Court, which is closely divided on many critical issues, Judge Gorsuch would tip the balance in a direction that would undermine many of our core rights and legal protections. He lacks the impartiality and independence the American people expect and deserve from the federal bench.

President Trump outsourced the selection process of a Supreme Court justice to the ideologically-driven Federalist Society and Heritage Foundation. Never before has a president so blatantly curried favor with partisan organizations for a Supreme Court nomination. In addition, as a presidential candidate he pledged to appoint Supreme Court justices who would overturn *Roe v. Wade*. Litmus tests in judicial selection subvert the most critical qualities of a judge: open-mindedness and independence.

In a 2005 article published in the conservative *National Review*, Judge Gorsuch wrote, “American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education. This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary.”^[1] Throughout our nation’s history, the federal courts have been a critical bulwark in ensuring the rights and liberties of all Americans, especially minority groups whose numbers mean they have less influence at the ballot box. Judge Gorsuch’s hostility to the valid use of courts by victims of discrimination in all forms to enforce

their rights under the US Constitution and federal law demonstrates his ideological agenda and has been reflected in his decisions during his decade on the bench.

Erosion of the Establishment Clause

As a judge on the Court of Appeals for the Tenth Circuit, Judge Gorsuch has written or joined dissents that would dramatically weaken the Establishment Clause of the First Amendment. In *American Atheists, Inc. v. Duncan*,^[2] a panel of three Republican-appointed judges ruled against the Utah Highway Patrol Association's construction and maintenance of a series of 12-foot crosses on public land near roads to memorialize deceased officers, explaining that the crosses had the "impermissible effect" of appearing to endorse the Christian religion. Judge Gorsuch wrote an opinion for himself and several other judges that dissented from the decision of the full court of appeals not to rehear the case. Gorsuch asserted that the "endorsement" test should not be applied, and criticized the "reasonable observer" standard that the circuit court used to determine that the crosses were religious symbols. Judge Gorsuch wrote that the intent of the person who displayed the religious symbol weighs more than the impression that such a symbol leaves on the person who views it.^[3] The Supreme Court denied review of the case; Justice Thomas alone wrote a vigorous dissent,^[4] making some of the same arguments as Judge Gorsuch.

In *Green v. Haskell County Board of Commissioners*,^[5] another case involving Christian symbols on public property, a three-judge panel of all Republican-appointed judges concluded that an Oklahoma county's decision to approve the construction of and maintain a Ten Commandments monument on its courthouse lawn violated the Establishment Clause. Judge Gorsuch again wrote an opinion for himself and other judges that dissented from a decision by the full court of appeals not to rehear the case. He argued that the court should not expect that a reasonable person would infer a religious endorsement when a government official appearing in that capacity appears and/or speaks at a religious unveiling ceremony^[6]. As the panel decision explained, however, the endorsement test remained the law in the Tenth Circuit (and elsewhere), and the monument clearly had the "primary effect of endorsing religion."^[7] The Supreme Court denied review of the case.^[8]

Religious Views Imposed on Women's Health

Judge Gorsuch has written or joined opinions that would restrict women's health care, including allowing religious beliefs to override women's access to birth control and defunding Planned Parenthood. In *Hobby Lobby Stores, Inc. v. Sebelius*,^[9] he signed on to an opinion allowing certain for-profit employers to refuse to comply with the birth control benefit in the Affordable Care Act. Citing *Citizens United v. FEC*,^[10] the decision held that corporations can be "persons" with religious beliefs and that employers can use those religious beliefs to block employees' insurance coverage of birth control. In *Little Sisters of the Poor Home for the Aged v. Burwell*,^[11] Judge Gorsuch dissented from the majority's decision approving the accommodation in the birth control benefit that allows non-profit employers to opt out of the benefit but makes sure the employees get birth control coverage. Judge Gorsuch joined a dissent that argued the simple act of filling out the opt-out form constitutes a substantial burden on religious exercise. In *Planned Parenthood Association of Utah v. Herbert*,^[12] Judge Gorsuch dissented from the majority's decision to keep in place a preliminary injunction that stopped the state of Utah from blocking access to health care and education for thousands of Planned Parenthood's patients. If the policy

had gone into effect, it would have cut off access to an after-school sex education program for teens and STI testing and treatment for at-risk communities.

Rejection of Aid-in-Dying

Judge Gorsuch wrote a dissertation that rejects laws that provide aid-in-dying to terminally ill persons.^[13] He calls such laws “assisted suicide” and wrote “all human beings are intrinsically valuable and the intentional taking of human life by private persons is always wrong.”^[14] However, Gorsuch declined to discuss capital punishment or death during war, saying those issues brought “unique questions.”^[15] The Supreme Court upheld Oregon’s death with dignity law in 2006, explaining that “[r]ather than simply decriminalizing assisted suicide, [the Oregon law] limits its exercise to the attending physicians of terminally ill patients[.]”^[16] Now six states^[17] and the District of Columbia permit aid-in-dying. Judge Gorsuch wrote that such aid-in-dying laws would “tend toward, if not require, the legalization not only of assisted suicide and euthanasia, but of *any* act of consensual homicide” including “sodomasochist killings, mass suicide pacts, duels, and the sale of one’s own life.”^[18] In Oregon, where aid-in-dying has been closely research and studied for more than a decade, there have been no reports of any such instances.^[19] Judge Gorsuch’s position denies terminally ill individuals basic human dignity at the end of life, and it is not his role as a judge to make personal medical decisions for a patient.

The Supreme Court is the final arbiter of our laws, and its rulings dramatically impact the lives and rights of all Americans. We urge all senators to carefully examine Gorsuch’s nomination. They must fully exercise their “advise and consent” responsibilities by engaging in a thorough review of Judge Gorsuch’s record and judicial philosophy. The Senate Judiciary Committee must engage in full and fair hearings in which all requested documents are produced and examined, committee members are permitted to adequately question Judge Gorsuch and receive full and complete answers, and enough outside witnesses are permitted to testify regarding Judge Gorsuch’s record. **Before the full Senate considers acting on the nomination of Judge Gorsuch, the American people have a right to know precisely how his confirmation to the Supreme Court would impact their rights, freedoms, and liberties.**

Thank you for your consideration of our views. If you would like to discuss the matter further, please contact Caroline Ostro, Judicial Nominations Campaign Organizer, National Council of Jewish Women, at caroline@ncjwdc.org or Amanda Knief, National Legal and Public Policy Director, American Atheists, at aknief@atheists.org.

Sincerely,

African American Ministers In Action
American Atheists
American Humanist Association
Bend the Arc Jewish Action
Catholics for Choice
Cedar Lane Unitarian Universalist Church
Center for Inquiry
Congregation of St. Joseph
Keshet

Moishe Kavod House
National Coalition of American Nuns
National Council of Churches
National Council of Jewish Women
National LGBTQ Task Force Action Fund
New Ways Ministry
Religious Institute
Sisters of the Most Precious Blood (Gospel Justice Committee member)
Unitarian Universalist Women's Federation
Women's Alliance for Theology, Ethics and Ritual (WATER)

^[1] Neil Gorsuch, *Liberals' n' Lawsuits*, NATIONAL REVIEW (Feb. 7, 2005), available at <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>.

^[2] 616 F.3d 1145 (10th Cir. 2010).

^[3] *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting).

^[4] *Utah Highway Patrol Association v. American Atheists, Inc.*, 565 U.S. 994 (2011) (cert denied) (Thomas, J., dissenting).

^[5] 568 F.3d 784 (10th Cir. 2009).

^[6] *Green v. Haskell County Bd. of Comm'rs*, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting).

^[7] 568 F.3d 784, 788 (10th Cir. 2009).

^[8] *Haskell County Bd. of Comm'rs v. Green*, 559 U.S. 970 (2010) (cert denied).

^[9] 723 F.3d 1114 (10th Cir. 2013).

^[10] 558 U.S. 310 (2010).

^[11] 799 F.3d 1315 (10th Cir. 2015).

^[12] 839 F.3d 1301 (10th Cir. 2016).

^[13] Neil Gorsuch, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* (Princeton University Press 2009).

^[14] Gorsuch, "Introduction," paragraph 13.

^[15] Gorsuch, "An Argument Against Legislation," paragraph 3.

^[16] *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

^[17] California, Colorado, Montana, Oregon, Vermont, and Washington.

^[18] Gorsuch, "8.2 Posner's and Epstein's Libertarian Case for Assisted Suicide," paragraph 3.

^[19] "Death with Dignity Act," Oregon.gov,

<https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx>