**AFL-CIO REVIEW OF JUDGE NEIL GORSUCH'S RECORD**
**IN WORKERS' RIGHTS CASES**
March 17, 2017

The next Justice confirmed to the U.S. Supreme Court will play a critical role in shaping and enforcing the laws protecting working people. President Trump has nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit for a life-time appointment to fill the existing vacancy of Associate Justice on the U.S. Supreme Court. On Monday, March 20, the U.S. Senate Committee on the Judiciary will begin its hearings to consider Judge Gorsuch's nomination.

Working families need and deserve a Supreme Court justice who understands and respects the importance of the laws and protections for working people in this country, including the right to form unions; to be free from discrimination because of race, gender, national origin, age or disability; to have a safe workplace; and to be paid for all hours worked.

**The AFL-CIO, a federation of 55 national and international unions representing approximately 12.5 million working men and women, is deeply troubled by Judge Gorsuch's record: It reflects an unduly narrow and restrictive view of worker protections. His record also indicates a disturbing tendency to favor the rights of corporations over working people. The AFL-CIO respectfully requests that members of the U.S. Senate Committee on the Judiciary thoroughly question Judge Gorsuch on the decisions in which he participated where he routinely ruled against workers with health and safety concerns; regularly rejected claims of employees seeking relief from discrimination in the workplace; and frequently denied workers' efforts to secure earned wages and benefits. Working people across the country will be watching the hearings with great interest.**

**The AFL-CIO is further alarmed by Judge Gorsuch's eagerness to overturn the well-established and oft-honored U.S. Supreme Court precedent of judicial deference to the expertise of administrative agencies.** Overturning *Chevron, U.S.A, Inc. v. NRDC, Inc.* would be a radical departure from precedent and would undermine the work and expertise of worker protection agencies, such as the National Labor Relations Board, the Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission.

**The AFL-CIO is also concerned by Judge Gorsuch's interest in resurrecting the antiquated, long-rejected non-delegation doctrine, thereby placing Judge Gorsuch well outside the legal mainstream.** The non-delegation doctrine, not used by the Supreme Court since 1935, argues that Congress should not be able to delegate policy-making authority even when it is essential to effective legislation.

**Lastly, the AFL-CIO is dismayed that Judge Gorsuch's writings as a private lawyer, specifically his article admonishing liberal advocacy groups to "win elections rather than [constitutional] lawsuits," may reflect a closed mindset to important lawsuits that are often before the U.S. Supreme Court.**

**Judge Gorsuch routinely ruled against workers with health and safety concerns.**

**Health and Safety:** Christopher Carder, a trench hand, died on-the-job after being electrocuted by an overhead power line at a surface mine site. The Occupational Safety and Health Administration imposed a $5,550 fine on the employer, finding that the accident could have been avoided had the employer adequately trained Carder. The employer appealed, and the court majority upheld OSHA's findings against the employer: It was "undisputed that Compass did not give this employee any instruction . . . [on the] fatal danger posed by the high voltage lines located in the vicinity of his work area." Judge Gorsuch dissented, finding no government regulations existed requiring the employer to provide training on such workplace conditions. He further contended that this case was yet another example of administrative agencies wielding "remarkable powers" and unfairly "penalizing" the company. *Compass Environmental, Inc. v. OSHRC,* 663 F.3d 1164 (2011)

**Whistleblower Protection:** A shipping company fired trucker Alphonse Maddin for abandoning his cargo, when out of safety concerns, Maddin refused in subzero temperatures to drag a trailer with frozen brakes. He reported the problem to the company, waiting hours in the truck in freezing temperatures for the company's tow truck to arrive. When Maddin became numb and had difficulty breathing, he unhitched the trailer from the truck, leaving the trailer behind while he drove to seek help. The employer later fired Maddin for abandoning his cargo and not following instructions to stay waiting for the tow truck. The court majority, applying the whistleblower protections of the Surface Transportation Act, found the company had improperly fired Maddin, and awarded him reinstatement and backpay. Judge Gorsuch dissented, finding the driver unprotected. He deemed worker health and safety as "ephemeral and generic" goals, and challenged the Department of Labor's position that the phrase "refuse to operate" should be interpreted within the Transportation Act's context of promoting health and safety because, "What, under the sun, at least at some level of generality, *doesn't* relate to 'health and safety'?" *TransAm Trucking, Inc. v. Administrative Review Board, U.S. Department of Labor,* 833 F.3d 1206 (10th 2016)

**Health and Safety:** The Occupational Safety and Health Administration cited an oil-well servicing rig company for numerous safety violations and fined the company $3,000. The company appealed. Judge Gorsuch joined the two-judge majority, reasoning the agency's finding was arbitrary and capricious because the company failed to receive "fair warning" from the Secretary of Labor by the "blurred" ambiguities of the "floor hole" regulation being applied to the company's "floor opening." The dissent called the majority's decision "nonsense": The employer "cannot credibly claim to have been unaware of the dangerous condition for which it was cited and ultimately sanctioned. Instead, it attempts to shift the focus from its inadequate concern for safety to a terminology war. Preferring rhetoric to substance is most convenient." *Longhorn Service Company v. Perez*, 652 F. App'x 678 (10th Cir. 2016)

**Judge Gorsuch regularly rejected claims of employees seeking relief from discrimination in the workplace.**

**Sex Discrimination.** Account executive Carole Strickland, a former driver, sued UPS asserting various claims, including that she had been unlawfully discriminated against based on gender because she was held to a higher performance standard than her male co-workers. The court majority agreed with Strickland, overturning the lower court and finding that Strickland presented adequate evidence that "similarly situated" male co-workers were treated more favorably than Strickland to allow a jury to consider the case. Judge Gorsuch dissented, finding circumstantial evidence of sex discrimination entirely "absent." *Strickland v. UPS*, 555 F.3d 1224 (10th Cir. 2009)

**Sexual Harassment.** A female employee, Betty Pinkerton, filed claims for sexual harassment and retaliation, complaining that over several months her supervisor made sexually inappropriate remarks to her (e.g., asking about "whether she had sexual urges," "her breast size," and "if she had breast enlargements,"), and that after an investigation of her internal complaint, she was fired. The two-judge majority in which Judge Gorsuch joined found that Pinkerton's termination was not caused by discrimination, but by her performance. The majority also decided that her two-month wait to report the harassment to the agency was too long a time. The dissent, however, found sufficient evidence to establish a harassment claim. The dissent also reasoned that it was for a jury, not the judges, to decide whether two months was a reasonable time within which to report the harassment, noting that Pinkerton's termination just six days after the completion of the internal harassment investigation established a genuine issue of retaliatory discharge. *Pinkerton v. Colorado Department of Transportation*, 563 F.3d 1052 (10th Cir. 2009)

**Race and National Origin Discrimination.** In a split *en banc* decision, Judge Gorsuch voted to affirm the lower court that blocked a race and national origin case involving an employee's discriminatory discharge and suspension claim from proceeding, despite evidence of animus, unlawful reverification, and document abuse by the employer. The employer asked Ramon Zamora, a Mexican-born naturalized citizen, for his social security number and work authorization documentation, even though Zamora had already provided them. The employer then suspended Zamora until he provided what the employer claimed would be sufficient documentation. Zamora provided the employer a letter from the Social Security Administration confirming his Social Security number, and he returned to work, demanding an apology and explanation. Instead, the employer fired Zamora. *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007) (*en banc*)

**LGBTQ Discrimination.** A transgender woman, Rebecca Kastl, alleged sex discrimination based on gender stereotyping when her employer, a community college, refused her use of the women's restroom after her gender transition, despite having provided documentation of her gender reassignment surgery. The community college then did not renew Kastl's teaching contract. Judge Gorsuch joined the majority, which upheld the lower court ruling, finding that the employer's decision to deny Kastl a gender appropriate bathroom was based on "restroom safety," and therefore not discriminatory. *Kastl v. Maricopa County Community College District*, 325 F. App'x 492 (9th Cir. 2009)

**Age Discrimination.** Two school district employees sued, arguing they had been illegally demoted to lower paying jobs because of age. The school district transferred the maintenance employees, Dwight Almond and Kevin Weems, to lower-paying jobs after their positions were eliminated, with the district compensating them for two years at their prior higher salary level. At the end of the two-year period, their salaries were lowered. Judge Gorsuch wrote the decision, ruling that the employees' claims of discrimination were untimely because the claims needed to be filed at the time of the demotions, and that the Lily Ledbetter Fair Pay Act, which was for unequal pay for unequal work, did not apply to discriminatory demotions. *Almond v. Unified School District #501*, 665 F.3d 1174 (10th Cir. 2011)

**Judge Gorsuch frequently denied workers' efforts to secure earned wages and benefits.** In cases involving pensions and benefits, he has ruled for employers 21 out of 23 times.[1]

**Wages/Labor Law.** The National Labor Relations Board ruled that the interim earnings of 13 respiratory-department workers should be disregarded when calculating backpay awards where a hospital unlawfully reduced their full-time work hours. The Board reasoned that, on balance, workers who take on additional outside jobs should retain the benefit (wages from their outside jobs) of their "extra effort," not "recalcitrant" employers who violated the law. The hospital appealed, and the majority of the court agreed with the NLRB about how best to make the hospital workers "whole." Judge Gorsuch dissented, deciding the backpay award gave too much money to the workers and observing that the Board's "statutory charge isn't to promote full employment . . . It's not some sort of reincarnation of the Works Progress Administration." *NLRB v. Community Health Services, Inc.*, 812 F.3d 768 (10th 2016)

**Wages/Labor Law**. The National Labor Relations Board ruled in favor of the union in finding that the employer's *threa*t to hire permanent replacement workers during a lockout violated the National Labor Relations Act (NLRA); however, the Board disagreed with it that the lockout *itself* violated the NLRA. And so, the Board denied backpay to the union employees during the lockout, and the union sought review. Judge Gorsuch, who wrote the majority opinion, agreed with the Board, against the workers. In challenging the union, which lost, Judge Gorsuch raised questions about the NLRA's treatment of permanent replacements and strikers, concluding: "Happily, to decide this particular case we need not attempt any answers of our own. . .. Neither need we evaluate the Board's views on the matter or the amount of deference owed them." Judge Gorsuch upheld the Board ruling, deferring grudgingly to the agency:

> At the end of the day, the union musters no justification for forcing the Board to act where it has chosen not to act. In saying this much we don't mean to suggest we endorse every jot and tittle in the administrative precedents. . .. To resolve this case, we need and do hold only that the Board's refusal to order additional remedial measures wasn't arbitrary.

[1] Denise Lavoie and Michael Tarm, "Gorsuch Often Sided with Employers' in Workers' Rights Cases," Associated Press (Feb 27, 2017) ("[Judge Gorsuch] has sided with employers 21 out of 23 times in disputes over the U.S. pensions and benefits law, the Employee Retirement Income Security Act, or ERISA.")

Nevertheless, Judge Gorsuch opined at some length that that the Tenth Circuit had the "discretion" to question whether the Board "was even properly composed" to decide the issue at hand "even though the question isn't jurisdictional and even though the parties never raised it." In the end, Judge Gorsuch was persuaded that the "ease" of deciding the case on its merits determined that the court's "*sua sponte* intervention" was not "appropriate." *Teamsters Local No. 455 v. NLRB*, 765 F.3d 1198 (10th Cir. 2014)

**Retirement.** Judge Gorsuch sided with the company, finding a group of employees who had sued their employer were not entitled to any kind of relief, even though the employer failed to give the employees adequate notice of the negative implications of changes to their pension plan, specifically the elimination of early retirement subsidies. Judge Gorsuch reasoned that the employer didn't intentionally misinform them about the changes. *Jensen v. Solvay Chemicals, Inc.*, 721 F.3d 1180 (10th Cir. 2013)

**Health Care.** Judge Gorsuch joined the divided *en* banc majority in ruling that corporations that have religious objections to contraception may withhold insurance coverage for women employees' health care that otherwise was required by the Affordable Care Act. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (*en banc*)

**Judge Gorsuch routinely favored the rights of corporations over those of individuals.** Judge Gorsuch regularly sided with companies in not only workers' rights cases, but other areas of the law as well, such as campaign finance, religious freedom, and securities fraud.

**Corporate Money in Politics.** Judge Gorsuch wrote a concurring opinion in a campaign finance case in which he suggested that corporate contributions to political campaigns are a "fundamental" right and, therefore, should be given the highest level of constitutional protection ("strict scrutiny"). Courts have reserved strict scrutiny for protecting the most important of individual rights, such as the right to be free from racial discrimination. If Judge Gorsuch's approach were adopted, corporations and wealthy donors would be able to spend almost unlimited amounts of money in political campaigns. *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014)

**Corporate Religious Freedom.** Judge Gorsuch joined the majority in a divided *en banc* opinion that enabled businesses to assert religious freedom to eliminate their obligation to provide federally-required contraceptive care to women. *Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d 1114 (10th Cir. 2013) (*en banc*). In so holding, the Tenth Circuit majority extended to the workplace the concept that corporations are persons, which was embraced in the campaign finance context by the U.S. Supreme Court in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that political spending is a form of protected speech under the First Amendment, and the government may not keep corporations from spending money to support or denounce individual candidates in elections).

**Securities Fraud.** In private practice, when Neil Gorsuch represented the Chamber of Commerce and corporate clients in the securities industry, he opposed class actions by

individuals in securities fraud litigation, explaining that protecting corporations from the burden and risk of litigation outbalanced the concerns of individual consumers and investors who may have been swindled. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005)

## Judge Gorsuch Promoted Overturning the Precedent of, and Resurrecting a Legal Doctrine Rejected by, the U.S. Supreme Court

### Overturning the U.S. Supreme Court Precedent of *Chevron*

Judge Gorsuch is eager to overturn the well-established and oft-honored U.S. Supreme Court precedent of *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court held that unelected judges must defer to executive agencies' construction of a statute when Congress has given an agency primary responsibility for interpreting its mandates, so long as the agency does not act contrary to Congress' clear intent. Judge Gorsuch has criticized *Chevron* and has made clear he would overturn it. This would be a radical departure from precedent and would undermine the work and expertise of worker protection agencies such as the National Labor Relations Board, the Occupational Safety and Health Administration, and the Equal Employment Opportunity Commission. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., majority and concurring) ("We managed to live with the administrative state before *Chevron*. We could do it again."); *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968 (10th Cir. 2016).

### Resurrecting the Antiquated, Long-Rejected Non-Delegation Doctrine

Judge Gorsuch articulates the radical position of resurrecting the antiquated non-delegation doctrine, which once limited elected lawmakers power to permit executive branch agencies to fill inevitable gaps in laws and to respond to changing circumstances. Legislation protecting working people's right to organize passed in 1935 could not have anticipated that the right would be exercised via email. Nor could legislation adopted in 1970 protecting working people's health and safety have anticipated the hazard posed by AIDS to healthcare workers in the 1980s. Judge Gorsuch would resurrect a doctrine that would cripple effective enforcement of these key congressional mandates through administrative actions, like OSHA's adoption of a blood-borne pathogen standard protecting nurses and other healthcare workers in 1991. This places Judge Gorsuch well outside the legal mainstream. As the late Justice Scalia opined, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). Judge Gorsuch disagrees with this long-settled legal principle, arguing that Congress should not be able to delegate policy-making authority even when it is essential to effective legislation. *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015) (*en banc*) (Gorsuch, J., dissenting).

**Neil Gorsuch, as a Private Attorney, Denigrated Constitutional Litigation by Liberal Organizations, Which May Reflect a Closed Mindset**

The AFL-CIO is also dismayed by Judge Gorsuch's writings as a private attorney, specifically his pejorative denigration of what he called the "overweening addiction" to constitutional lawsuits by "American liberals." Neil Gorsuch, "Liberals' N' Lawsuits," National Review Online (Feb. 7, 2005). Gorsuch acknowledged such litigation has abolished racial segregation in our public schools. More recently, constitutional litigation has established the right to same-sex marriage. It has also given working people the right to speak out to expose government malfeasance without fear of retaliation. If Judge Gorsuch were to be confirmed to the U.S. Supreme Court, he will hear such constitutional challenges by American liberal, conservative and other advocacy organizations. We are concerned that his admonition to "kick" the litigation addiction and to "win elections rather than lawsuits" may reflect a closed mindset to such important lawsuits.

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**Working families need and deserve a Supreme Court justice who understands and respects the importance of the laws and protections for working people in this country. Working people across the country will be listening with great interest to the upcoming hearings of Supreme Court nominee Judge Gorsuch. The AFL-CIO respectfully requests that members of the U.S. Senate Committee on the Judiciary question thoroughly Judge Gorsuch on the decisions in which he participated that impact the protections for working families.**