

# State of Connecticut

DENISE L. NAPIER  
TREASURER



Hartford

February 27, 2017

The Honorable Patrick Leahy  
437 Russell Senate Building  
United States Senate  
Washington, D.C. 20510

***Re: Judge Neil Gorsuch's Record Concerning the Private Securities Litigation Reform Act***

Dear Senator Leahy:

In my capacity as Treasurer of the State of Connecticut, I write to express concerns with the United States Supreme Court nominee, Neil M. Gorsuch, and his ability to uphold investors' and consumers' rights under the Private Securities Litigation Reform Act (PSLRA). Nominee Gorsuch has written advocacy pieces seeking to restrict the use of private securities class actions to provide redress for victimized investors including: (i) an amicus brief submitted on behalf of the Chamber of Commerce of the United States (the "Chamber") in *Dura Pharmaceuticals, Inc. v. Broudo*<sup>1</sup> and (ii) a working paper entitled *Settlements in Securities Fraud Class Actions: Improving Investor Protection*.<sup>2</sup> In his writings, Nominee Gorsuch takes the position that securities class actions are abusive; reward meritless lawsuits at the expense of the capital markets; and are a tax on the American economy.

My fiduciary duties as Treasurer include the prudent management of the State's pension assets by, among other things, engagement of the companies that comprise the public equity portfolio on issues regarding best practices leading to sustainable growth of shareholder value. I serve both (i) the beneficiary population whose retirement assets I am obligated to protect and invest and (ii) the tax payers that ultimately provide the means to pay these benefits. Specifically, I am responsible for managing the assets for approximately 194,000 teachers, state and municipal employees, and retirees who are pension plan participants and beneficiaries as well as academic programs, grants, and initiatives throughout the state.

Nominee Gorsuch asserted that securities litigation was being abused to extract settlements for unworthy claims at a time when the country had lain victim to the largest, broadest and perhaps most devastating multi-industry frauds and manipulations in history. Financial and accounting fraud on an unprecedented scale resulted in the demise and bankruptcy of corporate giants such as

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<sup>1</sup> *Dura Pharmaceuticals, Inc. v. Broudo*, No. 03-932, 2004 WL 2069560 (U.S. Sept. 13, 2004) ("Amicus Brief").

<sup>2</sup> Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. LEGAL FOUND.: CRITICAL LEGAL ISSUES WORKING PAPER SERIES, 2, 4 (Apr. 2005), [www.wlf.org/upload/0405WPGorsuch.pdf](http://www.wlf.org/upload/0405WPGorsuch.pdf)

Enron, WorldCom, Tyco, HealthSouth and Adelphia.<sup>3</sup> These frauds brought the country to the brink of economic disaster and highlighted the fundamental lack of regulatory oversight that ultimately resulted in a crushing recession out of which we were just recovering, all during a time when privatizing social security was under discussion.<sup>4</sup>

Moreover, the nominee has written about his perceived evil of fraud litigation without giving any weight to the need for private enforcement even now when Congress has vested the litigation in the hands of pension fiduciaries nationwide who exercise oversight and control over securities recovery. To be sure, the government has obtained securities fraud convictions or guilty pleas for the most egregious cases of misconduct by corporate officers. However, it was primarily large public pension funds that achieved billions of dollars of recoveries for the benefit of investors such as municipal employees and retirees. In many instances the bankrupt corporations were judgment-proof shells. The pension funds were left to recoup their fraud losses from the banks and accountants that had failed in their respective roles.

The oversight of fraud litigation by pension fiduciaries has also resulted in the recovery of billions of dollars through private litigation challenging mortgage security fraud, banking fraud, benchmark manipulation, options backdating fraud, Medicare billing fraud and other schemes that impair the overarching integrity of the securities markets and make investment questionable.<sup>5</sup> Pension funds want to invest in honest capital markets. Private securities litigation provides a vehicle for redress when those markets are tainted and manipulated by corporate misconduct, and serves to deter such conduct.<sup>6</sup> Pension funds are not looking for “insurance” through frivolous securities litigation as the Nominee has repeatedly written.<sup>7</sup>

The need for accountability for fraud has never been more self-evident than after 2008 yet the nominee has only focused on demonizing private securities litigation.<sup>8</sup> My Office, with attorneys

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<sup>3</sup> See THE FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT, 59-60 (Jan. 2011) (“Financial Crisis Report”), available at <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>

<sup>4</sup> See U.S. Gov’t Accountability Office, GAO-13-180, *FINANCIAL REGULATORY REFORM: Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act* (Jan. 2013) (“GAO Report”), available at <http://www.gao.gov/assets/660/651322.pdf>

<sup>5</sup> See Financial Crisis Report, at xviii-xxv, 42, 63, 78, 80; GAO Report, at 9-11, 32-33, 39, 48-49, 55-56.

<sup>6</sup> “Indeed, in adopting the PSLRA, Congress emphasized that ‘[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses’ and that private lawsuits ‘promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.’ Joint Explanatory Statement of the Committee of Conference, Conference Report on Securities Litigation Reform, H.R. Conf. Rep. No. 104-369, at 31 (Nov. 28, 1995), 1995 U.S.C.A.A.N. at 730. The importance of this tool has been highlighted by recent disclosures of extraordinary corporate misconduct.” *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 593-94 (S.D. Tex. 2002).

<sup>7</sup> See Amicus Brief, at 12.

<sup>8</sup> “It is an indisputable fact that one of the most significant contributors to our economic downturn was an unraveling of major financial institutions and the lack of adequate regulatory structures to prevent abuse and excess. A culture of irresponsibility took root from Wall Street to Washington to Main Street.” Remarks of the President on 21st Century Financial Regulatory Reform, Pub. Papers (Jun.17, 2009) <http://www.presidency.ucsb.edu/ws/index.php?pid=86287&st=&st1=#axzz1JUdruqhd>.

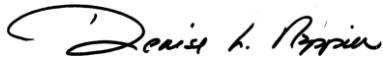
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general, has recovered millions of dollars directly for our beneficiaries, which were lost due to fraud. Billions more were recovered for other victimized investors. The nominee's views raise serious doubts as to his capacity to exert the right level of independence from the Chamber and uphold consumer and investor redress rights under the PSLRA.

Sincerely,



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State Treasurer

cc: U.S. Sen. Richard Blumenthal  
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