The Leadership Conference
on Civil and Human Rights

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The Leadership Conference

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:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promote and protect the civil and human rights of all persons in the United States, and the 116 undersigned national organizations, we are writing to express our opposition to the confirmation of Judge Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States. The Supreme Court is the final arbiter of our laws, and its rulings can dramatically impact the lives and rights of all Americans. Judge Gorsuch's decade-long record on the federal bench, as well as his writings, speeches, and activities throughout his career, demonstrate 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.

This nomination must be assessed in context. In light of the shameful, nearly year-long blockade of Judge Merrick Garland – President Barack Obama's nominee to the current Supreme Court vacancy – we believe President Trump had an obligation to put forward a mainstream nominee. He failed to do so, instead outsourcing the selection process to the ideologically driven Federalist Society and Heritage Foundation. 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.

President Trump's first weeks in office further demonstrate the need for a strong and independent judiciary to serve as a bulwark against the White House's abusive and autocratic approach to governance, underscoring the significance of appointing justices with a proven track record of independence and objectivity. President Trump's *ad hominem* attacks on judges who have ruled against him – on Judge Robart in Washington State for halting his Muslim travel ban, and last year on Judge Curiel in California for ruling against Trump University – threaten judicial independence and the separation of powers that form the fabric of our democracy. His unprecedented firing of Acting Attorney General Sally Yates for not being willing to defend the President's travel ban is another disturbing example. Independent and impartial federal judges are needed now more than ever. Judge Gorsuch has demonstrated in his opinions and writings that he is results-oriented and would be highly unlikely to show independence from a President who shares his ideological agenda.

Discrimination Claims: 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 backstop in ensuring the rights and liberties of all Americans. Judge Gorsuch's hostility to the use of courts by discrimination victims to enforce their rights under the Constitution and federal law demonstrates his ideological agenda and has been reflected in his judicial decisions, particularly dissents and concurrences, during his decade on the bench.

Take, for example, the case *Strickland v. UPS*.[2] In this case, the majority held that Carole Strickland, a UPS account executive, could proceed with a sex discrimination claim under Title VII based on evidence that she was treated worse than male colleagues despite her outperforming them in sales. Judge Gorsuch dismissed the evidentiary record and dissented; he voted to throw the victim's discrimination claim out of court. In *Weeks v. Kansas*,[3] writing for a conservative panel, Judge Gorsuch threw out another Title VII case where the plaintiff, Rebecca Weeks, was fired in retaliation for her advocating on behalf of two colleagues who had been discriminated against. In his opinion, Judge Gorsuch declined to consider a superseding Supreme Court decision that might have benefitted the plaintiff simply because she did not raise it in her briefs, a troubling approach because judges have a duty to consider relevant case law regardless of whether the parties have cited it.

Workers' Rights: Judge Gorsuch's favorable treatment of employers and corporate defendants can also be seen in his reflexive rejection of workers' rights claims, and he's often a dissenting voice in such cases. In *Compass Environmental, Inc. v. OSHRC*,[4] the majority held that the employer must pay a fine for disregarding an internal policy and failing to train a worker who was electrocuted to death by high-voltage lines located near his work area. Judge Gorsuch issued a dissent and voted to throw the case out of court because he rejected the finding of an administrative agency that the employer had violated industry safety norms.

In *TransAm Trucking, Inc. v. Administrative Review Board*,[5] the majority held that a trucking company unlawfully fired an employee in violation of federal whistleblower protections. The employee, Alphonse Maddin, was a truck driver whose brakes broke down in the middle of a freezing January night in Illinois. The truck heater didn't work either, and he got so cold that he couldn't feel his feet or torso, and he had trouble breathing. Nonetheless, his boss ordered him to wait in the truck until a repairperson arrived. After waiting for three hours, Mr. Maddin finally drove off in the truck and left the trailer behind, in search of assistance. His employer fired him a week later for violating company policy by abandoning his load while under dispatch. The panel majority said the firing was unlawful, but Judge Gorsuch dissented and said the employee should have followed orders even at the risk of serious injury.

In *NLRB v. Community Health Services, Inc.*[6] Judge Gorsuch again dissented from a majority opinion that found in favor of employees, where a hospital was required to award back pay to 13 employees whose

[1] Neil Gorsuch, *Liberals 'N' Lawsuits*, National Review, February 7, 2005.
[2] 555 F.3d 1224 (10th Cir. 2009) (Gorsuch, J., concurring in part and dissenting in part).
[3] 503 F. App'x 640 (10th Cir. 2012).
[4] 663 F.3d 1164 (10th Cir. 2011) (Gorsuch, J., dissenting).
[5] 2016 U.S. App. LEXIS 13071 (10th Cir. July 15, 2016) (Gorsuch, J., dissenting).
[6] 812 F.3d 768 (10th Cir. 2016) (Gorsuch, J., dissenting).

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hours had been reduced in violation of the National Labor Relations Act. His recurrent dissents in workers' rights cases suggest a refusal to follow binding case law when it leads to results that favor workers rather than businesses and employers.

Immigration: In the closely-divided *en banc* decision in *Zamora v. Elite Logistics, Inc.*,[7] Judge Gorsuch voted to affirm the district court's granting of summary judgment which blocked a Title VII national origin discrimination case from going to trial despite evidence of animus, unlawful reverification, and document abuse by the employer. The lead concurrence in this case, which Judge Gorsuch joined, reflects an approach that insulates employers from liability for discrimination against immigrant workers so long as they claim that they were unaware of the law or took their actions due to a fear of sanction by federal immigration authorities – even where those actions themselves violated immigration law. Judge Gorsuch's record suggests that if he were confirmed as a Supreme Court justice, he would give great leeway to immigration enforcement strategies that use the fear of sanction against employers as a principal mechanism, and would condone employers hiding behind federal immigration laws to justify unlawful workplace practices.

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*,[8] 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 to *Citizens United v. FEC*,[9] 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*,[10] 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 an opt-out form constitutes a substantial burden on religious exercise. And in *Planned Parenthood Association of Utah v. Herbert*,[11] 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 STD testing and treatment for at-risk communities.

LGBT Rights: As noted previously, in his 2005 *National Review* article Judge Gorsuch expressed disdain for those seeking to use the courts to enforce their rights under the law, and he specifically criticized LGBT Americans who have relied on federal courts in their quest for equality. The rationale he employed in the *Hobby Lobby* case – a license to discriminate for private corporations – has also been used by several states to justify discrimination against LGBT Americans.[12] And his skepticism about LGBT claims is also demonstrated in a 2015 case, *Druley v. Patton*,[13] where he voted to reject a claim by a transgender woman incarcerated in Oklahoma who alleged that her constitutional rights were violated

[7] 478 F.3d 1160 (10th Cir. 2007) (Gorsuch, J., concurring).
[8] 723 F.3d 1114 (10th Cir. 2013) (Gorsuch, J., concurring).
[9] 558 U.S. 310 (2010).
[10] 799 F.3d 1315 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[11] 839 F.3d 1301 (10th Cir. 2016) (Gorsuch, J., dissenting).
[12] http://www.hrc.org/blog/anti-lgbt-bills-introduced-in-28-states.
[13] 601 F. App'x 632 (10th Cir. 2015).

when she was denied medically necessary hormone treatment and the right to wear feminine clothing. Other federal courts have reached the opposite conclusion in such cases.[14]

Police Misconduct: In the case *Wilson v. City of Lafayette*,[15] a 22-year-old man possessing marijuana was fleeing arrest, and a police officer shot him in the head with a stun gun from a distance of 10-15 feet away, which was contrary to the police department's training manual. The young man, Ryan Wilson, died. Judge Gorsuch held that the officer was entitled to qualified immunity from an excessive force claim, reasoning that the use of force was reasonable because the young man was fleeing arrest. The dissent in this case criticized Judge Gorsuch's analysis and stated: "In the present case, it would be unreasonable for an officer to fire a taser probe at Ryan Wilson's head when he could have just as easily fired the probe into his back. The taser training materials note that officers should not aim at the head or throat unless the situation dictates a higher level of injury risk. Nothing about the situation here required an elevated level of force."[16]

Students with Disabilities: Judge Gorsuch has consistently ruled against students with disabilities seeking educational services to which they were entitled under the Individuals with Disabilities Education Act (IDEA). In *A.F. v. Española Public Schools*,[17] he dismissed a claim brought under the Americans with Disabilities Act because the school district had previously settled a lawsuit with the student for IDEA violations. A dissenting judge in this case criticized Judge Gorsuch's reasoning and observed: "This was clearly not the intent of Congress and, ironically enough, harms the interests of the children that IDEA was intended to protect."[18] In *Garcia v. Board of Education of Albuquerque Public Schools*,[19] Judge Gorsuch held that a student who left the school out of frustration with the school's failure to follow the IDEA was entitled to no remedy. And in *Thompson R2-J School District v. Luke P.*,[20] he held that a student with autism did not have a right under the IDEA to attend a private residential program, even though the district court and a Colorado Department of Education hearing officer determined that such a placement was necessary for Luke and that public schools had been unsuccessful in addressing his educational needs.

Corporate Bias: Judge Gorsuch's judicial activism was on display last year in the case *Gutierrez-Brizuela v. Lynch*,[21] where he issued a lengthy concurrence to an opinion he himself had written – a signal that his colleagues refused to sign on to his ideological agenda. In his concurrence, he questioned the constitutional legitimacy of a decades-old binding precedent, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[22] The *Chevron* doctrine requires deference to federal agencies' interpretation of ambiguous laws as long as the interpretation is reasonable, which has resulted in the safeguarding of workers' rights, environmental protection, consumer protections, food safety, and many other protections for people's health and well-being. Judge Gorsuch believes that judges should make these decisions instead of agencies with the relevant expertise, which would lead to a dramatic expansion of the power and role of the judiciary. He would relegate this vital precedent to the dustbin of history because it disfavors the corporate interests he championed as a lawyer and as a judge. As several commentators

[14] *See, e.g.*, Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011).
[15] 510 F. App'x 775 (10th Cir. 2013).
[16] *Id.* at 787 (Briscoe, J., concurring in part and dissenting in part).
[17] 801 F.3d 1245 (10th Cir. 2015).
[18] 801 F.3d at 1251 (Briscoe, J., dissenting).
[19] 520 F.3d 1116 (10th Cir. 2008).
[20] 540 F.3d 1143 (10th Cir. 2008).
[21] 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring).
[22] 467 U.S. 837 (1984).

have noted, Judge Gorsuch's cramped view of the *Chevron* doctrine is even more extreme than the views of Justice Antonin Scalia.[23]

Money in Politics: For four decades, the Supreme Court's flawed approach to money in politics has gutted common sense protections against the power of special interests and wealthy individuals – most recently in *Citizens United* and *McCutcheon v. FEC*[24] – that has shaped a system that 85% of Americans believe needs fundamental change. In his only opinion directly addressing money in politics, Judge Gorsuch expressed openness to providing a higher level of constitutional protection to a donor's right to make political contributions than the Court at times has provided the right to vote. In *Riddle v. Hickenlooper*,[25] he wrote a separate concurrence that suggested courts should afford strict scrutiny, the highest constitutional protection, to political contribution limits. That view puts Gorsuch among the ranks of judges who are extremely hostile to campaign finance reform measures and would essentially gut the ability of Congress and the states to set any reasonable limits on money in our elections.

Environmental Protection: Judge Gorsuch's rejection of the binding *Chevron* decision, which prevents judges from substituting their judgment for that of federal agencies with expertise, betrays a general hostility to regulatory agencies and regulatory safeguards that protect our air, water, lands, and wildlife. In *United States v. Nichols*,[26] he wrote a lengthy dissent that tried to revive an obscure legal doctrine that could strike down many significant environmental laws. And in *Wilderness Society v. Kane County*,[27] he concurred with a decision to dismiss a claim brought by several environmental organizations asserting that a county ordinance that opened a large stretch of federal land to off-highway vehicles was preempted by federal law. The dissent in this case observed that the majority holding "will have long-term deleterious effects on the use and management of federal public lands."[28]

Right to a Fair Trial: In the case *United States v. Benally*,[29] Judge Gorsuch voted to deny a petition for rehearing en banc by a Native American defendant who was convicted by a racially biased jury. The foreman of the jury "told the other jurors that he used to live on or near an Indian Reservation, that '[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent."[30] A second juror said she agreed with the foreman. In light of these troubling statements, the district court threw out the jury verdict, concluding that the defendant's Sixth Amendment right to a fair trial had been violated. The Tenth Circuit disagreed and upheld the conviction. Although Judge Gorsuch was not a member of the original panel, his vote to deny rehearing en banc was a vote of support. Judge Gorsuch's approach to this issue was recently rejected by the Supreme Court in *Pena-Rodriguez v. Colorado*,[31] where the Court ruled that anti-Hispanic statements during jury deliberations constituted a Sixth Amendment violation.

Voting Rights: In 2006, when he was nominated to the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch stated in his Senate questionnaire that between June 2005 and July 2006, he served as the

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[23] Elliot Mincberg, *Gorsuch is to the Right of Scalia on the "Chevron Doctrine" – Here's Why it Matters*, Huffington Post, February 1, 2017; Richard Primus, *Trump Picks Scalia 2.0*, Politico Magazine, January 31, 2017.
[24] 572 U.S. ___ (2014).
[25] 742 F.3d 922 (10th Cir. 2014) (Gorsuch, J., concurring).
[26] 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[27] 632 F.3d 1162 (10th Cir. 2011) (Gorsuch, J., concurring).
[28] 632 F.3d at 1180 (Lucero, J., dissenting).
[29] 560 F.3d 1151 (10th Cir. 2009).
[30] 560 F.3d at 1152 (Briscoe, J., dissenting from denial of rehearing en banc).
[31] 2017 U.S. LEXIS 1574 (March 6, 2017).

Principal Deputy to the Associate Attorney General, a job in which he managed several litigating components at the Justice Department, including the Civil Rights Division. On Gorsuch's watch, political appointees ran roughshod over career attorneys who sought to lodge Section 5 objections under the Voting Rights Act to Georgia's photo ID law. This disgraceful practice was exposed in a November 2005 *Washington Post* article: "A team of Justice Department lawyers and analysts who reviewed a Georgia voter-identification law recommended rejecting it because it was likely to discriminate against black voters, but they were overruled the next day by higher-ranking officials at Justice, according to department documents…. The plan was blocked on constitutional grounds in October by a U.S. District Court judge, who compared the measure to a Jim Crow-era poll tax."[32] Gorsuch should be questioned about his role in supervising the Georgia photo ID litigation and the extent to which he was involved in supporting the use of photo ID laws by Georgia and other states, and about his role in overturning the recommendations of career attorneys to object to such laws.

Politicized Hiring in Civil Rights Division: In addition, during the year in which Gorsuch helped manage the Civil Rights Division, political appointees there engaged in unlawful hiring discrimination against lawyers with liberal affiliations, and this became the subject of a 2008 Inspector General report entitled "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division."[33] Gorsuch should be questioned by Senators about his knowledge of and role in these activities, which constituted an unlawful attempt to exclude lawyers from the Department of Justice who had a civil rights background and who would have aggressively enforced federal civil rights laws. He should also be questioned about his role in the 2005 appointment of Bradley Schlozman – whom the Inspector General concluded committed the most infractions – to be the Acting Assistant Attorney General for Civil Rights.

The Leadership Conference urges all Senators to oppose the Gorsuch nomination. They must exercise their full "advice and consent" responsibility by engaging in a searching and 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 appointment to the Supreme Court would impact their rights, freedoms, and liberties. When this review is complete, we are confident that the Senate will reject this nomination.

Thank you for your consideration of our views. If you would like to discuss this matter further, please contact Wade Henderson, President and CEO, or Nancy Zirkin, Executive Vice President, at (202) 466-3311.

Sincerely,

The Leadership Conference on Civil and Human Rights
9to5, National Association of Working Women
A. Philip Randolph Institute
Advocates for Youth

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[32] Dan Eggen, *Criticism of Voting Law Was Overruled*, Washington Post, November 17, 2005.
[33] https://oig.justice.gov/special/s0901/final.pdf.

African American Ministers In Action (AAMIA)
The African American Policy Forum
Alliance for Citizenship
Alliance for Justice
American Association of People with Disabilities
American Atheists
American Federation of Teachers (AFT)
American-Arab Anti-Discrimination Committee
Americans for Democratic Action (ADA)
Americans United for Separation of Church and State
Asian Americans Advancing Justice - AAJC
Asian Pacific American Labor Alliance, AFL-CIO (APALA)
Association of University Centers on Disabilities
Battle Born Progress
Bazelon Center for Mental Health Law
Bend the Arc Jewish Action
Bill of Rights Defense Committee/ Defending Dissent Foundation
Black Women's Roundtable
Catholics for Choice
Center for Health and Gender Equity (CHANGE)
Center for Law and Social Policy (CLASP)
The Center for Popular Democracy
Center for Responsible Lending
Coalition of Black Trade Unionists
Coalition of Labor Union Women
Coalition on Human Needs
Communications Workers of America
Congregation of Sisters of St. Agnes
Democracy Initiative
Demos
Earthjustice
Economic Policy Institute Policy Center
EMILY's List
Equal Justice Society
Equal Rights Advocates
Every Voice
Family Equality Council
Farmworker Justice
Feminist Majority
Four Freedoms Forum
Friends of the Earth
GLMA: Health Professionals Advancing LGBT Equality
Global Justice Institute

GLSEN
Hispanic Federation
Housing Choice Partners
Human Rights Campaign
Immigrant Legal Resource Center
Institute for Science and Human Values
Labor Council for Latin American Advancement (LCLAA)
Lambda Legal
LatinoJustice PRLDEF
League of Conservation Voters
League of United Latin American Citizens
Legal Aid at Work
Main Street Alliance
Mi Familia Vota
MomsRising
NAACP
NAACP Legal Defense and Education Fund, Inc.
NARAL Pro-Choice America
National Abortion Federation
National Action Network
National Asian American Pacific Islander Mental Health Association
National Asian Pacific American Women's Forum
National Association of Human Rights Workers
National Association of Social Workers
National Bar Association
National Black Justice Coalition
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for Asian Pacific American Community Development
National Coalition on Black Civic Participation
National Council of Asian Pacific Americans (NCAPA)
National Council of Jewish Women
National Council on Independent Living
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Health Law Program
National Hispanic Media Coalition
National Immigration Law Center
National Latina Institute for Reproductive Health
National LGBTQ Task Force Action Fund

National Organization for Women
National Partnership for Women & Families
National Women's Law Center
OCA - Asian Pacific American Advocates
Partnership for Working Families
People For the American Way
Planned Parenthood Federation of America
PolicyLink
Population Connection Action Fund
Pride at Work
Pride Fund to End Gun Violence
Prison Policy Initiative
ProgressNow
Project Vote
Religious Institute
Service Employees International Union (SEIU)
Sierra Club
Southeast Asia Resource Action Center (SEARAC)
Transgender Law Center
The Trevor Project
URGE: Unite for Reproductive & Gender Equity
US Women and Cuba Collaboration
Voices for Progress
Voting Rights Forward
Women Employed
Women's Voices.Women Vote Action Fund
Woodhull Freedom Foundation