

Written Testimony of Patrick Gallagher on the Senate Confirmation Hearings for Judge Neil Gorsuch

We need strong environmental laws to safeguard the water we drink and the air we breathe. The Clean Air Act, Clean Water Act and similar laws were enacted in the 1970s because corporate polluters had fouled our air and water so badly that Congress stepped into the breach. In the decades since, vigorous enforcement of environmental law has led to the cleanup of dangerous pollution across this country and to substantial improvements in the quality of our air and water. That progress could be undermined if Judge Gorsuch's views take hold on the Supreme Court.

The Sierra Club believes that we must protect our democracy in order to protect our air, water, and communities. Among other things, this means ensuring that corporations do not have a louder voice than citizens in any branch of our government and citizens and organizations have access to our courts. Judge Neil Gorsuch's track record shows that he cannot be relied on to guarantee either, which is why the Sierra Club opposes his nomination.

Several factors lead the Sierra Club to oppose the nomination of Judge Gorsuch. First, Judge Gorsuch has expressed a consistent willingness to close the courthouse doors to citizens and the public, even while holding them wide open for corporate and industrial interests. Second, Congress' wisdom in permitting citizens to protect clean air and water are particularly important now, in the face of an Administration that is openly hostile to duly enacted laws that secure such protection. Third, Judge Gorsuch's hostility to the *Chevron* doctrine echoes the threats of the Trump administration to dismantle the EPA and sister agencies, and bring the courts into technical and scientific disputes over any rule opposed by industry. We cannot afford to appoint another justice whose ideology favors corporate and industrial interests over the common goods of clean air, clean water and wilderness.

In 2005, then government lawyer Neil Gorsuch penned an article in the National Review entitled "Liberals N' Lawsuits." In that article, Judge Gorsuch lambasted progressive groups for resorting to the federal courts to remedy injustice. In what now seems an ominous foretelling, Judge Gorsuch ended the article with this warning:

Finally, in the greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold.

Reportedly Judge Gorsuch has stated that he wishes the National Review piece would "just disappear." <https://electionlawblog.org/?p=91160>. Unfortunately, the philosophy espoused in the article has not disappeared. As discussed below, a pattern has begun to emerge from Judge Gorsuch's opinions that suggests he disfavors lawsuits brought by

citizens and environmental non-profits, and will find ways to shut the courthouse doors on them.

Based on what we can glean from his writings, Judge Gorsuch holds an extremely limited view of what the Constitution allows when ordinary citizens seek to protect their rights in federal court. This view, which goes even further than the view of late Justice Scalia's, would severely restrict citizen access to the courts by imposing jurisdictional hurdles. One of these hurdles is the misinterpretation of Article III of the Constitution to create a nearly-impassable test to prove a standing to sue -- a tactic that conservative judges deployed with increasing activism under Justice Scalia to prevent environmental plaintiffs from protecting our water and air from harmful pollution.

The notion that the Separation of Powers demands a more burdensome standing test for environmental plaintiffs has been thoroughly debunked by legal scholars.[1] While Justice Scalia saw, and now Judge Gorsuch may see, an inter-branch conflict in allowing citizens to take to the courts to enforce environmental laws where the government has failed, Congress and the Executive Branch have historically encouraged citizen enforcement as a necessary supplement to government prosecution. For example, *qui tam* suits by citizens alleging fraud on the government were specifically authorized by the first Congress and continue to exist today. Congress has put citizen enforcement into almost every major environmental law. The Environmental Protection Agency, created under President Nixon, has consistently supported citizen enforcement of environmental law. All of this suggests that Judge Gorsuch's contrary tendency to deny jurisdiction for pro-environmental litigants demonstrates a different agenda than simply preserving equal branches of government .[2]

Sadly, polluters and corporations fare much better getting into federal court in Judge Gorsuch's world. In 2011, the Energy and Environment Legal Institute ("EELI") filed a lawsuit against the State of Colorado's renewable energy standard ("RES") in federal court. EELI is a non-profit organization that promotes coal and denies the existence of climate change; it was represented by David Schnare, a known antagonist of climate scientists. The Sierra Club asked Judge Gorsuch to dismiss EELI for lack of standing, as none of its members had shown actual harm from the Colorado RES. Judge Gorsuch dismissed this argument in a footnote. Contrast that with the probing opinions Judge Gorsuch issued in several cases, described below, where he denied environmental advocates access to the courthouse, and this imbalance becomes clear.

Already, the federal courts typically welcome corporate plaintiffs who allege economic impacts from the imposition of pollution controls. Conversely, the environmental non-profits or individual citizens who seek to vindicate the public's congressionally-conferred rights to protect a river or a lake from pollution are forced to jump through all kinds of hoops just to get into court, often to be turned away. That leaves the environmental plaintiffs "out in the cold," to use Judge Gorsuch's words. We fear that a Justice Gorsuch would greatly exacerbate the asymmetry between citizen and corporate plaintiff access to the courthouse.

Judge Gorsuch's limited environmental jurisprudence to date lends credence to this threat assessment. In the case *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, the Sierra Club and other non-governmental organizations ("NGOs") were granted intervention to defend a Forest Service rule limiting off-road vehicles in a national forest. Neither the government nor the off-road group objected to the NGO intervention. However, Judge Gorsuch objected in a dissenting opinion that, according to his interpretation of Federal Rule of Civil Procedure 24, the NGOs should not be allowed to intervene in the case because they were adequately represented by the Forest Service. The majority sharply criticized Judge Gorsuch's reasoning and allowed the citizens groups to intervene and assert their rights. The majority noted, among other faults in Judge Gorsuch's reasoning, that "the Forest Service does not contest intervention by the environmental groups, and, thus, has not stated that its interests align with those of the environmental groups or that it will represent their interests." 540 F. App'x 877, 882 n.7 (10th Cir. 2013). While not a particularly groundbreaking case, it hints at the real danger in Gorsuch's judicial philosophy: he will limit access to the courts by heightening the already significantly restrictive rules on standing, intervention, and other procedural hurdles.

In 2015, he ruled that environmental groups lacked standing to challenge the Forest Service's temporary approval of motorcycle use on forest trails, relying on the specious reasoning that the relief the organizations sought would not have helped to redress their injuries under Article III. *Backcountry Hunters and Anglers v. U.S. Forest Service*, 612 Fed. Appx. 934 (10th Cir. 2015). In 2011, Gorsuch joined an opinion denying access to federal court for several environmental organizations who challenged a Utah county ordinance that opened a large stretch of federal wilderness to off-highway vehicle (OHV) use, *The Wilderness Society v. Kane County, Utah*, 632 F.3d 1162 (10th Cir. 2011).

The most extreme and troubling aspect of Judge Gorsuch's Separation of Powers ideology relates to whether citizens should be able to enforce environmental laws in federal court *at all*. In his dissent from the majority in the case *Laidlaw v. Friends of the Earth*, 528 U.S. 167 (2000), Justice Scalia questioned whether allowing the environmental plaintiffs to proceed with a suit seeking penalties against an industrial polluter would usurp the Executive Branch's prerogative to enforce or not to enforce the law. Such an extreme view of Separation of Powers would eviscerate the enforcement of environmental laws and inevitably lead to environmental decline. Judge Gorsuch's extreme Separation of Powers ideology and antipathy to "liberal lawsuits" suggest that his issuing a ruling along these lines is a very real possibility.

The main point here is that Judge Gorsuch's cramped view of the public's right to enforce the law in federal courts allows him to throw citizens out of court, even when it becomes perfectly clear that the law is being violated. That view presents an acute danger now, when the President and EPA Administrator are openly announcing their intention to stop enforcing those laws. We are threatened with a world in which the Clean Air Act and Clean Water Act are made meaningless—a devastating form of judicial activism (and, ironically, precisely the sort of constitutional activism for which Judge Gorsuch criticized "liberals" in his National Review article).

One can easily imagine the argument that a Federalist Society “expert,” as Judge Gorsuch is pegged, might assert to support such a cramped view of the Constitution. The main thrust might be along the lines of the following: a) the federal government should play a limited role in regulating pollution because the states are on the front lines (hence the \$2 billion cut to EPA’s budget proposed by the White House) and; b) to the extent that the federal government does enforce environmental laws, that is the President’s prerogative and citizens should not be allowed to interfere.

At least three major flaws afflict Judge Gorsuch’s cramped view of the courts’ constitutional ability to protect citizens from air and water pollution. First, Congress made the prudent policy decision to protect our drinking water and air, and explicitly provide citizens with the ability to vindicate their rights in court. We have a long record demonstrating that absent enforcement of those federal laws, the public has little hope of protection from pollution. Much has been written about the many obstacles facing robust enforcement at the state level, including the lack of resources and expertise and “capture” by state-based industries. If the states had the will and ability to safeguard their air and water, federal environmental laws might never have been legislated in the first place. But that fact resides in the history books and cannot be changed. If environmental enforcement is now turned back to the states, we can expect “sacrifice zones” to arise in nearly every state, where industry and pollution will concentrate and people will suffer. In short, expect more, and worse, repetitions of the tragedy that has unfolded in Flint, Michigan.

Second, we now have an anti-environmental Executive Branch that has pledged to cut EPA’s budget by a third, and rescind all of the major environmental safeguards adopted by its predecessor. Scott Pruitt, the new Administrator of the EPA, walks in lockstep with the White House (and the fossil fuel industry), and cannot be counted on to mount vigorous enforcement of our environmental laws. While serving as Oklahoma Attorney General, Pruitt disbanded the environmental enforcement unit and ignored the fracking-induced earthquakes that literally shook the foundations of the public he was sworn to champion. Environmental prosecutions all but disappeared under his tenure.

So who are we going to call, we citizens and environmental advocates who have been left out in the cold? If the states cannot or will not safeguard our communities from pollution, and the Executive Branch is downright hostile to environmental law, is that just a consequence of elections we must bear? Judge Gorsuch might think so. Such a fatalistic view of environmental protection, however, would be absolutely wrong and a perversion of our Constitution. Congress passed a host of laws designed to protect our air and water, and put citizen enforcement in each of those laws. Whether to enforce those laws is not optional, depending on who happens to be in the White House. Our very health depends on it.

Third and finally, as to the conceivable (while callous and cynical) counterargument that neither Congress’s legislative choices nor the practical need to protect American families from real-world environmental harms can overcome a constitutional deficiency, it is important to keep in mind that the Supreme Court has repeatedly reaffirmed the constitutionality of citizen suits—not only in the environmental arena, but across a wide

variety of legal contexts. Thus, an attack on citizen access to the courts not only would disrespect Congress's legislative prerogative and discount critical public health safeguards, but would also fly in the face of the bedrock principle of *stare decisis* that our judiciary has honored since its inception.

Another dangerous aspect of Judge Gorsuch's judicial philosophy, far outside even the conservative judicial mainstream, relates to the so-called "*Chevron* Doctrine," established by the Supreme Court to guide federal court review of administrative agency actions. Briefly stated, the *Chevron* Doctrine dictates that federal courts should defer to reasonable, principled administrative agency interpretations and implementation of federal environmental statutes, if the statutory text is not already clear. This doctrine, whose theoretical legal justifications as well as policy wisdom were defended by Justice Scalia himself, rests on the correct premise that modern administrative agencies like the EPA must tackle very technical, complex problems such as the interstate transport of air pollution. The agencies are staffed with career scientists who have dedicated their public service to analyzing and solving such complex problems.

Now comes Judge Gorsuch, with another theory that would upend this well-established structure. Less than one year ago, Gorsuch called out the *Chevron* doctrine as the "elephant in the room," in the case *Gutierrez-Brizuela v. Lynch*. Gorsuch criticized it for "permit[ting] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Not even Justice Scalia held such an extreme view; in fact he affirmed his allegiance to the *Chevron* Doctrine several times, and recognized the need for deference to agency expertise. In a 1989 speech Justice Scalia stated that "[i]n the long run, *Chevron* will endure and be given its full scope" because, not only is *Chevron* constitutional, but it more "accurately reflects the reality of government, and thus more adequately serves its needs," while also promoting fairness and predictability by ensuring that all such questions are resolved in a principled, consistent manner.[3] Justice Alito similarly affirmed his support for the *Chevron* Doctrine during his confirmation hearings, stating that the Environmental Protection Agency "is the expert on environmental questions" and "is entitled to a broad measure of deference under the *Chevron* decision." Thus Judge Gorsuch veers to the right of even the most conservative Justices on this issue.

The notion that *Chevron* deference violates Separation of Powers echoes the current White House's anti-regulatory stance (not to mention its attack on the judiciary and its precedents). Steve Bannon described this view in a speech to the Conservative Political Action Conference, in which he professed that a White House priority is the "deconstruction of the administrative state. Judge Gorsuch's views on *Chevron*, if they became the law, would go a long way towards accomplishing that goal. *Chevron* reflects the basic reality that federal agencies, given their experience and expertise, are in the best position to apply the law to specific industries and real world problems. Congress authorized EPA to do just that, with many statutes establishing desired outcomes for clean air or clean water and then directing EPA to achieve those outcomes through highly technical rulemakings. That all gets thrown out the window should *Chevron* be overturned

or weakened. Incentivizing judges to second-guess and reverse career agency scientists would certainly slow environmental protection to a near halt. It will impose more burdens as well as inappropriate policy decisions on federal judges, will embolden regulated industries to litigate every EPA rule instead of striving to timely comply with the law, and will paralyze the agency's ability to protect our air and water.

[1] Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996).

[2] See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 597–99, 632–47 (2010).

[3] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 DUKE L.J. 511, 521 (1989); *see also id.* at 516-17.