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NEIL GORSUCH: WRONG FOR THE LGBTQ COMMUNITY, WRONG FOR THE SUPREME COURT

"American liberals have become addicted to the courtroom… as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide."

– JUDGE NEIL GORSUCH, 2005

President Trump's nomination of Judge Neil Gorsuch is deeply troubling for the LGBTQ community and for fair minded, justice-seeking people across the country. If Gorsuch is confirmed, he will infuse the Trump-style radical exclusionary policies of today's fractured political moment into the American legal landscape for decades. Supreme Court Justices may not always be popular. We might not always agree with their decisions. But we must believe in their commitment to reaching impartial judgments based upon fact rather than ideology or bias. The LGBTQ and civil rights communities depend on the Court to respect our nation's civil rights and to interpret them in ways that protect our community. We must demand that any Supreme Court Justice commits to guaranteeing that the Court recognizes LGBTQ people's fundamental rights and basic equality. This is not a high bar. But this is one that Judge Gorsuch has never met.

Judge Gorsuch has a staunchly conservative record and has heard cases involving the rights of transgender prisoners, reproductive justice, and religious liberty. He joined the majority opinion in the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius,*[1] finding that the corporation should receive personhood-status for purposes of the Religious Freedom Restoration Act (RFRA) and setting the stage for the Supreme Court decision. Judge Gorsuch's opinions demonstrate his strict adherence to an originalist view of the Constitution; a view that allows for blatantly discriminatory laws targeting the LGBTQ

1 723 F.3d 1114 (2013)

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community, limits our right to privacy, and that seeks to block marriage-equality. LGBTQ Americans deserve a justice that will support equality under the law, and not someone who casts equality as a "social agenda."

BACKGROUND

Judge Neil Gorsuch was nominated to serve on the U.S. Court of Appeals for the Tenth Circuit by President George W. Bush in 2006. Judge Gorsuch graduated with his bachelor's degree from Columbia University, a law degree from Harvard Law School, and was a Marshall Scholar at the University of Oxford. He has clerked for "conservative" justices, notably, U.S. Supreme Court Justice Byron White and Justice Anthony Kennedy from 1993-1994. During the Bush Administration, Judge Gorsuch served as Principal Deputy to the Associate Attorney General at the U.S. Department of Justice. If Judge Gorsuch is appointed to the Supreme Court, he would be the youngest sitting justice on the Court at forty-nine years old.

LGBTQ PEOPLE'S STRUGGLES DESERVE RECOGNITION AND PROTECTION, NOT INDIFFERENCE

As recently as 2015, Judge Gorsuch forfeited the opportunity to recognize the Constitutional rights of a transgender prisoner, refusing to recognize that the denial of basic, consistent health care and her placement in an all-male housing facility constituted cruel and unusual punishment. In *Druley v. Patton,*[2] the Tenth Circuit affirmed the lower court's denial of Jeanne Marie Druley's motion for preliminary injunction. Druley, a transgender Oklahoma state prisoner, alleged that the Oklahoma Department of Corrections (ODOC) violated the Eighth Amendment's prohibition on cruel and unusual punishment by stopping and starting her prescribed hormone medications and giving her inadequately low dosages of her hormone medication.[3] She also alleged that ODOC violated the Equal Protection Clause by housing her in an all-male facility.[4] The opinion joined by Judge Gorsuch sets the Tenth Circuit apart from a majority of other circuits—seven to be exact—that do recognize gender dysphoria as a serious medical need under the Eighth Amendment requiring adequate treatment.[5] Judge Gorsuch's failure to recognize the brutality facing this prisoner reveals a level of indifference and a lack of compassion that are unacceptable qualities in a Supreme Court Justice.

In 2009, Judge Gorsuch also joined the opinion in *Kastl v. Maricopa County Community College District*[6] finding against a transgender woman alleging employment discrimination under Title VII. The community college refused to allow the employee to use the women's restroom following her gender transition despite providing government identity documents confirming her gender. The Judge Gorsuch court determined that the community college's argument that denying the employee access to a gender appropriate facility was based on "restroom safety" was not discriminatory.

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2 601 Fed. Appx. 632 (10th Cir. 2015).
3 *See Druley,* 601 Fed. Appx. at 633.
4 *Id.*
5 *See Kosilek v. Spencer,* 774 F.3d 63, 86 (1st Cir. 2014); *De'Lonta v. Angelone,* 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez,* 9 F. App'x 793, 794 (9th Cir. 2001); *Cuoco v. Moritsugu,* 222 F.3d 99, 106 (2d Cir. 2000); *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *11 (6th Cir. Jan. 28, 1997); *White v. Farrier,* 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner,* 821 F.2d 408, 413 (7th Cir. 1987).
6 325 Fed. Appx. 492 (9th Cir. 2009).

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THE RIGHT TO BELIEVE IS FUNDAMENTAL. THE RIGHT TO PRIVACY AND SELF-DETERMINATION IS TOO.

The Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.* expanded the Religious Freedom Restoration Act (RFRA), raising concerns about RFRA's use as a means to discriminate in the name of religious freedom. Religious beliefs have long been used as a basis to deny LGBTQ people access to basic civil rights. However, exactly what *Hobby Lobby* means for LGBTQ rights hinges on the composition of the Supreme Court. If confirmed to the Supreme Court, Judge Gorsuch's record indicates he could push the Court to adopt a broader interpretation of RFRA.

Judge Gorsuch joined with the majority in *Hobby Lobby Stores, Inc. v. Sebelius,*[7] recognizing corporations as persons capable of exercising religion under RFRA.[8] The decision further held that under RFRA, corporations are exempt from complying with the Affordable Care Act's (ACA) contraceptive-coverage requirement because the requirement substantially burdens their sincerely held religious beliefs.[9]

When RFRA became law in 1993, it was supported by a richly diverse coalition of religious and civil rights groups. Designed to protect the rights of religious minorities from unlawful government intrusion, RFRA was seen as an important safeguard for our country's most vulnerable groups. However, the *Hobby Lobby* decision has turned this original intent on its head. By recognizing large corporations as "people" who are neither vulnerable nor minorities this decision has empowered politically and socially powerful groups to cite RFRA, as the legal mechanism to discriminate and marginalize truly vulnerable groups including women and LGBTQ people. The right to believe is fundamental. But we need a Supreme Court Justice that also recognizes that the right to privacy and self-determination is, too.

Although this decision dealt directly with access to reproductive care and contraception, this dangerous reasoning could be used by employers to deny LGBTQ people access to other critical health care services including hormone therapy for transgender people, infertility treatment for same-sex couples, or PrEP. Some businesses are already leaning on this troubling decision to deny basic healthcare to LGBTQ people. The *Hobby Lobby* decision is a clear departure from the intent of RFRA, and if a Justice like Neil Gorsuch is confirmed, it could be used to support discrimination against LGBTQ people at work, school, and beyond under the guise of religious expression.[10]

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7 723 F.3d 1214 (10th Cir. 2013).

8 *See Hobby Lobby,* 723 F.3d at 1121-22.

9 *Id.*

10 *See, e.g.,* Caroline Mala Corbin, *What Does Hobby Lobby Mean for LGBTQ Rights?*, HRC Blog (July 1, 2016), http://www.hrc.org/blog/what-does-hobby-lobby-mean-for-lgbtq-rights; Sarah Warbelow, *Hobby Lobby's Implications for the LGBT Community*, HRC Blog (June 30, 2014), http://www.hrc.org/blog/hobby-lobbys-implications-for-the-lgbt-community; *HRC Responds to Supreme Court Ruling in Hobby Lobby,* HRC Blog (Jun 30, 2014), http://www.hrc.org/blog/hrc-responds-to-supreme-court-ruling-in-hobby-lobby.

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ACCESS TO HEALTHCARE AND REPRODUCTIVE SERVICES ARE VITAL TO LGBTQ PEOPLE

In *Planned Parenthood Association of Utah v. Herbert,*[11] the Tenth Circuit rejected Utah Governor Gary Herbert's request to suspend public funding to four programs operated by the Planned Parenthood Association of Utah following the release of a fake video allegedly showing Planned Parenthood officials negotiating the sale of fetal tissue.[12] The court granted a preliminary injunction in favor of Planned Parenthood, finding the Governor's termination of Planned Parenthood's funding violated its constitutional rights.[13]

Judge Gorsuch authored a dissent to the Tenth Circuit's denial for rehearing *en banc*.[14] Specifically, Judge Gorsuch believed the full court should rehear the case due to what Judge Gorsuch considered the panel's gross departure from the court's previously uniform practice of answering questions on standard of review and the burden of proof.[15] The case turned on the court's decision on the issue of Governor Herbert's intention for suspending funding to Planned Parenthood: If he suspended funding out of concern for Planned Parenthood's illegal sale of fetal tissue, then no constitutional rights were violated.[16] However, if Governor Herbert's decision was based on retaliation or animus towards Planned Parenthood's advocacy for lawful abortion, then Planned Parenthood's constitutional rights were violated.[17] Based on this assessment, Judge Gorsuch held that the Tenth Circuit acted inappropriately overruling the lower court's preliminary evidentiary record that Governor Herbert's intentions were not based on animus and that Planned Parenthood failed to meet its burden of proof for preliminary relief .[18] However, this dissent ignores admissions made by Governor Herbert in his response to Planned Parenthood's motion for preliminary injunction. This selective analysis is a troubling example of Judge Gorsuch's ideologically driven decision-making.

Access to quality reproductive and health care services is essential for LGBTQ people. Laws restricting access to care and limiting outreach and education to our community directly impact the well-being of LGBTQ people of all ages. Quality, culturally competent care is critical to ensuring that LGBTQ people receive the information and support they need. However, access to culturally competent care is too often out of reach for many members of our community. Hesitancy on the part of many physicians to inquire about sexual activity coupled with bias or a lack of knowledge regarding LGBTQ people results in substandard care for many in our community. Often health centers like those operated by Planned Parenthood offer the only culturally competent care in a community.

11 828 F.3d 1245 (10th Cir. 2016).
12 *See Herbert,* 828 F.3d at 1248.
13 *Id.* at 1264.
14 839 F.3d 1301 (10th Cir. 2016).
15 *See Herbert,* 839 F.3d at 1307.
16 *Id.*
17 *Id.*
18 *Id.* at 1308.

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GORSUCH WOULD DISMANTLE THE LGBTQ COMMUNITY'S STRONGEST PROTECTIONS

Judge Gorsuch believes the U.S. Supreme Court should reconsider the administrative law doctrine known as "*Chevron* deference" and declare it unconstitutional. *Chevron* deference requires courts to defer to interpretations of statutes made by executive agencies tasked with interpreting the statute, unless the interpretation is unreasonable.[19] In a twenty-two page concurrence in *Gutierrez-Brizuela v. Lynch,*[20] Gorsuch portrays *Chevron* as a gross violation of the separation of powers intended by the founding fathers and enshrined in the Constitution.[21] Specifically, he argues that *Chevron* is an unconstitutional delegation of legislative power to executive agencies that strips courts of their judicial mandate to check executive action.[22]

Judge Gorsuch's understanding of executive agencies' power of interpretation under *Chevron* is deeply concerning. Most alarming is the impact such a decision would have on the LGBTQ community. Over the last eight years, several executive agencies have issued LGBTQ-inclusive regulations and guidance.[23] Overturning *Chevron* would result in a tremendous shift of power from executive agencies to the courts – giving judges with no specialized expertise the power to decide policy. Given the trend of the Supreme Court, if *Chevron* is overturned it is highly likely that many Obama-era regulations and guidance would not survive. Without Chevron deference administrative actions like the ACA regulations, the hospital visitation regulations, and other critical protections could be undermined and challenged.

19 *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984).
20 834 F.3d 1142 (10th Cir. 2016).
21 https://www.ca10.uscourts.gov/opinions/14/14-9585.pdf.
22 *Id.*
23 *See, e.g.,* Dep't of Health and Human Serv., Nondiscrimination in Health Programs and Activities, 45 C.F.R. § 92.4 (May 13, 2016); Dep't of Justice & Dep't of Educ., "Dear Colleague Letter on Transgender Students" 2 (May 13, 2016); Dep't of Def., *Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members* (Jul. 29, 2016); Memorandum from Attorney General Eric Holder, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); Discrimination Based on Sex, 41 C.F.R. § 60-20.2(a) (2016).