



The Rev. Barry W. Lynn
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March 15, 2017

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of Americans United for Separation of Church and State, representing over 120,000 members and supporters across the country, we write to express our strong opposition to the confirmation of Neil Gorsuch as Supreme Court Justice. Judge Gorsuch, currently serving on the U.S. Court of Appeals for the Tenth Circuit, has taken positions that undermine the fundamental American value of religious freedom. For this reason, we urge you to oppose his confirmation.

Judge Gorsuch's Opinions in the Contraception Coverage Cases Undermine Religious Freedom

Religious freedom guarantees everyone the freedom to believe or not, as they see fit. It does not, however, give anyone the right to act on their beliefs in ways that harm others. Judge Gorsuch's stances in *Hobby Lobby Stores, Inc. v. Sebelius*¹ and *Little Sisters of the Poor Home v. Burwell*,² however, demonstrate that he wrongly believes religious freedom can justify denying critical healthcare services to women and their families.

Both *Hobby Lobby* and *Little Sisters of the Poor* involved the Affordable Care Act (ACA) regulations that require most health insurance plans, including plans provided by employers, to cover all FDA-approved methods of contraception with no co-pay. This policy was adopted to improve access to birth control, which is vital to women's health and equality.

In *Hobby Lobby*, for-profit corporations argued that providing contraception coverage for their employees violated their owners' religious freedom. When the case was before the Tenth Circuit, Judge Gorsuch joined the court's opinion, siding with the corporations and holding that businesses can cite religion as a reason to deny their employees such coverage. The Constitution prohibits the government from granting religious exemptions if they would result in real harm to others,³ yet the majority's opinion ignored this important limitation. At the same time, the court trivialized the real harm women would face without insurance coverage for vital medical services.

¹ 723 F.3d 1114 (10th Cir. 2013).

² 799 F.3d 1315 (10th Cir. 2015).

³ E.g., *Cutter v. Wilkinson*, 544 U.S. 709, 722, 725 (2005) (A religious exemption "must be measured so that it does not override other significant interests" and may not "impose unjustified burdens on other[s]."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (A religious exemption may not "unyielding[ly] weight[]" religious interests "over all other interests" including coworkers who do not share the same religious beliefs.); see also, e.g., *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989).

In *Little Sisters of the Poor*, non-profit organizations challenged the religious accommodation to the contraception coverage rule. Under the accommodation, an entity must only state its objection in writing, and the government will arrange for a third party to pay for and provide the coverage instead. The non-profits argued that even having to request the opt-out burdens their religious exercise. Ultimately, these groups want to block their employees and students from receiving birth control coverage from third-party insurance companies, even though they would not have to pay for it or otherwise provide it. When the Tenth Circuit declined to rehear the case en banc, Judge Gorsuch joined a dissenting opinion agreeing with the non-profits that the mere act of requesting an accommodation substantially burdened their religious exercise.

Judge Gorsuch's positions in both *Hobby Lobby* and *Little Sisters of the Poor* are troubling. They ignore the constitutional limits on religious exemptions and would result in harm to women by greatly limiting access to insurance for contraception and harm religious freedom itself. His positions also obviously raise serious concerns about cases that may come before the Supreme Court that would address access to healthcare, LGBTQ rights, and more: religion is not an excuse to ignore laws that protect healthcare and prevent discrimination.⁴

Judge Gorsuch's Record Favors Government Endorsement of Religion, Threatening Religious Freedom

True religious freedom also means that the government cannot promote or endorse religion, as doing so is divisive and sends a strong message to those who do not adhere to a particular religion that they are "outsiders, not full members of the . . . community."⁵ Indeed, government displays of religious texts and symbols constitute government endorsement of religion and violate the Constitution.⁶ Yet Judge Gorsuch, who spelled out his views in in opinions dissenting from the Tenth Circuit's refusal to rehear two cases, appears to take a different view of government-sponsored religious displays.

In *Green v. Haskell County Board of Commissioners*,⁷ the Tenth Circuit struck down a Ten Commandments display on an Oklahoma county's courthouse lawn. Judge Gorsuch maintained that the Commandments, sacred religious text for Jews and Christians, are not "just religious" and thus, could be displayed without violating the Constitution. In *American Atheists v. Davenport*,⁸ the Tenth Circuit held that the practice of memorializing fallen Utah Highway Patrol officers by erecting 12-foot-tall crosses bearing the Highway Patrol's symbol on the side of state highways violated the Constitution. Judge Gorsuch, however, contended that these preeminent symbols of Christianity did not actually promote Christianity. Taken to their logical conclusion, Judge Gorsuch's opinions could support a distressing result: allowing governmental bodies to endorse religion.

Judge Neil Gorsuch's record demonstrates he has not been willing to uphold the principles of true religious freedom, including the separation of church and state. Thus, we have serious concerns that, in future cases, he could support the promotion of religion by government officials in a wide

⁴ See, e.g., *EEOC v. R.G. & G.R. Funeral Home*, 100 F. Supp. 3d (E.D. Mich. 2015) (holding that Religious Freedom Restoration Act provides exemption from Title VII's protections for transgender individuals against employment discrimination).

⁵ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)) (O'Connor, J., concurring).

⁶ E.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (finding displays of the Ten Commandments on government property unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980) (declaring a display of the Ten Commandments in a public school to be "plainly religious in nature" and unconstitutional).

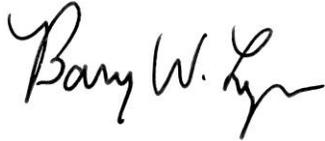
⁷ 574 F.3d 1235, 1248 (10th Cir. 2009) (denial of mot. to rehear case en banc) (Gorsuch, J., dissenting).

⁸ 637 F.3d 1095, 1107 (10th Cir. 2010) (denial of mot. to rehear case en banc) (Gorsuch, J., dissenting).

range of arenas, including in public schools, at government-sponsored events, and by funding religious institutions, as well as the proliferation of religious accommodations that cause real harm to third parties.

Accordingly, we urge you to oppose his confirmation.

Sincerely,

A handwritten signature in black ink that reads "Barry W. Lynn". The signature is written in a cursive, flowing style.

The Rev. Barry W. Lynn
Executive Director

cc: Members of the Committee