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Congressional Black Caucus Testimony in Opposition to the Nomination of Judge Neil Gorsuch to the Supreme Court of the United States

Submitted by Chair Cedric L. Richmond and Judicial Nominations Working Group Chair Eleanor Holmes Norton

We have looked at Judge Neil Gorsuch's body of work to understand his

record and how he would review cases as a Supreme Court justice. In the process,

we have discovered a record on race and related matters and an even more

troubling hostility to constitutional and equal rights litigation that does not merit

the support of the Congressional Black Caucus (CBC) or the Senate.

Judge Gorsuch's approach to equal protection matters was forecast during

his time at the Department of Justice (DOJ) from 2005 to 2006. Gorsuch was the

Principal Deputy to the Associate Attorney General, who managed litigation in the

Civil Rights Division. During Gorsuch's tenure, the DOJ Inspector General found

that hiring had been politicized to stifle enforcement of civil rights laws. Judge

Gorsuch has not considered a voting rights case during his tenure on the 10th

Circuit Court of Appeals, but his period of involvement with voting rights litigation



at DOJ offers disturbing evidence of his approach. In 2005, as part of the Voting Rights Act preclearance process, lawyers from the Civil Rights Division initially rejected a strict voter ID law in Georgia, arguing that the law was likely to discriminate against black and minority voters—but their superiors at DOJ overruled them and cleared the law to go forward. A district court judge later prevented the Georgia law from going into effect in a ruling that compared the law to a Jim Crow-era poll tax. Only after Georgia amended its law to provide free photo IDs to residents in 2006 was the law precleared.

About the same time that Gorsuch worked for the DOJ, he elaborated on his views on constitutional litigation in a telling op-ed on the conservative website National Review Online. Although Gorsuch conceded that constitutional lawsuits have yielded important civil rights gains, he lamented that “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.” His advice that liberals “kick their addiction to constitutional litigation” should alarm Americans of every background who find themselves in the minority at any given time. Even the most conservative justices and nominees have expressed no such thoroughgoing disdain for efforts to achieve vindication of rights through the constitutional law process.

These views are stunning criticism particularly for African Americans, who have been able to claim their major rights only by going to the federal courts. For groups still facing discrimination,

Gorsuch's views appear hostile to vindication of their rights through the Supreme Court. Equally disturbing, his preference for the political process alongside his antipathy toward constitutional litigation show a shallow appreciation for the reason for the Bill of Rights the framers wrote to protect the minority from majoritarian power. The addition of the 13th, 14th, and 15th Amendments are in the tradition of the framer's original amendments, and were enacted to protect African Americans in particular following the abolition of slavery. The framers shared Gorsuch's preference for the democratic political process, but they created a separation of powers system of government with an independent judiciary because of their belief that democratic majorities need to be checked, particularly by the courts.

Because the CBC represents the voices of millions of African Americans in Congress, this testimony highlights areas and representative cases related to discrimination. Employment discrimination cases form the largest number of discrimination cases before the Supreme Court, and Judge Gorsuch's past decisions often involve employment discrimination. The Midwestern and Rocky Mountain states covered by the 10th Circuit have relatively few racial minorities. Judge Gorsuch's approach to discrimination cases, however, is consistent regardless of the background of the plaintiffs.

All of the nation's anti-discrimination statutes are broadly written and have been broadly construed to capture discrimination by the Supreme Court. Unfailingly, Judge Gorsuch has construed these laws narrowly. His aversion to constitutional litigation to protect the rights of minorities is also

carried out in his opinions concerning discrimination cases brought by minorities of various backgrounds. The 10th Circuit has not produced many racial discrimination cases but Judge Gorsuch's approach has been consistent in other discrimination cases. Title VII of the Civil Rights Act was broadly written to capture employment discrimination in its many forms, but Gorsuch has consistently adopted a cramped interpretation of this and other discrimination statutes. His partial dissent in *Strickland v. UPS* would have closed the courts to a female UPS driver and ruled in favor of UPS despite testimony from many coworkers of disparate treatment.

We do not discuss Judge Gorsuch's very concerning technical rulings that govern whether litigants will be heard in federal court. These include motions for summary judgment that decide matters on procedure rather than merit, which makes it difficult for plaintiffs in civil rights cases to get a jury trial. Judge Gorsuch's strict interpretation of the Federal Rules of Civil Procedure poses yet another barrier to civil rights litigation and is in keeping with his view that "liberals [are] addicted to the courtroom."

In *Hwang v. Kansas State University*, Judge Gorsuch refused to follow the guidance of the Equal Employment Opportunity Commission (EEOC) in a case brought by a professor. She sought to extend her six-month sick leave accommodation to a date certain following a cancer diagnosis and bone marrow transplant. The EEOC guidance said additional leave must be provided unless there is an alternative accommodation that would allow the individual to work or the leave would cause an undue hardship.

Gorsuch found that six months of sick leave provided “more than sufficient to comply with the [law] in nearly any case.”

Gorsuch is perhaps best known for his opinions in the religion cases *Hobby Lobby v. Burwell* and *Little Sisters of the Poor v. Burwell*. Unlike his reluctance to rule for minority and female plaintiffs in discrimination cases, Gorsuch joined the majority opinion and wrote a separate concurrence in *Hobby Lobby* finding that the Affordable Care Act’s (ACA) requirement that employers provide contraceptive coverage to their employees discriminated against a for-profit, secular corporation whose owners opposed contraception on religious grounds. In *Little Sisters*, Judge Gorsuch joined the dissent from a denial of rehearing en banc, which argued that the government’s proposed religious accommodation was a “substantial burden.” The government’s compromise would have allowed the Little Sisters to sign a form stating their objection to contraceptive coverage, permitting female employees to receive contraceptive coverage from a third-party insurer. In *Hobby Lobby*, *Little Sisters*, and other religion cases, Gorsuch shows a zeal to protect adherents, adopting a pro-religion view of the Establishment Clause and the Religious Freedom Restoration Act that is decidedly at odds with his views on anti-discrimination laws.

We have not detailed all of the several areas of Judge Gorsuch’s jurisprudence where we have deep reservations. His strict approach to claims by African Americans and other minority litigants who rely on

the courts to vindicate their rights spreads across related groups. These areas include high bars for litigants in capital punishment, racial traffic stops, and excessive force. LGBTQ litigants have reason to fear that Judge Gorsuch could apply his strict approach in *Hobby Lobby* and *Little Sisters* to religious claims over their rights—women have already seen Judge Gorsuch do so. This record is discouraging to African Americans and other litigants, but all the more so because of Gorsuch's views that they have depended too much on the federal courts. Beyond possible readings that could deny constitutional and statutory rights, Judge Gorsuch's statements concerning overreliance on the courts and his preference for the political process along with his restrictive anti-discrimination and procedural rulings make it impossible to support his nomination. The Congressional Black Caucus opposes the nomination of Neil Gorsuch to be an Associate Justice to the United States Supreme Court.