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THE GORSUCH RECORD

ALLIANCE FOR JUSTICE

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INTRODUCTION

On February 13, 2016, Justice Antonin Scalia died, creating a vacancy on the United States Supreme Court. Approximately one month later, on March 16, 2016, President Barack Obama nominated Merrick Garland, Chief Judge of the United States Court of Appeals for the D.C. Circuit, to the Supreme Court.

Despite bipartisan praise for Judge Garland, Republicans in the Senate refused to consider and act on his nomination. Instead, the Republican Senate Majority Leader Mitch McConnell went public within hours of Justice Scalia's death with a statement that no nominee would be considered for the seat until after the presidential election. On January 3, 2017, pursuant to Senate rules, Judge Garland's nomination was returned to the President. And, on February 1, 2017, President Donald Trump nominated Neil Gorsuch, a judge on the United States Court of Appeals for the Tenth Circuit, to fill the vacant seat on the Supreme Court.

To aid the Senate—and the public—in its task of evaluating this nomination, this report assesses Judge Gorsuch's judicial record, outlook, and views about the law. Importantly, in considering his record—as with any nomination for a lifetime seat on the judiciary—it is not the Senate's job to merely rubber stamp a nominee based on a review of a resume or academic record. The Supreme Court at any time, but particularly now, is essential in protecting our rights. It is vital that anyone confirmed to the Court has a demonstrated commitment to ensuring that the Constitution and our nation's laws protect *all* Americans. Thus, the Senate must carefully examine the nominee's record to ensure our nation's next Supreme Court justice shares a commitment to critical constitutional values and legal protections and can be a fair and open-minded jurist.

Alliance for Justice has reviewed an extensive portion of Judge Gorsuch's record—most notably cases, but also writings from the period before he joined the Tenth Circuit as well as during his tenure as a judge. The report focuses primarily, although not exclusively, on cases that split the court.[1] We have not, however, reviewed decisions he made while serving at the Department of Justice; papers from this period of his career have not been made public.

After a thorough review of his record, the primary conclusion is that, on the merits, Judge Gorsuch is not qualified to serve on the Supreme Court.

In the following pages, we will substantiate this conclusion. Following this introduction, Part II of the report provides a brief biography of Judge Gorsuch.

Part III provides an overview of Judge Gorsuch's record and explains key findings. The overall conclusion of this section is that Judge Gorsuch has, throughout his life, been driven by an ultraconservative ideology. This ideology is marked by four themes: (1) hostility toward social and legal progress over the last century; (2) willingness to downplay abuses of constitutional rights by government actors; (3) aggrandizement of corporations over individuals; and (4) skepticism of the federal government's role in protecting the health and safety of the American people and a desire to weaken important legal protections. His record demonstrates that Judge Gorsuch is driven by

1 A large focus of this report is on split decisions in which Judge Gorsuch participated. Split decisions are uniquely valuable because they involve the most closely contested issues. Unlike unanimous decisions, they necessarily involve legal questions that do not compel a uniform result. Because split decisions prove an objective basis to conclude that a case could have come out differently, they are especially useful for identifying trends and drawing distinctions between individual judges.

this ideology; he is not an unbiased judge, who decides cases on the facts and law, as opposed to his own personal views.

Part IV examines Judge Gorsuch's record on specific issues. It is clear that for many communities—women, workers, LGBTQ Americans, persons with disabilities, and people of color—Judge Gorsuch's philosophy represents an existential threat to rights and freedoms. First, Judge Gorsuch's philosophy of favoring corporations and special interests has resulted in his approval of corporate personhood and rulings against workers trying to enforce laws that ensure safe working conditions, fair wages, and equal opportunities. Moreover, his rulings have made it harder for consumers to seek redress for injuries. Second, Judge Gorsuch has demonstrated hostility toward women's rights. He has questioned the principles underlying the constitutionally protected right of women to decide whether to have an abortion. And, as a judge, he has consistently ruled to make it harder for women to access basic contraceptive health services. Third, Judge Gorsuch has repeatedly failed to give proper effect to essential protections for people of color, persons with disabilities, and LGBTQ Americans. Fourth, Judge Gorsuch's rulings have frequently been adverse to immigrants' rights. Fifth, on key First Amendment issues, Judge Gorsuch has argued for a stronger link between political speech and money in politics, and he has advocated for a greater role for religion in government. Sixth, Judge Gorsuch has turned away challenges from environmental groups seeking to protect natural resources and public land, while issuing rulings that favor corporations. Finally, in the area of criminal justice, Judge Gorsuch has a troubling record of failing to enforce important constitutional protections.

It is important to note the unique circumstances surrounding Judge Gorsuch's nomination. Even before making his nomination to the Court, President Trump made certain guarantees regarding his selection. First, unlike past presidents who sought advice from numerous persons and groups, but did not outsource the selection process itself, Trump promised that his judicial nominees would "all be picked by the Federalist Society."[2] He said that he had turned to the "Federalist people" and the Heritage Foundation to assemble a list of 21 potential nominees, which included Judge Gorsuch.[3] Trump also promised to nominate a justice who would "automatically" overturn *Roe v. Wade*,[4] and he made clear that "evangelicals, Christians will love my pick and will be represented very fairly."[5]

Moreover, even before Judge Gorsuch was nominated, the President attacked the independence of the judiciary, attacks that have only increased. During the campaign, then-candidate Trump attacked federal judge Gonzalo Curiel, claiming he could not be unbiased in a case involving Trump University because Judge Curiel was of "Mexican heritage."[6] With respect to Judge Curiel, President Trump called him a "disgrace" and said that he was presiding over "a rigged system."[7]

Just two days before he nominated Judge Gorsuch, President Trump fired Acting Attorney General Sally Yates because she had reached the independent conclusion that the President's executive order on travel and immigration could not be defended in court (a decision confirmed by a unanimous panel of the Ninth Circuit).

And, after Judge Gorsuch was nominated, the

2 Lawrence Baum and Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/how_the_federalist_society_became_the_de_facto_selector_of_republican_supreme.html.
3 *Id.*
4 Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 16, 2016), http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.
5 Shane Goldmacher, *Trump says he wants Supreme Court nominee 'who's going to get approved'*, POLITICO (Jan. 27, 2017), http://www.politico.com/blogs/donald-trump-administration/2017/01/donald-trump-supreme-court-nominee-approval-234287.
6 Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, THE WALL STREET JOURNAL (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
7 Peter Beinart, *Trump Takes Aim at the Independent Judiciary*, THE ATLANTIC (June 1, 2016), https://www.theatlantic.com/politics/archive/2016/06/the-gop-front-runner-takes-aim-at-the-independent-judiciary/485087/.

President's attacks on the judiciary continued. On February 4, 2017, President Trump attacked and insulted federal Judge James Robart, a George W. Bush appointee. The President called him a "so-called judge" after Robart issued a temporary restraining order against Trump's executive order barring people from seven predominantly Muslim countries from coming to the United States.[8] President Trump wrote that he "[j]ust cannot believe a judge would put our country in such peril. If something happens blame him and court system."[9] After the Ninth Circuit heard an appeal in the case, he wrote "I don't ever want to call a court biased . . . . And we haven't had a decision yet. But courts seem to be so political and it would be so great for our justice system if they would be able to read a statement and do what's right."[10] He added, "[i]f the U.S. does not win this case as it so obviously should, we can never have the security and safety to which we are entitled."[11] And, on February 11, 2017, he wrote "our legal system is broken."[12]

These comments and actions by the President raise the bar for lawmakers charged with evaluating the Gorsuch nomination. Judge Gorsuch has been nominated by a person who has expressed contempt for our legal system; a system he has called "broken." Given the fact that the President has made repeated promises about how his nominee would rule on the Court and has attacked the judicial branch of government, including on occasions when it simply performed its duty to enforce the Constitution, it is particularly critical that the Senate closely scrutinize President Trump's nominee: a nominee who will, if confirmed, have a lifetime seat on the Supreme Court. Under such circumstances, the Senate's normal customs for evaluating a nominee are insufficient. The Senate must apply heightened scrutiny to Judge Gorsuch's record to ensure that he will be an independent and unbiased jurist.

Indeed, until Justice Scalia's death, five justices on the Supreme Court consistently eviscerated critical constitutional rights and legal protections. The Court, for example, struck down Section 5 of the Voting Rights Act, making it easier for states and localities to erect barriers to voting, *see* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); made it harder for women to ensure equal pay for equal work, to band together to fight gender discrimination, and for older workers to protect themselves against discrimination, *see* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); upheld limits on a woman's right to decide whether to have an abortion, *see* *Gonzales v. Carhart*, 550 U.S. 124 (2007); enabled corporations to claim religious beliefs and then deny contraceptive coverage to female employees, *see* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); eroded our democracy by enabling corporations and special interests to inundate our elections with unlimited spending, *see* *Citizens United v. FEC*, 558 U.S. 310 (2010); and made it harder for states to protect consumers and ensure victims of fraud have their day in court, *see* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

As these cases—and countless others—demonstrate, a justice has the awesome power to interpret our laws and to influence the lives of all Americans. This report seeks to provide a comprehensive review of Judge Gorsuch's record in order to better understand who he would be as a justice.

8 Amy B. Wang, *Trump lashes out at 'so-called judge' who temporarily blocked travel ban,* THE WASHINGTON POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.a68aedfeccb5.

9 Eric Bradner and Jeff Zeleny, *Trump: 'if something happens blame' the judge*, CNN (Feb. 5, 2017), http://www.cnn.com/2017/02/05/politics/trump-twitter-attacks-judge/.

10 Matt Zapotosky and Robert Barnes, *As judges weigh travel ban, Trump asserts that courts are 'so political'*, CHICAGO TRIBUNE (Feb. 8, 2017), http://www.chicagotribune.com/news/nation-world/politics/ct-trump-defends-travel-ban-20170208-story.html.

11 Louis Nelson, *Trump: If court rules against travel ban, we'll never be safe,* POLITICO (Feb. 8, 2017), http://www.politico.com/story/2017/02/trump-travel-ban-tweet-federal-appeal-234785.

12 Elliot Smilowitz, *Trump tweets: 'Our legal system is broken!'*, THE HILL (Feb. 11, 2017), http://thehill.com/homenews/administration/319069-trump-tweets-our-legal-system-is-broken.

BIOGRAPHY

Neil Gorsuch was born on August 29, 1967, in Denver, Colorado, and moved to Washington D.C. in 1981, when President Ronald Reagan appointed his mother to serve as Administrator of the Environmental Protection Agency (EPA). Gorsuch graduated from Georgetown Preparatory School in Washington and then from Columbia University, in 1988, and Harvard Law School, in 1991. He also obtained a doctorate in philosophy from Oxford University in 1995. After law school, Gorsuch clerked for Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit, former Supreme Court Justice Byron White, and Justice Anthony Kennedy.

From 1995 to 2005, Gorsuch worked at the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, where he became a partner in 1998. In private practice, Gorsuch primarily represented corporate clients and worked on large anti-trust, class action, and securities litigation.

In 2005, Gorsuch became Principal Deputy to the Associate Attorney General at the U.S. Department of Justice. Among other divisions, the Associate Attorney General's Office oversees the Antitrust Division, the Civil Division, the Civil Rights Division, and the Environment and Natural Resources Division. In his Senate questionnaire, Gorsuch stated that his responsibilities included assisting in "managing the Department's civil litigating components" and making "[m]ajor litigation decisions in certain cases—such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms [and] reviewing and editing trial and appellate court legal briefs and developing case strategy." The questionnaire does not specify, however, which cases and policies Gorsuch worked on.

On May 10, 2006, President George W. Bush nominated Gorsuch to the United States Court of Appeals for the Tenth Circuit. On June 21, 2006, the Senate Judiciary Committee held a hearing on his nomination, and on July 13, 2006, the Committee reported his nomination to the full Senate. On July 20, 2006, the full Senate, by voice vote, confirmed Gorsuch, and he received his commission on August 8, 2006.

OVERVIEW OF JUDGE GORSUCH'S RECORD AND KEY FINDINGS

Throughout his life, Judge Gorsuch has been driven by an ultraconservative ideology. In fact, Neil Gorsuch's judicial philosophy is clear. In his own words, he believes that judges should "strive . . . to apply the law as it is, *focusing backward*, not forward."[13] It is no surprise that he has been a vocal critic of courts advancing core constitutional rights, such as the right to marry and essential rights for women; and as

13 Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia,* 66 CASE W. RES. L. REV. 905, 906 (2016), *available at* http://scholarly-commons.law.case.edu/cgi/viewcontent.cgi?article=4658&context=caselrev (emphasis added).

a judge, he has consistently voted to undermine essential rights and legal protections. Judge Gorsuch's view of the Constitution is one that would indeed take our nation "backward" to an earlier era, where women, people of color, persons with disabilities, workers, LGBTQ Americans, and those interacting with the criminal justice system have fewer rights and legal protections.

As this section demonstrates, Judge Gorsuch has repeatedly shown hostility toward the efforts of vulnerable populations to use the courts to protect their constitutional rights. He has, moreover, consistently downplayed constitutional abuses by government officials. And he has placed the rights of corporations over those of other Americans, weakened critical acts of Congress, and advocated for overturning long established legal doctrines that ensure the federal government can properly enforce protections for the American people.

Judge Gorsuch's consistent adherence to these ideological values calls into question his ability to be an unbiased justice who reviews and analyzes the facts of each case independently from his own personal and political views.

I. IDEOLOGICAL BIAS BEFORE JOINING THE BENCH

To better understand Judge Gorsuch's legal decisions, it is imperative to recognize that ideology has driven Neal Gorsuch throughout his career. First, Gorsuch has a long history of attacking social and legal progress.

While at Columbia, Gorsuch co-founded a newspaper, *The Federalist*, and a magazine, *The Morningside Review*, to counter what he and his co-founders saw as the predominance of liberal political views at the University. In an article entitled, *A Tory Defense*, Gorsuch defended social inequality.[14] He said that "[s]ocial inequality, correctly executed, assures all of equality of opportunity, of education and training, of a share in progress, while allowing men of different abilities and talents to distinguish themselves as they wish, without devaluating their innate human worth as members of society."[15] Gorsuch concluded that a "responsible system" requires a "governing class" comprised of "men of exceptional political ability, spirit and concern" that craft laws and run the government.[16]

Gorsuch also repeatedly criticized students exercising First Amendment rights. He demeaned an anti-racism march, which he characterized as "more a demand for the overthrow of American society than a forum for the peaceable and rational discussion of these people and events."[17] He also complained about progressive protests on campus.[18] He remarked that the wide range of issues that the students were protesting were "trivial" and called those who were challenging changes to university rules that made it more difficult to protest a "vigilante squad."[19] Gorsuch also threatened to sue students who encouraged others to boycott *The Federalist* and who alleged the Heritage Foundation had funded the paper.[20]

Gorsuch—in writings relevant to any jurist who could potentially be called upon to review Executive Branch actions—also defended President Reagan during the Iran-Contra affair. In a piece titled *Let's Let the Commander in Chief Lead,* Gorsuch admitted that the President may have violated an act of Congress. Yet, Gorsuch wrote, "many have speculated that the President doesn't legally

14 Neil M.T. Gorsuch, *A Tory Defense*, MORNINGSIDE REVIEW, (October 1986).

15 *Id.* at 20.
16 *Id.* at 20-21.
17 Neil Gorsuch, *A Movement Goes Astray: Fighting Racism not Making Revolution*, COLUMBIA SPECTATOR (Apr. 8, 1987), *available at* http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19870408-01.2.10&srpos=9&e=-------en-20--1--txt-txIN-Neil+Gorsuch-----#.
18 Neil Gorsuch, *Where have all the protests gone?*, COLUMBIA SPECTATOR, Vol. CXII, Number 105 (Apr. 11, 1988), *available at* http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19880411-01.2.10&srpos=18&e=-------en-20--1--txt-txIN-gorsuch-----#.
19 *Id.*
20 Asha Badrinath, *Fed Paper may sue Coors poster writers*, COLUMBIA SPECTATOR, Vol. CXI, Number 102 (March 26, 1987), *available at* http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19870326-01.2.5&srpos=1&e=-------en-20--1--txt-txIN-gorsuch-----#.

have the power to transfer funds . . . few recall—or more correctly, choose to recall—the powers of commander-in-chief."[21] He argued that past presidents acted similarly to Reagan, and that "these presidents did not ask, nor did they need to ask, Congress."

Given his views as a student, it is no surprise that as a lawyer Gorsuch continued to criticize progressives. In an op-ed published in the *National Review Online* shortly before he became a Justice Department official, Gorsuch attacked "American liberals" for what he said was an overreliance on litigation to "effect[] their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education."[22]

He asserted that liberals' "overweening addiction to the courtroom" negatively affects public policy by aggrandizing the courts and consequently dampening "social experimentation" by the legislative branches.[23] Gorsuch also predicted that the "Left's alliance with trial lawyers and its dependence on constitutional litigation to achieve its social goals risks political atrophy," which will ultimately invite "permanent-minority status for the Democratic Party."[24] Gorsuch concluded that the country would be much better off if liberals "kick[ed] their addiction to constitutional litigation" and attempted to "win elections rather than lawsuits."[25]

Importantly, Gorsuch did not—*nor has he ever*—made a similar criticism of litigation initiated by conservatives aimed at invalidating public policies enacted by the democratically elected branches of government, such as environmental laws, campaign finance reform, immigration reforms, efforts to provide critical health care, or efforts to address gun violence.[26] In other words, his concern with "an addiction to the courtroom" seems not based on any neutral principle but a results oriented approach premised on whether he liked the litigation in question.

During his time in private practice, Judge Gorsuch represented corporate interests and criticized those who sought to vindicate their rights using class-action lawsuits. He sought to make it more difficult to hold accountable corporations that act illegally and harm the American people. Gorsuch recommended that the legislature and courts make securities fraud class actions more difficult to achieve.[27] Telling is a brief Gorsuch wrote in *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005), where he urged the Court to ignore the statutory and legislative history of the Securities and Exchange Act, and advocated that the Court limit the ability of those defrauded by corporations to band together to seek redress.[28] In a 2005 article discussing the case, Gorsuch launched into an attack on plaintiffs' lawyers for using such cases as vehicles for "free ride[s] to fast riches." He concluded that they involve "frivolous claims . . . [that] impose[] an enormous toll on the economy, affecting virtually every public corporation in America at one time or another and costing business billions of dollars in settlements every year."[29] In contrast, the Supreme Court has found that securities fraud class actions play an important role in vindicating the rights of defrauded shareholders. *See* *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201–02 (2013) ("Congress, the Executive Branch, and this Court, moreover, have recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by

21 Neil Gorsuch, *Let's let the Commander in Chief Lead*, COLUMBIA SPECTATOR, Vol. CXI, Number 28 (Jan. 28, 1987), *available at* http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19870128-01.2.12&srpos=14&e=-------en-20--1--txt-txIN-Neil+Gorsuch-----.
22 Neil Gorsuch, *Liberals' n' Lawsuits,* NATIONAL REVIEW (Feb. 7, 2005), *available at* http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.
23 *Id.*
24 *Id.*
25 *Id.*
26 In fact, as discussed in Part IV.B.2., while on the bench, Judge Gorsuch had no trouble voting to invalidate part of the Affordable Care Act.
27 Neil M. Gorsuch and Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASHINGTON LEGAL FOUNDATION 3-4 (2005), *available at* http://www.wlf.org/upload/0405WPGorsuch.pdf.
28 *See* Brief of Amicus Curiae for the United States Chamber of Commerce at 2, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (No. 03-932) (arguing that the class action rules under securities fraud claims place an excessive burden on businesses).
29 Neil M. Gorsuch & Paul B. Matey, *No Loss, No Gain*, LEGAL TIMES, Jan. 31, 2005.

the Department of Justice and the Securities and Exchange Commission." (internal quotation marks omitted)).

II. CONTINUED BIAS ON THE BENCH

Of course, the role of a student, lawyer, or advocate is different from that of a judge, and student written articles, for example, are not dispositive of what type of justice Neil Gorsuch would be. But, his writings are illuminating precisely because, as demonstrated more fully in this report, as a Tenth Circuit judge, ideology—not facts and the law—continues to drive Judge Gorsuch.

A. Refusal to check government illegality and overreach

At the outset, as noted above, President Trump has repeatedly demonstrated his disregard for the role of an independent judiciary. In this context, the ability of a jurist to hold government officials accountable when they violate the Constitution or our nation's laws is critical. And, in this area, Judge Gorsuch's record is wanting.

In fact, Judge Gorsuch has consistently ruled against people who seek to hold government officials accountable for abuse. Judge Gorsuch's dissent in *Planned Parenthood Ass'n of Utah v. Herbert (Planned Parenthood II)*, 839 F.3d 1301 (10th Cir. 2016), demonstrates this trend. There, the Republican Governor of Utah, Gary Herbert, had ordered the state to strip $272,000 in federal funding from Planned Parenthood Association of Utah. A panel of the Tenth Circuit Court of Appeals granted a preliminary injunction in favor of Planned Parenthood, concluding that Utah's Planned Parenthood was operating lawfully and the Governor's actions were likely unconstitutional. *See Planned Parenthood Ass'n v. Utah v. Herbert (Planned Parenthood I)*, 828 F.3d 1245 (10th Cir. 2016). Judge Gorsuch would have granted en banc review, at the behest of no litigant, which is contrary to court practice and custom. In his dissent, which Judge Mary Briscoe noted, "mischaracterize[d] this litigation and the panel decision at several turns," Judge Gorsuch explained that he would have permitted Governor Herbert to strip funding. *Planned Parenthood II*, 839 F.3d at 1302–03 (Briscoe, J., concurring).

Judge Gorsuch's unwillingness to hold government officials accountable when they abuse their authority or violate the Constitution is also apparent in cases involving police abuse and excessive force. For example, in *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013), Judge Gorsuch held that a police officer was entitled to qualified immunity from a § 1983 excessive force claim arising from his use of stun gun that killed a young man. He also held that officers had not used excessive force against a Vietnam War veteran who was suicidal when they burst into his hotel room unannounced with guns drawn and ended up shooting him. *See Estate of Bleck v. City of Alamosa*, 643 F. App'x 754 (10th Cir. 2016); *see also, e.g., Thomas v. Durastanti*, 607 F.3d 655 (10th Cir. 2010) (joining divided panel majority opinion that reversed denial of qualified immunity to ATF agent who opened fire on passengers in a car—hitting one in the head and another in the leg—as they attempted to leave a gas station parking lot).

Whether upholding summary judgment in favor of a school district where a boy with mental and physical disabilities was abused and repeatedly subjected to confinement in a small room, *see Muskrat v. Deer Creek Public Schools*, 715 F.3d 775 (10th Cir. 2013), or holding that a police officer had not used excessive force against a nine-year-old when she put him in a twist-lock hold that broke the child's collarbone, *see Hawker v. Sandy City Corp.*, 591 F. App'x 669 (10th Cir. 2014), Judge Gorsuch repeatedly forgives constitutional abuses by government officials. And, in fact, Judge Gorsuch has, on several occasions, questioned whether people even can seek to remedy violations of their rights

under the Constitution. *See, e.g.,* *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning whether Constitution protects against malicious prosecution); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1083–84 (10th Cir. 2015) (Gorsuch, J., concurring) (writing concurrence to his own majority opinion in case involving substantive due process and questioning whether a federal court should abstain from entertaining 42 U.S.C. § 1983 claims in cases "when we have state courts ready and willing to vindicate those same rights using a deep and rich common law").

B. Pro-corporate record

On the bench, Judge Gorsuch has advanced an ultraconservative agenda that favors corporations and special interests over the American people. Most notably, Judge Gorsuch has agreed that private corporations are persons with rights that trump those of other Americans. Tellingly, Judge Gorsuch joined in an opinion by the full Court of Appeals holding that closely-held for-profit corporations have the legal right to deny contraceptive coverage as part of their employer-sponsored health insurance plans if doing so conflicted with the corporation's religious beliefs. *See* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc). The significance of Judge Gorsuch's position cannot be overstated. The *Hobby Lobby* decision has already been invoked not only to support curtailing employees' access to reproductive health care but also to justify noncompliance with child labor laws, *see* *Perez v. Paragon Contractors Corp.*, No. 2:13CV00281-DS, 2014 U.S. Dist. LEXIS 128339 (D. Utah Sept. 11, 2014); anti-kidnapping laws, *see* *United States v. Epstein*, 91 F. Supp. 3d 573 (D. N.J. 2015); and antidiscrimination laws, *see* *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016).

Judge Gorsuch also has taken troubling positions on issues that ensure that all Americans have access to the courts to hold corporations accountable. As noted in more detail below, he consistently sides with corporations over workers, women, people of color, and persons with disabilities.

Moreover, Judge Gorsuch has repeatedly tried to close the courthouse door. For example, he has demonstrated hostility toward class-action lawsuits. Often, class-action lawsuits are the only vehicle through which aggrieved consumers and others can enforce their rights. They enable people with common claims to join together to challenge large corporations or institutions in positions in power. As the Supreme Court has recognized, class actions "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods. v. Windsor*, 521 U. S. 591, 617 (1997) (internal quotation marks omitted). Yet, as a lawyer, Gorsuch harshly criticized the right of defrauded individuals and attorneys who sought to hold companies accountable for securities fraud.[30]

And, as a judge, Judge Gorsuch has taken positions that would make it more difficult for class-action lawsuits to proceed. For example, he has prevented a group of inmates with mental illnesses who were not receiving proper care from joining together to request that the jail meet its constitutional obligation to provide medical care. *See* *Shook v. Bd. of Cnty. Comm'rs*, 543 F.3d 597 (10th Cir. 2008). Although *Shook* did not involve a corporation, the same legal reasoning Judge Gorsuch applied in that case can be used to limit class-action lawsuits brought against corporations.

He has, moreover, criticized modern discovery rules.[31] While he did not articulate specifics, any effort to limit discovery could have disastrous consequences for those trying to hold corporations accountable. Discovery is the stage of a court case where information to prove or disprove a claim can be obtained.

30 *Id.;* Gorsuch & Matey, *supra* note 27.
31 Neil M. Gorsuch, *Law's Irony,* 37 HARV. J.L. & PUB. POL'Y 743, 745-46 (2014).

Discovery is typically the only way for those whose rights have been violated to obtain the necessary facts to prove their claims. Limiting access to important information—which is often only in the control of defendant corporations—would have the effect of further harming working Americans.

Judge Gorsuch also has demonstrated a willingness, when it benefits corporations, to read federal statutes broadly to preempt a person's ability to obtain relief under state law. For example, in *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335 (10th Cir. 2015), he prevented a woman severely injured by a medical implant procedure *not* approved by the FDA from seeking redress from a device manufacturer that actively encouraged doctors to misuse its product. Another Tenth Circuit judge wrote that the decision was "compelled neither by binding precedent nor the plain text and clear purpose of the Federal Food, Drug and Cosmetic Act." *Id.* at 1347 (Lucero, J., dissenting).

Judge Gorsuch's opinions also have suggested that he fully supports the right of corporations to force employees and consumers into arbitration. Significant evidence demonstrates that arbitration in these situations almost always favors the employer or corporation because the ordinary safeguards of litigating a claim in court disappear. Moreover, corporations often are free to select their preferred arbitrator and that person's rulings are very difficult to challenge in court. Judge Gorsuch has been protective of arbitration agreements, and in at least one case involving corporate parties he has written that arbitration clauses should be enforced even when the parties don't reach an agreement about the details of the arbitration. *See* *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016). In another case, Judge Gorsuch criticized a district court for conducting comprehensive discovery to determine whether the parties had agreed to arbitrate. *See* *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014).

Even when litigants get into the courtroom, Judge Gorsuch has consistently put up additional roadblocks for litigants fighting corporations. For example, Judge Gorsuch displays a tendency to resolve material disputes of fact, substituting his own judgment for the judgment of a jury. In at least two cases, Judge Gorsuch has downplayed evidence of discrimination, including sexual harassment. *See* *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052 (10th Cir. 2009) (joining opinion discounting Pinkerton's evidence of discrimination and concluding that Pinkerton's performance, not discrimination, resulted in her termination); *Strickland v. UPS*, 555 F.3d 1224 (10th Cir. 2009) (Gorsuch, J., concurring in part and dissenting in part) (dissenting from opinion holding that Strickland provided ample evidence that she was regularly outperforming her male colleagues and yet she was treated less favorably than they).

As noted above, Judge Gorsuch is often unwilling to check and permit redress for unconstitutional actions by government officials that *harm* the American people. Yet, when the government *helps* the public, he goes out of his way to weaken its ability to do so. He regularly second-guesses agencies that enforce duties given to them by Congress. And, in fact, Judge Gorsuch wants to make it even more difficult for federal agencies to enforce laws that keep our air and water clean and safe; that ensure our food and medicine are secure; that protect essential workers' rights; and that safeguard consumers and investors.

Judge Gorsuch has referred to federal agencies that do these essential functions as "behemoth," *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring), as if it is the job, or within the expertise, of a federal judge to know and opine on the proper number of employees necessary to protect, as just one example, our nation's food and medicine. And, he has advanced several radical positions which, if adopted,

would severely curtail countless protections so many Americans rely on.

C. Restricting the ability of the government to protect all people

As noted earlier, Judge Gorsuch said that "judges should . . . strive (if humanly and so imperfectly) to apply the law as it is, *focusing backward*, not forward."[32] The results of Judge Gorsuch's views indeed would take the country backwards, resulting in the dismantling of many protections Americans have come to rely on over the past century.

1. Dangerously narrow readings of statutes

When Congress passes a law, it is a judge's job to give it full effect. *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). Yet, Judge Gorsuch's approach to statutory interpretation is results oriented, gutting critical acts of Congress. Two cases, one involving the Surface Transportation Assistance Act and one involving the Individuals with Disabilities Education Act, demonstrate how narrowly he gives effect to acts of Congress.

In TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206 (10th Cir. 2016), Judge Gorsuch dissented from a decision affirming the judgment of the Department of Labor that a trucker was impermissibly fired after he abandoned his stranded truck, which lacked heat, in subzero temperatures, after he had waited for hours for a repair truck and he couldn't feel his feet and had trouble breathing.

In doing so, Judge Gorsuch demonstrated that he construes worker-protection laws as narrowly as possible. In fact, he deems worker "health and safety" as "ephemeral and generic" statutory goals. *Id.* at 1217 (Gorsuch, J., dissenting). The majority opinion affirming the whistleblower's win at the Department of Labor was based on the plain meaning of the statute, well-established precedent, the purpose of the statute, and appropriate deference to the Department of Labor. In contrast, Judge Gorsuch cloaked his disdain for worker protection laws in alleged neutral statutory construction to conclude that an employee's firing did not violate the law even though that employee spent more than three hours in subzero temperatures, without heat, after notifying his employer that his trailer's brakes had frozen.

Likewise, in Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P., 540 F.3d 1143 (10th Cir. 2008), an impartial hearing officer, an administrative law judge, and a federal district court judge all agreed that a young boy with autism, Luke, needed placement in a residential school program due to his lack of progress in "generalizing" skills—applying skills learned at school to other environments. Yet, Judge Gorsuch wrote an opinion reversing that determination, holding instead that "the educational benefit mandated by IDEA must merely be more than de minimis" and that the benefit provided to Luke satisfied that standard. According to the Solicitor General, writing in another case from the Tenth Circuit applying the "de minimis" standard, Judge Gorsuch's "interpretation is not consistent with the IDEA's text or structure, with [the Supreme Court's] analysis in [*Board of Education v. Rowely*], or with Congress's stated purpose."[33]

Judge Gorsuch also has applied, as another example, a narrower reading of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) than most of his colleagues, frequently

dissenting from decisions that confer relief

32 Gorsuch, *supra* note 13.

33 Brief of Amicus Curiae for the United States at 13, *Endrew F. v. Douglas Cnty. Sch. Dist.*, No. 15-827 (U.S. Aug. 18, 2016).

upon individuals who have received unfair trials. *See* Williams v. Jones, 571 F.3d 1086 (10th Cir. 2009) (dissenting from opinion concluding that an inmate was entitled to relief where his attorney pressured him to reject a plea deal in violation of the Sixth Amendment); Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009) (en banc) (dissenting from an opinion concluding that no deference was required where state court refused to consider non-record evidence of ineffective assistance of counsel).

2. Reinvigorating the non-delegation doctrine

Judge Gorsuch has called for reinvigorating a doctrine—the non-delegation doctrine—last used successfully in 1935 by a famously reactionary Supreme Court majority bent on invalidating the New Deal. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Currently, executive agencies are permitted to exercise rulemaking authority pursuant to a valid delegation from Congress. As long as the delegation provides a "sufficiently intelligible principle, there is nothing inherently unconstitutional about it." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Stevens, J., concurring).

Judge Gorsuch disagrees with this long established principle of law, arguing that agencies should not be able to exercise such authority, even if Congress properly delegates. *See* United States v. Nichols, 784 F.3d 666 (10th Cir. 2015).

Justice Scalia himself made clear how radical this position is. As he explained, reviving that doctrine would deprive Congress of authority essential to empower agencies to effectively implement and enforce critical statutes that protect the American people in countless areas from ensuring financial stability to controlling health hazards. As Scalia noted, "we [the justices] have 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*, 531 U.S. at 474–75 (internal citation omitted), because "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive and judicial action," Mistretta v. United States, 488 U.S. 361, 417 (Scalia J., dissenting). Judge Gorsuch would flout these principles, overturn decades of precedent, and disable Congress from making government work for the American people.

3. Second-guessing agency experts

Justice Scalia also accepted a legal principle that gives agencies authority to determine how they will carry out their mandates when the Congressional act governing their actions might be open to different interpretations—referred to as "*Chevron* deference." Judge Gorsuch wants to reverse this basic principle so courts can overrule agency experts when it comes to their important work in enforcing regulations. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016) (Gorsuch, J., concurring); Caring Hearts Personal Home Servs., Inc. v. Burwell, 824 F.3d 968 (10th Cir. 2016).

It is difficult to overstate the damage this position would cause. Judge Gorsuch would tie the hands of precisely those entities that Congress has recognized have the depth and experience to enforce critical laws, safeguard essential protections, and ensure the safety of the American people. Importantly, the agency leaders whose expertise Judge Gorsuch would dismiss are answerable to the people's elected representatives in Congress.

As even Justice Scalia noted, "[i]n the long run, *Chevron* will endure and be given its full scope" because "it more accurately reflects the reality of government, and thus more adequately serves its needs."[34] As scholars have noted, "no one seriously disputes the New Deal-era adage that agencies are usually

34 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 DUKE L.J. 511, 521 (1989), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj.

better informed than courts" and are almost always in a better position than courts "to fill in the details of statutory schemes."[35] Indeed,

> [Agencies] understand the subject matter of their statutory scheme and the regulated industry with greater depth, have better access to experts (such as scientists and economists) who provide specialized information in response to targeted inquiries, and have the kind of practical wisdom that comes from dealing with legal issues arising day-to-day under the statute (or perhaps triggered by the agency's own proposals and experiments).[36]

Moreover, deference to agency interpretations "enhances the probability of uniform national administration of the laws"[37] and provides all Americans with fair notice of what the law is.

Indeed, courts' deference to agency interpretations has been critical in ensuring essential protections for the American people. *See, e.g.*, *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (deferring to the NLRB's reasonable determination that live-haul workers were employees entitled to the protections of the National Labor Relations Act); *EPA v. Homer City Generation*, L.P., 124 S. Ct. 1584 (2014) (deferring to the EPA's rule requiring states to reduce emissions from power plants that travel across state lines and harm downwind states); *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015) (deferring to the Department of Labor's interpretation of portions of the Black Lung Benefits Act that made it easier for coal miners afflicted with black lung disease to received compensation); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012) (deferring to the EPA's revision of regulations under the Toxic Substances Control Act that provided more protection from exposure to lead paint).

35 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1172–73 (2008).
36 *Id.* at 1173.
37 Peter Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).

In contrast, the danger to the American people if Judge Gorsuch's positions are adopted is apparent in opinions involving Judge Gorsuch himself. In repeated decisions, Judge Gorsuch's colleagues—Democrat and Republican appointees alike—have followed Supreme Court precedent and deferred to agency determinations. In contrast, Judge Gorsuch, perhaps envisioning the day when courts do not need to defer to agencies, repeatedly would have overturned decisions that protected workers and the public.

JUDGE GORSUCH ON THE ISSUES

I. WORKER AND CONSUMER RIGHTS

Judge Gorsuch has advanced an ultraconservative agenda that favors corporations and special interests at the expense of consumers and workers.

A. Workers' rights

A series of cases—*TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016); *Compass Environmental, Inc. v. OSHRC*, 663 F.3d 1164 (10th Cir. 2011); *Longhorn*

Service Co. v. Perez, 652 F. App'x 678 (10th Cir. 2016); *NLRB v. Community Health Services, Inc.*, 812 F.3d 768 (10th Cir. 2016)—illustrate the efforts Judge Gorsuch takes in his judicial opinions to deny critical remedies to workers wronged by their employers. In fact, in these cases—split decisions where he disagreed with other judges (often other Republican appointees), to reach his desired result—he would have had to overturn decisions by federal agencies tasked with protecting the rights of workers, agencies he was supposed to give deference to. In other words, Judge Gorsuch went out of his way to substitute his own judgment as to worker safety and health over that of the agencies charged by Congress to do so—and in each instance he substituted his judgment in a way that would have been harmful to workers and beneficial to corporations.

TransAm epitomizes his approach. There, Alphonse Maddin, a truck driver, was transporting cargo through Illinois when the brakes on his trailer froze because of subzero temperatures. After reporting the problem to the company, he waited several hours in freezing temperatures (the auxiliary power unit was not working and there was no heat in the cab) for a repair truck to arrive. When he realized his torso was numb, he was having difficulty breathing because of the cold, and he could not feel his feet, Maddin unhitched the trailer from the truck and drove away, leaving the trailer unattended. He was fired for abandoning the trailer.

The Tenth Circuit upheld the decision of the Department of Labor that the truck driver was fired in violation of the Surface Transportation Act's whistleblower protections and that he should be reinstated with back pay. *See* 49 U.S.C. § 31105(a)(1)(A)(I).

Judge Gorsuch disagreed, arguing that the statute did not protect the driver. Judge Gorsuch's strained reading of the statute—which involves going out of his way to minimize the words "health" and "safety" in the law—demonstrates his insensitivity for the worker the statute was designed to protect.

In reaching his conclusion, Judge Gorsuch took an extremely narrow view of the statute, remarking that it only forbids employers from firing employees "who refuse to operate a vehicle out of safety concerns. And, of course, nothing like that happened here. The trucker in this case wasn't fired for refusing to operate his vehicle." *TransAm Trucking, Inc.*, 833 F.3d at 1215 (Gorsuch, J., dissenting) (internal quotation marks omitted). Indeed, Gorsuch wrote, "his employer gave him the very option the statute says it must: once he voiced safety concerns, TransAm expressly—and by everyone's admission—permitted him to sit and remain where he was and wait for help." *Id*. at 1216.

Thus, to Judge Gorsuch, despite the presence of an act of Congress expressly designed to protect worker safety, Alphonse Maddin's only choice, if he wanted to keep his job, was to stay with his trailer in subzero temperatures and wait indefinitely for a repair truck to show up. And, Judge Gorsuch dismissed the Department of Labor's view he was supposed to be deferring to, saying "there's simply no law any one has pointed us to giving employees the right to operate their vehicles in ways their employers forb*Id.*" *Id.* at 1216.

Similarly, in *Compass Environmental*, the Occupational Safety and Health Review Commission had imposed a fine on an employer that failed to properly train a mining-construction worker who was killed on the job. The worker, who was electrocuted when a piece of equipment got too close to an overhead power line, had joined the construction project one week after the work started, and the company failed to give him full job safety training.

A majority on the Tenth Circuit, including George W. Bush appointee Harris Hartz, upheld the fine, noting that 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." *Compass Envtl., Inc.*, 663 F.3d at 1170. Yet, Judge Gorsuch disagreed, contending that the case was yet another example of an administrative agency wielding "remarkable powers" and "penaliz[ing]" a company where, he purported, no evidence existed. *Id.* at 1170 (Gorsuch, J, dissenting).

Longhorn Service followed the same ideological pattern. There, Judge Gorsuch joined a split majority opinion that overturned OSHA's imposition of certain sanctions levied against an oil-well servicing company for numerous safety violations. The two-judge majority concluded that the agency's determination was arbitrary and capricious because Longhorn had not received fair notice that the Secretary of Labor was applying its regulation covering a "floor hole" to Longhorn's "floor opening." Dissenting, Judge Terrence O'Brien, a George W. Bush appointee, called the argument adopted by the majority "nonsense." *Longhorn Serv. Co.*, 653 F. App'x at 684 (O'Brien, J., dissenting). He argued that Longhorn knew that it had created a dangerous condition at the well and that the majority opinion "attempts to shift the focus from its inadequate concern for safety to a terminology war. Preferring rhetoric to substance is most convenient." *Id*. at 683.

It is not just worker safety where Judge Gorsuch rejected agency determinations that sided with employees. Judge Gorsuch would also have made sure that employers who broke the law, not workers, received the benefits of wages workers earned. *Community Health Services* involved a decision by the employer-hospital to reduce the hours of its full-time respiratory department employees. The employees' union filed unfair labor practice charges, and the NLRB ruled in favor of the union and ordered the employer to "make whole any employee for any loss of earnings and other benefits suffered." *Community Health Servs.*, 812 F.3d at 770.

The NLRB, importantly, rejected the employers' argument that any income an employee earned from other employment during the back pay period should be deducted from that employee's back pay award. In calculating the amount of back pay the workers were entitled to because of the hospital's illegality, the NLRB reasoned that workers who took on additional outside jobs while the legal dispute was ongoing should retain the benefit of their "extra effort," not the "recalcitrant" employers. The Tenth Circuit, in an opinion joined by George W. Bush appointee Timothy Tymkovich, agreed and deferred to the Board's policy justifications for its decision.

Judge Gorsuch dissented from the decision and would have found the back pay award excessive. Yet, again, Judge Gorsuch would have substituted his own judgment for that of the agency tasked with enforcing the law; would have disagreed with another Bush appointed judge; and, most importantly, would have ruled against workers.

However, when the NLRB issued decisions that *hurt* workers or sided *against* unions, he had no problem going out of his way to support that decision. For example, in *Teamsters Local No. 455 v. NLRB*, 765 F.3d 1198 (10th Cir. 2014), the NLRB had agreed with the Teamsters Union that the employer's threat to hire permanent replacement workers during a lockout violated the National Labor Relations Act (NLRA), but did not agree that the lockout itself was unlawful. Accordingly, the union employees were not entitled to back pay. The union petitioned for review, and Judge Gorsuch rejected the union's contention that "a previously lawful lockout *becomes* unlawful when a company threatens to hire not temporary workers but permanent ones." *Id.* at 1202. Interestingly, Judge Gorsuch articulated a more deferential standard in reviewing the NLRB's decision than he did in the cases described above: "[T]he 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," but "[t]o resolve this case, we need and do hold only that the Board's refusal to order additional remedial measure wasn't arbitrary." *Id.* at 1205.

Similarly, in *Laborer's International Union of North America, Local 578 v. NLRB*, 594 F.3d 732 (10th Cir. 2010), Judge Gorsuch authored the majority opinion upholding an NLRB decision that a union had engaged in unfair labor practices. Judge Gorsuch expounded on the level of deference the court afforded the agency, saying that its conclusion must stand so long as some evidence existed in the record "from which a reasonable mind could conclude as the NLRB d*Id.*" *id*. at 740. The court's job in reviewing the NLRB's decision, Judge Gorsuch continued, was akin to that of a replay-booth official, "the call on the field presumptively stands and we may overturn it only if we can fairly say that no reasonable mind could, looking at the facts again, stand by that call." I*d.* at 739. Such language is notably absent from some of the decisions mentioned above where Judge Gorsuch argues for overturning NLRB decisions seeking to protect workers' rights.

In a decision where Judge Gorsuch upheld an NLRB decision on *behalf* of workers, *Public Service Co. v. NLRB*, 692 F.3d 1068 (10th Cir. 2012), it is important to note that the company, Public Service Company, had forfeited several arguments and, on the preserved arguments, the NLRB's decisions were supported by substantial evidence.

In a case not involving agency determinations, *Jensen v. Solvay Chemicals, Inc.*, 721 F.3d 1180 (10th Cir. 2013), Judge Gorsuch authored the majority opinion, which held that even though an employer had failed to give adequate notice to employees of adverse changes to a retirement benefits plan, the employees were not entitled to relief because the employer's actions were not egregious. A class of employees had sued Solvay Chemicals after it had converted its defined benefit plan into a "cash balance" plan, which eliminated early retirement subsidies. Evidence in the record showed that the plan administrator had failed to comply with ERISA notice requirements. But Judge Gorsuch reasoned that the employer's failure to give proper notice was merely accidental and, therefore, would not serve to invalidate the changes to the retirement plan or restore lost benefits.

B. Equal opportunity

A review of Judge Gorsuch's decisions also demonstrates a repeated pattern of siding with corporations over individuals trying to assert their rights under anti-discrimination laws. Judge Gorsuch routinely refuses to allow cases to go to a jury even when there are material disputes of fact about the circumstances surrounding an adverse employment action. Instead, even in cases that split the court, Judge Gorsuch regularly resolves disputes in favor of the employer.

For example, in a case involving alleged sex discrimination, Judge Gorsuch dissented from a decision overturning judgment in favor of UPS. *See Strickland v. UPS*, 555 F.3d 1224 (10th Cir. 2009). There, Carole Strickland, a female driver for UPS, alleged sex discrimination. Two judges on the Tenth Circuit panel overturned a lower court decision granting UPS judgment as a matter of law. In doing so, they emphasized that Strickland provided ample evidence that she was regularly outperforming her male colleagues and yet she was treated less favorably than they were, including direct testimony of several of her coworkers who testified that she was treated worse. Despite such direct evidence, Judge Gorsuch, unlike his two colleagues, would have decided that the case could not even go to a jury because no reasonable juror could have found that Strickland was a victim of sex discrimination.

Similarly, in *Pinkerton v. Colorado Department*

of Transportation, 563 F.3d 1052 (10th Cir. 2009), Judge Gorsuch joined a divided panel that affirmed summary judgment in favor of the Colorado Department of Transportation on an employee's Title VII claim that she had been sexually harassed and retaliated against when she complained about her supervisor's actions.

In that case, Betty Pinkerton, an administrative assistant, alleged that her supervisor had made inappropriate sexually-explicit remarks to her over a period of several months, during a probationary period, and that she was fired when she reported the harassment. Specifically, Pinkerton alleged that her supervisor "asked whether she had sexual urges"; asked about "her breast size"; and said "that he liked it when she wore skirts and asked if she masturbated and if she had breast enlargements." *Id.* at 1057, 1068. After her supervisor asked to go to her house for lunch, Pinkerton called the internal civil rights administrator to complain and made a formal written complaint seven days later. An investigation ensued, leading to the supervisor's removal. But just six days after the investigator's report arrived, the agency fired Pinkerton.

Judge Paul Kelly's majority opinion, joined by Judge Gorsuch, concluded that it was Pinkerton's performance, not discrimination, that resulted in her termination and that Pinkerton had waited an unreasonably long time to report the harassment to the agency (two months). The dissent disagreed, arguing that it was for a jury to decide at what point Pinkerton's failure to report the harassment became unreasonable and that Pinkerton's termination just six days after the investigation had been completed raised a genuine issue of fact about her claim of retaliatory discharge.

Also telling is *Weeks v. Kansas*, 503 F. App'x 640 (10th Cir. 2012). There, Judge Gorsuch again upheld a grant of summary judgment—keeping the case from the jury—against a state fire marshal's in-house counsel who alleged that she was fired after she took complaints of unlawful discrimination made to her by employees to the fire marshal. Judge Gorsuch concluded that the attorney's actions, even when she presented evidence that she had taken a position adverse to her employer, were insufficient to show that she had engaged in protected activity. In the opinion, Judge Gorsuch acknowledged that *Crawford v. Metropoolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009) might have superseded his decision, but he declined to apply the Supreme Court's holding because the plaintiff did not rely on it in her briefing to the court.

In *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007), Judge Gorsuch concurred in an opinion protecting an employer accused of race and national origin discrimination. In that case, Zamora, who is a Mexican-born naturalized citizen, sued his employer, Elite Logistics, alleging that it had a discriminatory motive when it made excessive requests for work-authorization documentation. After working for Elite Logistics for several months, the company suspended Zamora until he provided documentation of a valid social security number. Zamora already had provided Elite Logistics with his social security number and a copy of his naturalization certificate, but the company deemed that insufficient to demonstrate that Zamora could lawfully work in the United States.

After Zamora provided Elite Logistics with a letter from the Social Security Administration verifying his social security number, he returned to work and demanded an apology. Instead of issuing an apology, Elite Logistics fired Zamora. The Tenth Circuit split 9 to 5 on Zamora's discriminatory discharge claim and tied 7 to 7 on Zamora's discriminatory suspension claim. Judge Gorsuch joined the six-judge majority and the seven-judge plurality in concluding that Zamora had not presented sufficient evidence of discriminatory motive to survive summary judgment on either claim.

Judge Gorsuch wrote separately to chastise the majority and the dissent for addressing what he thought was an unnecessary legal question—the impact of the Immigration Reform and Control Act anti-discrimination provision and its underlying policies on Title VII analysis. Judge Gorsuch believed that the plaintiff had not alleged a violation of the IRCA. *See id.* at 1183–84 (Gorsuch, J., concurring).

In *Bergersen v. Shelter Mutual Insurance Co.*, 229 F. App'x 750 (10th Cir. 2007), Judge Gorsuch authored an opinion affirming a district court's grant of summary judgment in favor of an employer who had allegedly fired an employee for reporting discriminatory practices. In that case, Bergersen had reported to his employer that he believed that the company was discriminating against Hispanic insureds. In one month, Shelter had canceled three auto policies of Hispanic clients. Just two weeks after Bergersen filed a formal complaint with the Kansas Insurance Department (KID), his employer placed him on probation and a month later, fired him.

Judge Gorsuch rejected Bergersen's state-law retaliatory-discharge claim even though only seven weeks had elapsed between Bergersen's complaint to KID and his termination, and Bergersen had been awarded for his performance at work on multiple occasions, even having received an award two months before he was placed on probation.

In *Almond v. Unified School District #501*, 665 F.3d 1174 (10th Cir. 2011), Judge Gorsuch authored the majority opinion, which held that the district court properly dismissed the claims of two school district employees who argued that they unlawfully had been demoted to lower paying positions because of their age. When the employees had agreed to the transfer, the school district continued to compensate them at their previous salary level for two years. At the end of the two-year period, the employees' compensation was lowered and the employees sued. Judge Gorsuch concluded that the employees' claims were untimely because they were filed outside of the 300-day statute of limitations that applies to the filing of discrimination charges. In so holding, Judge Gorsuch declined to extend the protections of the Lilly Ledbetter Fair Pay Act to the employees' claims because, he reasoned, the statute only modified the statute of limitations period for claims of discriminatory compensation (unequal pay for equal work), not discriminatory demotion.

In *Orr v. City of Albuquerque*, 531 F.3d 1210 (10th Cir. 2008), Judge Gorsuch wrote for a unanimous panel. The case involved two female Albuquerque police officers. Albuquerque required pregnant employees to take sick leave first, instead of allowing them to use personal or vacation leave first, as they did with others taking leave under the FMLA. That adversely affected paid benefits and the women's right to work overtime after they returned. Importantly, the city did not dispute that they required pregnant women to use sick leave first, or that they prohibited them from using compensatory time. Neither did the city "seriously purport to defend their practices as consistent with the FMLA." *Id.* at 1213. And, in fact, after the plaintiffs initiated their proceedings before the EEOC, the city changed its policy. The issue on appeal was whether plaintiffs could proceed under the Pregnancy Discrimination Act. And, the Tenth Circuit found that a reasonable jury could find that the city had intended to discriminate on the basis of pregnancy.

Although not a case about workers, *Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007), demonstrates the amount of evidence a plaintiff amassed in a civil rights case that Judge Gorsuch found created a triable issue of fact. There, in a case under Title IX, two women sued the University after they had been sexually assaulted by football players and recruits. The women alleged the University was deliberately indifferent to the practices

of the football program, including its recruiting practices that created an environment encouraging misconduct and sexual assault. The district court had granted summary judgment in favor of the University and Judge Gorsuch joined a majority opinion vacating that result.

The women had presented evidence that since the 1980s, the University had been the focus of news reports about sexual assaults committed by its football players, and the Boulder County District Attorney met with University officials in 1998 to express concern about reports of sexual assault by football recruits and outline the changes that needed to be made to the program. Moreover, the evidence showed that the football coaching staff knew and allowed misconduct to occur. The head coach, Gary Barnett, permitted an unsupervised player-host program that he knew had resulted in numerous allegations of misconduct and was unsupportive of women who reported abuses. Recruits were assigned to hosts who were encouraged to show the recruits a "good time." Barnett dismissed allegations from a student athletic trainer that she was raped by a football player. Barnett told her he would support the player if he had a different version of the story. Barnett also discouraged the victim from going to the police, and stated that because he was the player's coach and not his father, he would not punish the rapist. A female kicker on the team also reported significant sexual harassment to Barnett during her tenure on the team, but Barnett never acted on these allegations and she left the team.

The holding in *Simpson* was unanimous and consistent with the Supreme Court's decision in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

In a case that did not involve Title VII directly, but rather the awarding of fees after a trial, Judge Gorsuch dissented from a panel majority that held that the district court lacked jurisdiction to rule on a Title VII plaintiff's request for appellate attorney's fees. *See Flitton v. Primary Residential Mortgage, Inc.*, 614 F.3d 1173 (10th Cir. 2010). In the underlying case, which Judge Gorsuch did not participate in, the Tenth Circuit had reinstated a jury verdict in favor of the plaintiff. But, because the plaintiff had failed to request attorney's fees in the appellate court, the majority upheld the district court's conclusion that it lacked jurisdiction to consider her request. Judge Gorsuch disagreed, arguing that the court had jurisdiction to consider her request.

C. Consumer rights

Judge Gorsuch has also made it more difficult for the federal government to ensure the safety of American consumers.

In a major win for medical device manufacturers over patients, Judge Gorsuch, in *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335 (10th Cir. 2015), held that a medical device company is immune from liability for harm caused by its product when it sells that product for a use never approved by the FDA and never found to be safe and effective. Because of Judge Gorsuch's opinion it is more difficult for patients who are injured through the unapproved use of a medical device to seek recourse in the courts to hold medical device companies accountable.

In the case, Patricia Caplinger had undergone spinal surgery and doctors implanted a device, Infuse, to help with recovery. The FDA had approved the device for insertion during an anterior procedure, but Infuse's manufacturer, Medtronic, had encouraged Caplinger's doctors to insert the device during a posterior procedure, which the FDA had *not* approved.[38] In fact, a Medtronic representative was present

38 Indeed, "Medtronic aggressively promoted Infuse for unapproved use in posterior-approach surgeries. As the Department of Justice, the Senate, and a leading journal of spinal medicine documented, Medtronic's illegal promotion included paying kickbacks and other incentives to physicians to influence clinical studies, prevent publication of adverse events, and encourage the unapproved use." Petition for Rehearing En Banc or Rehearing by The Panel at 4-5, *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335 (10th Cir. 2015) (No. 13-6061), *available at* http://www.citizen.org/documents/caplinger-v-medtronic-petition-rehearing-en-banc.pdf.

and actively involved during the surgery,

providing information about the application of Infuse to Caplinger's surgery. After the surgery, however, Caplinger's symptoms returned and worsened. She experienced a foot drop in her right leg resulting from exuberant bone growth, which caused a tear of the anterior cruciate ligament in her right knee, requiring surgery. Caplinger continued to suffer exuberant bone growth and resulting pain. Caplinger filed a lawsuit asserting state-law product liability claims.

Judge Gorsuch adopted a broad reading of the Federal Food, Drug, and Cosmetic Act and ruled that FDA approval of the medical device preempted Caplinger's claims, and that there was no difference between off-label and on-label uses.

Judge Carlos Lucero strongly disagreed. He said that Judge Gorsuch held Caplinger "to an excessively stringent standard." *Id.* at 1350 (Lucero, J., concurring in part and dissenting in part). Because of Gorsuch's opinion, he wrote:

> Patricia Caplinger cannot recover for harms, long cognizable under state law, that flow directly from Medtronic's alleged violations of federal laws forbidding the introduction of misbranded or adulterated medical devices into the market. The result is neither compelled by binding precedent nor by the plain text and clear purposes of the Federal Food, Drug and Cosmetic Act[,] . . . which were enacted to promote the safety of medical devices through honest labeling and promotion."

Id. at 1347.

In addition to ensuring a medical device company was not held accountable for injuries it caused, Judge Gorsuch also held that the Consumer Product Safety Commission (CPSC) could not ensure children are safe from toy magnets. In *Zen Magnets, LLC v. Consumer Product Safety Commission*, 841 F.3d 1141 (10th Cir. 2016), Judge Gorsuch joined a divided panel opinion invalidating regulations the CPSC promulgated concerning the size and strength of certain magnets.

The issue involved magnets marketed and sold to consumers "as desktop trinkets, stress-relief puzzles, and toys." *Id.* at 1144. The magnets posed a "grave danger" when misused. Specifically, if the magnets were ingested by children they could cause serious damage. *Id.* And, since 2008, federal law barred the sale of such magnets "marketed as a plaything" to children under 14. *Id.* at 1145. Yet, the majority faulted CPSC in crafting its rule for relying on what it viewed as outdated data and inaccurate injury reports to evaluate the costs and benefits of the rule. Accordingly, the majority held, the CPSC violated the Consumer Product Safety Act because it had not promulgated a rule that "is reasonably necessary to eliminate or reduce an unreasonable risk of injury." 15 U.S.C. § 2058(f)(3)(A).

The dissent disagreed. It argued that CPSC's rule should be upheld because there was ample evidence for CPSC to make its determination, and it was not the role of the court to substitute its judgment for the reasoned judgment of the CPSC.

II. REPRODUCTIVE HEALTH CARE

A. Access to the constitutionally protected right to decide whether to have an abortion

Gorsuch's writings, even before he joined the bench, could be read as undermining the constitutionally protected right to decide whether to have an abortion. In his book, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA,[39] Gorsuch argued that the

39 Neil M. Gorsuch, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (Princeton University Press 2006).

United States should retain "existing law" banning "assisted suicide" and euthanasia "on the basis that human life is fundamentally and inherently valuable, and that the intentional taking of human life by private persons is always wrong."[40] Gorsuch elaborates that he "do[es] not seek to address publicly authorized forms of killing like capital punishment and war."[41]

In his book, Gorsuch also discussed his views on *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In *Casey,* a plurality of the Court wrote that "the essential holding of Roe v. Wade should be retained and once again reaffirmed." *Id.* at 845. As Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter wrote:

> It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

Id. at 846. Justices O'Connor, Kennedy, and Souter further wrote, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. The plurality's explanation that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."
Id. at 853.

Despite this clear language, Gorsuch, in his book, suggests that *Casey*, "may be read as a *stare decisis* decision" only.[42] Gorsuch explains that "*Casey*'s reliance on *stare decisis* was the narrower of the two grounds for decision offered by the plurality, and it was, standing alone, sufficient to decide the controversy before the Court."[43] Accordingly, Gorsuch concludes, there is "a colorable argument" that the autonomy discussion in *Casey* was "inessential to the plurality's decision."[44]

Moreover, he questioned whether *Casey*'s discussion of individual autonomy "may prove too much."[45] Gorsuch wrote that "[i]f the Constitution protects as fundamental liberty interests *any* 'intimate' or 'personal' decisions, the Court arguably would have to support future autonomy-based constitutional challenges to laws banning any private consensual act of significance to the participants in defining their 'own concept of existence.'"[46] Gorsuch goes on to say that it is an interesting question whether a broad constitutional protection for personal autonomy would protect "'polygamy, consensual duels, prostitution, and, indeed, the use of illicit drugs[.]'"[47]

In private practice, Gorsuch also submitted an amicus brief on behalf of the American Hospital Association in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Although the case was

40 *Id.*at 157.
41 *Id.*at 157.
42 *Id.* at 216.
43 *Id.* at 80.
44 *Id.*
45 *Id.* at 81.
46 *Id.* at 81–82
47 *Id.*at 82 (quoting *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting)).

unrelated to abortion, Gorsuch's brief aggressively criticized *Casey*, abortion jurisprudence, and substantive due process.[48] The brief restated the argument that *Casey* was merely a stare decisis decision: "[T]he plurality's opinion rests at heart upon stare decisis principles, upholding the abortion right largely because of the need to protect and respect prior court decisions in the abortion field . . . . Indeed, the plurality's reliance on stare decisis in Section III of its opinion was entirely sufficient to decide the controversy before the Court."[49]

Gorsuch's brief continues that if the Court were to recognize a right to medical aid in dying, "it would be enmeshed in endless problems of line drawing of the sort that have plagued the Court's abortion jurisprudence."[50] Moreover, the brief warned that creating a right to medical aid in dying would place a burden on hospitals that ethically opposed it, much like the right to an abortion has done:

> [T]hey will be under great pressure to provide a service that some providers consider antithetical to the integrity of their profession and their own sense of ethics. The patient's right to abortion has been distorted by at least one court into an obligation placed on a private hospital—deemed 'quasi-public' in part because of its acceptance of some public funding, but primarily because 'the hospital was the only one serving the community'—to make its facilities available for non-therapeutic (elective) abortions. If the courts feel free to override the conscience of health care providers in that context, there is a danger they will do so here as well." (internal citation omitted).[51]

If *Casey* can only be read as a stare decisis decision, and the right to decide to have an abortion is not commanded by the Constitution, then Judge Gorsuch can overturn these decisions if he becomes a justice on the Supreme Court.[52] Indeed, Gorsuch's dismissal of *Casey*'s broad approach to substantive due process suggests that Gorsuch may not support rights like the right of a woman to decide whether to have an abortion. Combined with the fact that President Trump promised that he would nominate a justice who would overturn *Roe,* Gorsuch's views are very concerning.

Also relevant, Judge Gorsuch issued the majority opinion in *Pino v. United States*, 507 F.3d 1233 (10th Cir. 2007), which overturned the district court's grant of summary judgment in favor of the United States on a couple's claim of wrongful death of a nonviable stillborn fetus. In that case, the Pinos sued a doctor—an employee of the federal government—under the Federal Tort Claims Act after he had rendered medical care that, the Pinos argued, caused the premature birth of the fetus. The Pinos sued the United States for wrongful death. The viability of their claim depended on interpretation of the Oklahoma wrongful death statute. Having no guidance from the Oklahoma Supreme Court on the issue of whether a claim existed for the death of a nonviable fetus, the Pinos asked the district court to certify the question to the Oklahoma Supreme Court, which it declined to do, instead ruling in favor of the United States based on a lower court decision in Oklahoma that did not recognize such a claim.

On appeal, Judge Gorsuch declined to interpret the Oklahoma statute, although it would have been common practice to do so, and certified the question to the Oklahoma Supreme Court. Judge Gorsuch acknowledged

48 Brief of Amici Curiae American Hospital Association, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 96-110, 96-1858).
49 *Id.*
50 *Id.*
51 *Id.*

52 For example, the Supreme Court in *Citizens United*, declined to follow precedent, concluding that "*stare decisis* does not compel the continued acceptance of" the case that "held that political speech may be banned based on the speaker's corporate identity." 558 U.S. 310, 319 (2010). In his concurrence, Chief Justice Roberts emphasized that "*stare decisis* is neither an inexorable command, nor a mechanical formula of adherence to the latest decision, especially in constitutional cases." *Id.* at 377 (Roberts, C.J., concurring) (internal quotation marks and citations omitted). He continued that the "greatest purpose" of *stare decisis* "is to serve a constitutional ideal—the rule of law." *Id.* at 378. But that "when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to part from that precedent." *Id.*

that the only Oklahoma case directly on point had not recognized such a right, but proceeded to disregard it. The Oklahoma Supreme Court determined that a claim for wrongful death of a nonviable fetus existed. Accordingly, Judge Gorsuch determined that the Pinos' claim had to be remanded to the district court for further proceedings. *See* *Pino v. United States*, 273 F. App'x 732 (10th Cir. 2008).

Although this case is not dispositive of Judge Gorsuch's views on the right to choose abortion, his decision to certify the question instead of applying existing Oklahoma case law, which concluded that no claim exists for the wrongful death of a nonviable fetus, is notable.

B. Access to contraception and reproductive health care

In 2013, Judge Gorsuch joined a majority opinion holding that the Department of Health and Human Services could not require closely-held for-profit corporations to provide contraceptive coverage as part of their employer-sponsored health insurance plans if the corporation said that doing so conflicted with its religious beliefs. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc). In reaching its conclusion, the court held that corporations are persons exercising religion for purposes of the Religious Freedom Restoration Act (RFRA). A narrowly divided 5-4 Supreme Court adopted this view and affirmed the Tenth Circuit's judgment. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Judge Gorsuch wrote separately to make clear that he would have gone even further than the Court of Appeals and the Supreme Court. He would have allowed not just corporations, but the individual owners, to challenge the mandate. And, in doing so, he espoused his overarching deference to religion over the rights of women:

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

Hobby Lobby Stores, Inc., 723 F.3d at 1152 (Gorsuch, J., concurring). Those religious beliefs, he concluded, justified allowing individuals, as well as corporations, to challenge the government's rules for employer-sponsored health insurance plans.

Judge Gorsuch also joined Judge Hartz's dissent from the denial of en banc review in *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315 (10th Cir. 2015). There, the Tenth Circuit had upheld the birth control accommodation for religiously-affiliated non-profit organizations under the Affordable Care Act. The accommodation allows the organizations to opt out of providing birth control coverage by signing a form, but still ensures that women get that coverage from their insurance provider. Judge Gorsuch disagreed with the majority's decision refusing to rehear the challenge brought by the Little Sisters of the Poor, and argued that the mere signing of the form substantially burdened the group's free exercise of religion.

Finally, Judge Gorsuch dissented from the denial of rehearing en banc in *Planned Parenthood Ass'n of Utah v. Herbert (Planned Parenthood II)*, 839 F.3d 1301 (10th Cir. 2016). There, the Republican Governor of Utah, Gary Herbert, had ordered the state to strip $272,000 in federal funding from Planned Parenthood Association of Utah.

A panel of the Tenth Circuit Court of Appeals granted a preliminary injunction to Planned Parenthood, concluding that Utah's Planned Parenthood was operating lawfully; Herbert's personal opposition to abortion could likely be demonstrated as a motivation for blocking federal funds; and Herbert was targeting the health organization in violation of its constitutional rights. *See* *Planned Parenthood Ass'n of Utah v. Herbert (Planned Parenthood I)*, 828 F.3d 1245 (10th Cir. 2016).

Importantly, neither Planned Parenthood nor the State of Utah sought en banc review of the panel decision. Judge Gorsuch would have granted en banc review (again at the behest of no litigant), and would have permitted Governor Herbert to strip funding.

A majority of the court declined to grant en banc review, and Judge Mary Briscoe wrote separately to highlight the troubling nature of Judge Gorsuch's dissent. She noted, first, how "unusual" and "extraordinary" it would be for the Tenth Circuit, sua sponte, to order en banc review when neither party to the litigation sought full court review. Second, Judge Briscoe emphasized that Judge Gorsuch repeatedly "mischaracterized this litigation and the panel decision at several turns." *Planned Parenthood II*, 839 F.3d at 3 (Briscoe, J., concurring).[53]

In other words, Judge Gorsuch was willing to ignore court practice and custom and mischaracterize facts and law to ensure that Utah's Republican governor could eliminate funding for Planned Parenthood.

III. DISABILITY RIGHTS

Judge Gorsuch consistently rules against rights and protections for persons with disabilities. He has read the Individuals with Disabilities Education Act (IDEA) extremely narrowly and he has regularly sided with

large insurance companies that deny benefits to workers with disabilities.

A. Children with disabilities

Judge Gorsuch's insensitivity to the rights of children and his extremely narrow approach to acts of Congress are on full display with his treatment of claims from children seeking to enforce their rights under the IDEA. He reversed the decision of a federal court that a young boy with autism was entitled to relief even though an impartial hearing officer and an administrative law judge all recognized he needed placement in a residential school program; in an issue of first impression Judge Gorsuch foreclosed legal remedies for a mother of a child whose school failed to identify a learning disability; and Judge Gorsuch dismissed the claim of a boy with mental and physical disabilities who was physically abused and repeatedly subjected to confinement in a small room.

In *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143 (10th Cir. 2008), an impartial hearing officer, an administrative law judge, and a federal district court judge all agreed that a young boy with autism, Luke, needed placement in a residential school program due to his lack of progress in "generalizing" skills—applying skills learned at school to other environments. Yet, Judge Gorsuch wrote an opinion reversing that determination.

The case involved the core requirement of the IDEA, that states must make available a free appropriate public education (FAPE) to eligible children with disabilities. Judge Gorsuch held that "the educational benefit mandated by IDEA must merely be more than de minimis" and that the benefit provided to Luke satisfied

53 Judge Briscoe's concurrence *repeatedly* makes clear how results oriented Judge Gorsuch's dissent was: Judge Gorsuch "again mischaracterizes how both the district court and the panel performed" its assessment; "the dissent misreads Rule 52(a)(2)"; "the panel did not, as the dissent implies, make its own factual findings, but instead properly conducted a de novo review of what it deemed to be the district court's legal determination"; "[Judge Gorsuch] attempts to reframe those admissions . . . . However this reframing belies the record." *Planned Parenthood II*, 839 F.3d at 1303–04.

that standard. *Id.* at 1149. He found that Luke was making "*some* progress" toward his education goals in public school—even though it was undisputed that there was no progress outside of school—and that was enough for the school to meet its obligations under the IDEA. *Id.* at 1150.

The Supreme Court, in another case from the Tenth Circuit, is now reviewing the standard Judge Gorsuch articulated in *Luke P. See Endrew F. v. Douglas Cnty. Sch. Dist.*, No. 15-827. As the Solicitor General noted, Judge Gorsuch's "view that a State can satisfy the IDEA's FAPE requirement by providing children with disabilities educational benefits that are "merely . . . more than de minimis" is mistaken.[54] "That interpretation is not consistent with the IDEA's text or structure, with this Court's analysis in [*Board of Education v. Rowley*], or with Congress's stated purposes."[55] The Supreme Court, the government notes, indicated in *Board of Education v. Rowley*, 458 U.S. 176 (1982), that the requirement FAPE imposes on states is a duty to ensure that children with disabilities have "access" to an education that is "meaningful." That "meaningful access" requirement, the government continues, requires states to provide each child with a disability with "an opportunity to make significant educational progress"—a much higher standard than a "more than de minimis" benefit.[56]

During oral argument before the Supreme Court, one commentator characterized the Court's reaction to the de minimis standard this way: "At today's oral argument in the case of a Colorado student with autism, one thing seemed relatively clear: The justices were dissatisfied with the U.S. Court of Appeals for the 10th Circuit's ruling that school districts can satisfy federal education law as long as they offer a student with a disability an educational program that provides him or her with a benefit that is more than merely de minimis, or non-trivial."[57]

54 Brief of Amicus Curiae for the United States at 13, Endrew F. v. Douglas Cnty. Sch. Dist., No. 15-827 (U.S. Aug. 18, 2016).
55 *Id.*
56 *Id.*at 9.
57 Amy Howe, *Argument analysis Justices grapple with proper standard for measuring educational benefits for children with disabilities*, SCOTUSblog (Jan. 11, 2017), http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-educational-benefits-children-disabilities/.

In *A.F. ex rel. Christine B. v. Española Public School*, 801 F.3d 1245 (10th Cir. 2015), the plaintiff's mother believed that the school district was not appropriately addressing her child's dyslexia, as the plaintiff was failing nearly all her classes. The mother had filed an administrative complaint alleging that the school district had not evaluated her child under the IDEA and it had failed to develop and implement an Individualized Education Program, as required by the statute. The parties mediated their dispute and entered into a mediation agreement. The school district agreed to identify the plaintiff as a child with learning disabilities and to pay a portion of the costs of sending her to private school. The mother then dismissed her complaint, but filed suit against the school district alleging disability discrimination in violation of the Constitution, the Americans with Disabilities Act (ADA), and the Rehabilitation Act. The plaintiff sought compensatory damages.

Judge Gorsuch affirmed the dismissal of the lawsuit. He held that the plaintiff's lawsuit sought the same relief that was available under the IDEA. He acknowledged that compensatory damages were not available under the IDEA, but that the injuries she sought to redress were "capable of being redressed to some degree by the IDEA administrative procedures." *Id.* at 1247. Thus, according to Judge Gorsuch, in order to bring a lawsuit under "other Federal laws protecting the rights of children with disabilities," a plaintiff had to utilize the procedures under the IDEA—an impartial due process hearing followed by an appeal to the state educational review agency. 20 U.S.C. § 1415*(l)*. In other words, as the dissent noted, in order to have the right to bring a suit under the Constitution or other federal statute, a student with a disability or her parent must not be successful in pursuing his or her IDEA claims during a due process

hearing. As a result, a plaintiff who has entered into a mediated settlement under the IDEA cannot bring a federal lawsuit under the Rehabilitation Act, the ADA, or the Constitution asserting educational injuries.

Judge Briscoe dissented:

> In this case of first impression, the majority misreads 20 U.S.C. § 1415*(l)* to require a litigant, such as plaintiff A.F., to forgo any resolution of her claim under the Individuals with Disabilities Education Act (IDEA) in order to preserve the ability to seek remedies in federal court under acts other than the IDEA. More specifically, a claimant under the IDEA must now, in order to later be able to file suit in federal court under other related statutes, refuse to settle her IDEA claim during the preliminary meeting required by 20 U.S.C. § 1415(f)(1) (B) or the mediation process described in 20 U.S.C. § 1415(e), and must also lose in both the due process hearing outlined in 20 U.S.C. § 1415(f)(1)(A) and the subsequent administrative appeal out-lined in 20 U.S.C. § 1415(g). This was clearly not the intent of Congress and, ironically enough, harms the interests of the children that IDEA was intended to protect.

A.F. ex rel. Christine B., 801 F.3d at 1251 (Briscoe, J., dissenting).

Also relevant is Judge Gorsuch's opinion in *Garcia v. Board of Education of Albuquerque Public Schools,* 520 F.3d 1116 (10th Cir. 2008), holding that even when a school violates a student's rights under the IDEA, the student may still be entitled to no remedy for an IDEA violation if the student leaves the school out of frustration with the school's continuous failure to provide services that meets his needs.

Muskrat v. Deer Creek Public Schools, 715 F.3d 775 (10th Cir. 2013), is also telling. Judge Gorsuch joined an opinion upholding summary judgment in favor of a school district and its administrators who physically abused and repeatedly subjected to confinement in a small room a boy with mental and physical disabilities. The boy, J.M. was between five and ten years old during the years when he suffered abuse, but had the mental age of a two- or three-year-old. As a result of repeatedly being placed in confinement, J.M.'s health declined and he suffered physical symptoms of stress and anxiety.

Nonetheless, among other things, the opinion concluded that the abuse suffered by J.M. did not violate the Constitution because it did not "shock the conscience," even though some of the actions of the school administrators showed "a careless or unwise excess of zeal rather than a brutal inhumane abuse of official power." *Id.* at 788 (internal citation omitted).

B. Rights of workers with disabilities

Judge Gorsuch's lack of sensitivity and narrow reading of statutes is also manifested in the case of Grace Hwang, an assistant professor at Kansas State University for 15 years. *See Hwang v. Kan. State Univ.,* 753 F.3d 1159 (10th Cir. 2014). After a cancer diagnosis, she requested and received a six-month leave of absence while she recovered from a bone marrow transplant. As she was preparing to return to teaching, the campus erupted in a flu epidemic. Because a flu infection would have been dangerous given her compromised immune system, Hwang asked for further leave, during which she could have worked from home. The university denied her request. Hwang then sued the university for violations of the Rehabilitation Act, which prohibits disability discrimination by entities that receive federal funds.

Under established disability rights law, a request for leave due to a disability must

be evaluated on a case-by-case basis to decide whether, on the specific facts, the request would present an undue hardship. *See* Mason v. Avaya Communs., Inc., 357 F.3d 1114 (10th Cir. 2004) ("The Supreme Court has generally eschewed *per se* rules . . . [and] the determination of whether a request for an at-home accommodation is reasonable must likewise be made on a case-by-case basis."); *Haschmann v. Time Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998) ("[T]he reasonableness of a requested accommodation is a question of fact.") Yet, instead of a jury considering the evidence, Judge Gorsuch ruled that Professor Hwang's request was unreasonable. He wrote that the "leave policy here granted all employees a full six months' sick leave" and that such leave was "more than sufficient." *See Hwang*, 753 F.3d at 1164. Gorsuch also asserted that showing up was an essential job function and opined that the Rehabilitation Act should not "turn employers into safety net providers for those who cannot work." *Id.* at 1162.

Judge Gorsuch's reasoning has been rejected by other courts. For example, the First Circuit reversed summary judgment against a plaintiff who had sought a five-month leave extension for cancer treatment after the one-year leave provided by her employer expired. *See* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000). As the First Circuit made clear, in language that could certainly apply to Judge Gorsuch's opinion, "[i]t appears from the court's statements that it was applying *per se* rules, and not giving the type of individual assessment of the facts that the Act and the case law requires. The Supreme Court has deemed 'essential' individualized attention to disability claims.'" *Id.* at 647 (citing School Bd. Of Nassau Cnty. v. Arline, 480 U.S. 273, 287 (1987)); *see also* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) (reversing summary judgment for the employer, finding triable issues where the needed leave was about eight or nine months); Cehrs v. Northwest Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (reversing summary judgment and noting that "we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as a year) could never constitute a 'reasonable accommodation' under the ADA"). Moreover, Judge Gorsuch's ruling contravened EEOC guidance. *See* Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA), EEOC, Examples 6, 13 (recognizing the possibility of leave in excess of six months).

Judge Gorsuch has also frequently sided with benefits plan administrators. Judge Gorsuch authored the majority opinion in Lucas v. Liberty Life Assurance Co. of Boston, 444 F. App'x 243 (10th Cir. 2011), which upheld the denial of long-term benefits to an employee who had suffered a severe back injury. In that case, Lucas, who was employed at Coca-Cola Company, had received long-term disability benefits after sustaining a work-related spinal injury. After 24 months, Lucas asked for an extension of benefits, which Liberty Life Assurance, the insurer and administrator of the plan, denied. Liberty denied the extension because it concluded that Lucas was capable of performing some occupation. In making that decision, Liberty rejected Lucas's treating physician's determination that he was totally and permanently disabled. Liberty chose instead to rely on doctors that it had hired who said that Lucas could work. Although recognizing that Liberty had an inherent conflict of interest in determining Lucas's status because of its role as insurer and administrator of the plan, Judge Gorsuch gave the conflict only "limited weight," because Liberty had taken sufficient steps to reduce bias by hiring doctors to review Lucas's medical records and examine him. *Id.* at 245–46.

In another case about termination of long-term disability benefits, Judge Gorsuch ruled in favor of the insurer terminating benefits. *See* Niedens v. Cont'l Cas. Co., 258 F. App'x 216 (10th Cir. 2007). In that case, the insurer had

terminated Niedens's benefits after an incomplete labor market survey showed Niedens's medical limitations would not preclude him from sustaining gainful employment. Once again, the insurer made the determination while laboring under a conflict of interest, but Judge Gorsuch concluded that its shoddy reasoning was sufficient: "Mr. Niedens's challenge to the survey is serious; we cannot say the administrator's rejection of it was beyond the continuum of reasonableness-even if on the low end." *Id.* at 219 (internal quotations marks omitted).

In *DeGraw v. Exide Technologies*, 462 F. App'x 800 (10th Cir. 2012), the Tenth Circuit affirmed the judgment of the district court granting summary judgment in favor of DeGraw's employer, Exide, on DeGraw's claims of retaliation under the Kansas Workers Compensation Act (KWCA) and the Family and Medical Leave Act (FMLA). In that case, DeGraw had taken FMLA leave because of back problems. His employer would not allow him to return to work until he had been cleared by a doctor. After several months, DeGraw's personal doctor lifted his work restriction, but the company-contracted doctor refused to do so. Accordingly, Exide refused to allow DeGraw to return to work and fired him when he ran out of FMLA leave. The Tenth Circuit panel, which included Judge Gorsuch, concluded that Exide genuinely could have believed that DeGraw could not return to work based on the conclusions of the company doctor and, thus, was not liable under the FMLA.

In *Salmon v. Astrue*, 309 F. App'x 113 (9th Cir. 2009), the divided panel opinion held that a woman's claim for social security disability benefits needed to be reexamined because the administrative law judge "failed properly to recognize and credit her mental impairment." *Id.*at 114. The majority reasoned that the ALJ improperly gave controlling weight to a psychological assistant's testimony that the claimant was not impaired because she hadn't sought therapy or taken psychotropic medication. As the majority explained, the ALJ should not have given controlling weight to that opinion, because the claimant gave credible testimony that "she lacked insurance and was unable to afford medical care during the relevant period." *Id.* at 115. Turning a blind eye to the claimant's predicament, Judge Gorsuch dissented, arguing that the ALJ's conclusion was reasonable. *See Id.at 116* (Gorsuch, J., dissenting).

IV. LGBTQ

As noted previously, in his 2005 *National Review* article, Gorsuch expressed disdain for those seeking to use the courts to enforce their rights under the law, and he specifically criticized LGBTQ Americans who have relied on federal courts in their quest for equality.

The rationale Judge Gorsuch employed in the *Hobby Lobby* case—a license to discriminate for private corporations—has also been used to justify discrimination against LGBTQ Americans. *See, e.g.,* *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016).

And his skepticism about LGBTQ claims is also demonstrated in a 2015 case, *Druley v. Patton*, where, writing for a conservative panel, he rejected a claim by a transgender woman incarcerated in Oklahoma who alleged that her constitutional rights were violated when she was denied medically necessary hormone treatment and the ability to wear feminine clothing. 601 F. App'x 632 (10th Cir. 2015). Other federal courts have reached the opposite conclusion in similar cases. *See, e.g.,* *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (upholding district court conclusion that statute barring Wisconsin Department of Corrections from providing transgender inmates with hormones to treat diagnosed gender identity disorder was unconstitutional); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (upholding judgment in favor of civilly committed person diagnosed with gender identity disorder when treatment center refused to provide hormones and garb

matching her gender).

In addition, in *Kastl v. Maricopa County Community College District,* 325 F. App'x 492 (9th Cir. 2009), Judge Gorsuch joined a panel opinion upholding summary judgment in favor of an employer who banned a transgender woman, Rebecca Kastl, from using the women's restroom until she could prove that she had undergone sex reassignment surgery, and then declined to renew her teaching contract. The opinion concluded that the college had provided a legitimate, nondiscriminatory reason for banning Kastl from the bathroom when it cited "safety reasons." *Id.* at 494. In 2015, The EEOC rejected this view, concluding that "denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination; an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure." *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Mar. 27, 2015).

V. IMMIGRATION

In cases involving administrative adjudication, Judge Gorsuch often upholds the decisions of the Board of Immigration Appeals to the detriment of immigrants.

Judge Gorsuch authored the majority opinion in *Garcia-Carbajal v. Holder,* 625 F.3d 1233 (10th Cir. 2010), dismissing a petition for review of a Board of Immigration Appeals decision because the petitioner, Garcia-Carbajal, had not exhausted his administrative remedies. Garcia-Carbajal sought to avoid deportation on the ground that it would cause unusual hardship to his family. The immigration judge (IJ) had denied Garcia-Carbajal's request, concluding that Garcia-Carbajal had previously been convicted of crimes of moral turpitude. In his appeal to the BIA, Garcia-Carbajal argued that the IJ had misapplied precedent in reaching the conclusion that Garcia-Carbajal's conviction was for a crime of moral turpitude. The BIA upheld the decision of the IJ.

On appeal to the Tenth Circuit, Garcia-Carbajal again argued that his crime was not a crime of moral turpitude and, therefore, he was eligible for relief. Judge Gorsuch applied an extremely narrow reading of Garcia-Carbajal's argument before the BIA, concluding that he only had argued that the process utilized by the IJ for determining whether his crime was one of moral turpitude was incorrect, not the substantive application of the law. Accordingly, Judge Gorsuch concluded that Garcia-Carbajal had not exhausted his administrative remedies as to his substantive argument and, thus, could not raise the argument on appeal. Judge Gorsuch highlighted that significant deference should be afforded to the agency: "Allowing [Garcia-Carbajal] to avoid a statutory exhaustion requirement based on language of, at most, ambiguous purpose would do nothing to respect agency authority and much to undermine it, encouraging future efforts by litigants to squeeze elephants of arguments into courts through administrative mouseholes." *Id.*at 1240. Judge Gorsuch's tendency to read petitioners' arguments before the Board narrowly sets an extremely high bar for preserving arguments on appeal.

In *Green v. Napolitano,* 627 F.3d 1341 (10th Cir. 2010), Judge Gorsuch joined a panel opinion holding that the revocation of a petition for immigrant status under 8 U.S.C. § 1155 is discretionary and, thus, not reviewable by the court. In the case, a United States citizen, Reginald Green, was married to a Nigerian citizen—Njideka Frances Abajue—and had filed a Petition for Alien Relative on her behalf. The petition was approved. The Department of Homeland Security later revoked the petition when Abajue's former spouse said that her prior marriage to him was fraudulent. The Board of Immigration Appeals agreed with the decision, concluding that Green had not submitted sufficient evidence to prove that his marriage to Abajue was bona fide. The Tenth

Circuit concluded that it did not have jurisdiction to review Green's appeal of the BIA's decision. The Tenth Circuit's decision in this case deepened a circuit split; at least one federal appeals court has concluded that it does retain jurisdiction to review the revocation of a visa petition. *See Herrera v. U.S. Citizenship & Immigration Servs.*, 571 F.3d 881, 885 (9th Cir. 2009). The Tenth Circuit's decision severely curtails the ability of individuals who are harmed by certain discretionary decisions of the BIA to seek relief in federal court.

And in *Bhattarai v. Holder*, 408 F. App'x 212 (10th Cir. 2011), Judge Gorsuch joined a majority opinion upholding the denial of a motion to reopen the removal proceedings of a Nepalese citizen who feared persecution because of his political opinions. The dissenting judge accused the majority of improperly replacing the agency's evaluation of the evidence with its own in violation of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), in order to uphold the denial of asylum. This case exemplifies Judge Gorsuch's willingness to overlook the Board of Immigration Appeals' mistakes and substitute his own reasoning for the Board's to reach an outcome he favors.

There are two cases where Judge Gorsuch has refused to defer to administrative adjudication in the immigration context. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015). But, in both of those cases, the issue on appeal—whether an agency could retroactively apply its statutory interpretation—easily could have been untethered from the immigration context and likely does not tell us much about Judge Gorsuch's views on immigration-related matters.

In *De Niz Robles*, Judge Gorsuch authored the majority opinion holding that it was improper for the Board of Immigration Appeals to retroactively apply one of its decisions. The case involved a complex statutory scheme that applied to individuals who had entered the country illegally and were seeking adjustment of their status. Nearly ten years before this case reached the court, the Tenth Circuit had concluded that 8 U.S.C. §1255(i) trumped 8 U.S.C. §1182(a)(9)(C)(i)(I), such that an individual could seek adjustment under §1255(i) despite the fact that he had been unlawfully present in the country for over a year, left the United States in order to seek a visa, and re-entered without inspection. *See Padilla-Caldera v. Gonzales (Padilla-Caldera I)*, 453 F.3d 1237 (10th Cir. 2006). The BIA disagreed and held that inadmissibility under § 1182(a)(9)(C)(i)(I) precluded adjustment under § 1255(i). *See Matter of Briones*, 24 I & N Dec. 355 (BIA 2007). The Tenth Circuit, in *Padilla-Caldera v. Holder (Padilla-Caldera II)*, 637 F.3d 1140 (10th Cir. 2011), deferred to the BIA's decision, concluding that it was a reasonable interpretation of ambiguous statutory language.

Before the BIA had issued its ruling in *Matter of Briones*, however, De Niz Robles had applied for adjustment of status under §1255(i) based on *Padilla-Caldera I*. His application took several years to process, so by the time it was adjudicated, *Padilla-Caldera II* had been decided. Accordingly, the BIA applied *Padilla-Caldera II* and *Matter of Briones* and denied De Niz Robles's application. De Niz Robles challenged that decision and the Tenth Circuit agreed that the BIA had inappropriately applied *Matter of Briones* retroactively to his application that was filed before that decision was issued. Judge Gorsuch noted that retroactive application in this case would have been unwise.

In a related case that is more often cited for the proposition that Judge Gorsuch is hostile to administrative decision making, *Gutierrez-Brizuela*, Judge Gorsuch once again overruled the Board of Immigration Appeals. Writing for the majority, Judge Gorsuch concluded that the BIA improperly had applied *Matter of Briones* to Gutierrez-Brizuela's application. Gutierrez-Brizuela had applied for adjustment of status relying on *Padilla I*, which held that he could

seek such relief. At the time of his application, the BIA issued its decision in *Matter of Briones*, which conflicted with *Padilla I*, but the Tenth Circuit had not yet ruled on the BIA's new interpretation or overruled its precedent. Accordingly, Judge Gorsuch reasoned, the BIA should have continued applying *Padilla I* to all applications submitted to it before its holding in Matter of Briones had been given legal effect by *Padilla II*.

Outside of the context of agency adjudication, Judge Gorsuch's rulings frequently have been adverse to immigrants' rights. For example, in *United States v. Adame-Orozco,* 607 F.3d 647 (10th 2010), Judge Gorsuch wrote the majority opinion affirming the denial of Adame-Orozco's request to have the indictment against him dismissed. The indictment charged Adame-Orozco with illegally reentering the country subsequent to a conviction for an aggravated felony. Adame-Orozco argued that the indictment must be dismissed because his prior deportation was invalid. It was invalid, he argued, because the issuance of the deportation order had not afforded him adequate time to attack collaterally the underlying state felony drug conviction. Judge Gorsuch concluded that Adame-Orozco's argument about his ability to attack collaterally his state convictions was irrelevant to the validity of the current indictment. Judge Gorsuch reasoned that the statute in question, 8 U.S.C. § 1326, permitted Adame-Orozco to raise a defense against the charges against him only if he could show that the initial *"deportation proceedings at which the order was issued* improperly deprived" him "of the opportunity for judicial review." *Adame-Orozco*, 607 F.3d at 652 (internal quotation marks omitted). But, Judge Gorsuch said, Adame-Orozco alleged that he didn't have sufficient opportunity to challenge the state convictions and the law did not permit that defense for illegal reentry charges: Federal law "does not afford a license to bootstrap separate criminal proceedings into the process guaranteed to aliens facing deportation." *Id.* at 655.

Judge Gorsuch also authored a case about the rights of immigration detainees. In *Porro v. Barnes,* 624 F.3d 1322 (2010), Judge Gorsuch wrote a majority opinion siding with law enforcement over a federal immigration detainee. The plaintiff, Alfredo Porro, was tased at least three times while restrained in a chair. The district court had granted summary judgment in favor of Porro on his claims against the officer who had tased him, a conclusion not challenged on appeal. But, the Tenth Circuit affirmed the grant of summary judgment in favor of the sheriff and the municipality. Before reaching the merits of Porro's claim, Judge Gorsuch concluded that it was the Due Process Clause that applied to Porro's claims: "We hold that it is this last, due process, standard that controls excessive force claims brought by federal immigration detainees." *Id.* at 1326. Judge Gorsuch then concluded that Porro could not prevail against the sheriff because the sheriff had not been personally responsible for the excessive force and § 1983 did not permit a claim for supervisory liability. As for the municipality, Judge Gorsuch rejected Porro's argument that it was liable for failing properly to train its officers. Porro had argued that a federal policy forbade use of tasers against immigration detainees and that the municipality had permitted its officers to flout that policy. Judge Gorsuch disagreed: "[T]he failure [by the county] to enforce a prophylactic policy imposing a standard of care well in excess of what due process requires cannot be and we hold is not enough by itself to create a triable question." *Id.* at 1329-1330.

VI. FIRST AMENDMENT

A. Campaign Finance

One of Judge Gorsuch's concurrences affords insight into his views on campaign contributions. In *Riddle v. Hickenlooper,* 742 F.3d 922 (10th Cir. 2014), Judge Gorsuch joined a Tenth Circuit majority opinion that

struck down a Colorado statute that imposed lower campaign contribution limits on minor party candidates than those applied to major party candidates. The court found this scheme unconstitutional on Fourteenth Amendment equal protection grounds; it declined to address First Amendment claims brought by the parties. Because the statute was discriminatory, the outcome of the case itself does not provide much guidance on how Judge Gorsuch would approach campaign finance issues in the future.

However, Judge Gorsuch authored a concurring opinion in the case suggesting that making a political contribution is a "fundamental" right that afforded the highest form of constitutional protection, strict scrutiny. As he wrote, "[n]o one before us disputes that the act of contributing to political campaigns implicates a basic constitutional freedom, one lying at the foundation of a free society and enjoying significant relationship to the right to speak and associate—both expressly protected First Amendment activities." *Id.* at 931 (Gorsuch, J., concurring). In other words, Judge Gorsuch is maintaining the link between political money and speech.

B. Church and State

As noted above, in cases like *Hobby Lobby* and *Little Sisters of the Poor*, Judge Gorsuch takes an expansive view of the religious liberty of persons and corporations, even when those religious beliefs curtail the rights of other Americans.

It is not surprising that he also is extremely permissive in permitting public displays of religion, more so than a majority of judges on the Tenth Circuit. In doing so, he has repeatedly criticized the "reasonable observer" test for Establishment Clause cases as, in his opinion, too likely to find impermissible endorsements of religion by the government.

In *Green v. Haskell County Board of Commissioners,* 568 F.3d 784 (10th Cir. 2009), the Tenth Circuit held that a county board had violated the Establishment Clause by approving a constituent's request to display a Ten Commandments monument on the courthouse's lawn. The Tenth Circuit, over Judge Gorsuch's vigorous dissent, denied the Board's request to rehear the case en banc. See *Green v. Haskell Cnty. Bd. Of Comm'rs.,* 574 F.3d 1235 (10th Cir. 2009).

In a second case involving the Establishment Clause, Judge Gorsuch again departed from his colleagues. In *American Atheists, Inc. v. Duncan,* 616 F.3d 1145 (10th Cir. 2010), the Utah Highway Patrol Association erected twelve-foot high crosses to memorialize fallen Utah Highway Patrol troopers. The Tenth Circuit held that this practice violated the Establishment Clause because a reasonable observer would conclude that the State preferred or endorsed a certain religion. Judge Gorsuch dissented from the denial of rehearing en banc, criticizing the majority's application of Supreme Court precedent. He accused the majority opinion of giving the court too much power by incorrectly concluding that "the constitutional authority to invalidate not only duly enacted laws and policies that *actually* 'respect[] the establishment of religion,' but also laws and policies a reasonable hypothetical observer could *think* do so." *American Atheists, Inc. v. Davenport,* 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting) (internal citation omitted).

Moreover, although not a suit involving the Establishment Clause, Judge Gorsuch joined a dissent from a denial of rehearing en banc in *Summum v. Pleasant Grove City,* 499 F.3d 1170 (10th Cir. 2007), regarding placement of a religious monument in a public park. In that case, a religious organization, Summum, had requested permission to place a monument in the park containing the Seven Aphorisms of Summum. *See Summum v. Pleasant Grove City,* 483 F.3d 1044 (10th Cir. 2007). The

monument would have been similar in size to the Ten Commandments monument already in the park. After the city denied its request, Summum sued, arguing that the denial violated its rights under the Free Speech Clause of the First Amendment and seeking injunctive relief. The Tenth Circuit agreed with Summum and ordered the district court to grant Summum's request for a preliminary injunction. In the dissent from the denial of rehearing en banc joined by Judge Gorsuch, Judge McConnell argued that the city had made a reasonable, content-based judgment in denying the monument. The Supreme Court reviewed the case and overturned the Tenth Circuit's holding, concluding that acceptance of privately donated religious monuments displayed in public parks does not violate the rights of others who are denied park space for a different religious monument. *See* *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009).

Finally, as noted above, in criticizing progressives for seeking to use the courts to enforce constitutional rights, Gorsuch specifically referenced challenges to school vouchers, likely referring to challenges to the use of school vouchers for religious institutions.

C. Free speech and expression under the First Amendment

In *Abilene Retail #30, Inc. v. Board of Commissioners,* 508 F.3d 958 (10th Cir. 2007), Gorsuch dissented from the denial of a petition for rehearing en banc in a case involving an adult bookstore's First Amendment challenge to a restrictive zoning ordinance. The Tenth Circuit had reversed the judgment of the district court, which had upheld a county ordinance as a content-neutral effort to address the secondary effects of adult businesses. *See* *Abilene Retail #30, Inc. v. Bd. Of Comm'rs,* 492 F.3d 1164 (10th Cir. 2007). The Tenth Circuit concluded that a jury had to decide whether the board reasonably relied on studies produced to analyze the secondary effects of adult businesses on communities. The studies, all from other jurisdictions, only analyzed secondary effects in urban settings, and the bookstore at issue in the case was located in an entirely rural setting. Arguing that the entire Tenth Circuit should rehear the case, Judge Gorsuch explained that the court had imposed too high a burden on municipalities for overcoming First Amendment challenges to zoning ordinances targeting adult businesses.

Judge Gorsuch authored the opinion in *Hill v. Kemp,* 478 F.3d 1236 (10th Cir. 2007), which dealt with the constitutionality of a vanity plate scheme in the State of Oklahoma that motorists contended was discriminatory. In that case, the Oklahoma Religious Coalition for Reproductive Choice Education Fund (ORC) had argued that Oklahoma had made it easier for drivers to obtain license plates with the slogans "Adoption Creates Families" and "Choose Life" than it had for individuals wishing to have license plates with slogans supportive of abortion rights. Moreover, ORC argued that the revenue collected from the sale of specialty license plates impermissibly funded groups involved in adoption, but had excluded ORC's adoption services because the organization was also involved in advocating for abortion rights. Judge Gorsuch dismissed ORC's claims that the State had made access to certain license plates more difficult, because the specialty license plate fees were a tax and so their claims were barred by the Tax Injunction Act. ORC could pursue its First Amendment claims that the State impermissibly denied "it the opportunity to receive monies from the Choose Life Assistance Program based solely on its viewpoint." *Id.* at 1254.

Judge Gorsuch authored the majority opinion in *Walton v. Powell,* 821 F.3d 1204 (10th Cir. 2016), which denied qualified immunity to a supervisor who allegedly had terminated an employee in violation of her rights to free political association under the First Amendment. In that case, Walton had worked as a political appointee in the New Mexico State Land Office under a Republican land

commissioner. Walton described herself as a long-time, active Republican. Before the land commissioner lost his reelection bid, he appointed her to a civil service job, where she could not be removed for political reasons. Shortly after the new land commissioner—a Democrat—took over, he terminated Walton because, he said, she was unqualified for the position. Before reaching the merits of the case, Judge Gorsuch declined to extend the framework articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), to First Amendment retaliations claims. Judge Gorsuch then proceeded to uphold the denial of qualified immunity to the land commissioner. Judge Gorsuch explained that when a government employer fires a protected civil service employee for "failing to endorse or pledge allegiance to a particular political ideology," the employee generally states a claim for retaliation in violation of the First Amendment. *Id.*at 1213.

In *Bustos v. A&E Television Networks*, 646 F.3d 762 (10th Cir. 2011), Judge Gorsuch wrote the panel opinion holding that the History Channel did not defame an inmate at a Colorado prison when it aired a documentary that identified him as being part of the Aryan Brotherhood prison gang. The plaintiff was not a member of the group and he said the misidentification caused him to receive threats from both the gang and its rivals. Judge Gorsuch concluded, however, that while the plaintiff was not "formally a member of the Brotherhood," he did communicate with the group and conspired to transport drugs on their behalf. *Id.* at 767. The court noted that while the difference between being a "member" of the group and being affiliated with the organization, could "cause some modicum of additional injury to [the plaintiff's] reputation," it was "not one a juror could find likely to be significant." *Id.* at 767. In upholding the dismissal of the lawsuit, Gorsuch noted that "while the statement . . . may not be *precisely true*, it is substantially true. And that is enough to call an end to this litigation as a matter of law." *Id.* at 762.

Judge Gorsuch also joined the panel opinion in *Cory v. Allstate Insurance,* 583 F.3d 1240 (10th Cir. 2009), which held that the defendant had not defamed the plaintiff. The panel concluded that substantial truthfulness is an affirmative defense and "minor inaccuracies will not preclude the defense so long as the substance, the gist, the sting of the defamatory charge can be justified." *Id.* at 1244.

Judge Gorsuch also joined a unanimous panel opinion in *Mink v. Knox,* 613 F.3d 995 (10th Cir. 2010). Thomas Mink, a student at the University of Northern Colorado conceived a fictional character, "Junius Puke," for an editorial column. The character was loosely based on actual Northern Colorado Professor Junius Peake, and included altered photographs of the professor "wearing dark sunglasses and a Hitler-like mustache." *Id.* at 998. The column also contained statements from the fictional character spouting views directly in contrast to those of Professor Peake. The professor filed a criminal libel complaint, and police searched Mink's home, taking his computer and other written materials.

Based on the Fourth Amendment, the Tenth Circuit ruled that a search warrant requesting "all computer and non-computer equipment and written materials in [a defendant's] house" was too broad. *Id*. at 1011. The court also found that a criminal defamation prosecution against Mink could not be upheld under the First Amendment, noting that "[e]ven false statements of fact are protected from a defamation claim if any reasonable person would recognize the statements as parody." *Id.* at 1005. The court further emphasized: "Although the Supreme Court has not yet squarely addressed whether fantasy, parody, rhetorical hyperbole, or imaginative expression is actionable in a case where a plaintiff is neither a public figure nor the speech on a matter of public concern, this circuit and at least one other circuit have done so." *Id.* at 1006.

Judge Gorsuch concurred that Mink's parody didn't constitute criminal libel. Gorsuch wrote, "the First Amendment precludes defamation actions aimed at parody, even parody causing injury to individuals who are not public figures or involved in a public controversy." *Id*. at 1012 (Gorsuch, J., concurring). However, he did not join the court's decision with respect to whether a private person can bring a libel suit involving parody where the speech is not a matter of public concern. He noted that "the Supreme Court has yet to address how far the First Amendment goes in protecting parody," adding that, "reasonable minds can and do differ about the soundness of a rule that precludes private persons from recovering for reputational or emotional damage caused by parody about issues of private concern." *Id*. at 1012.

Judge Gorsuch also joined a panel opinion in *Alvarado v. KOB-TV, LLC,* 493 F.3d 1210 (10th Cir. 2007), which affirmed a lower court decision holding that two officers could not recover for invasion of privacy and intentional infliction of emotional distress after a television station claimed they had been involved in a sexual assault. The two officers were never charged and an investigation cleared them of wrongdoing. Yet, the court ruled that the public had a legitimate interest in stories about police misconduct, noting there is a strong public interest in ensuring that officers comport themselves in accordance with the law. The panel found that criminalizing the publication of officers' identities would be at odds with the First Amendment because the officers' suspected involvement in a sexual assault was a topic of public interest and their identities were a large part of what made the story newsworthy.

In *Anderson v. Suiters,* 499 F.3d 1228 (10th Cir. 2007), Judge Gorsuch joined a similar Tenth Circuit opinion dismissing a plaintiff's federal right to privacy and intrusion upon seclusion claims against a television reporter and her news station. The plaintiff had been raped by her ex-husband, and she provided a video of the attack to a police officer. Against the direct wishes of the plaintiff, the officer showed the video to a reporter, who then aired a brief clip of the ex-husband from the video. (The plaintiff was not pictured or mentioned by name.) The district court allowed the plaintiff's case against the officer to proceed, but dismissed the case against the reporter and her station. The Tenth Circuit agreed with the trial court's decision, noting that "a matter can be of legitimate public concern even though it concerns private individuals." *Id*. at 1235. The court further found that the reporter was not a state actor and, therefore, civil rights charges against the reporter could not be brought.

VII. THE ENVIRONMENT

Judge Gorsuch has frequently turned away challenges by environmental groups seeking to protect natural resources and public land. Moreover, he has been skeptical of rules promulgated by environmental agencies designed to increase oversight of large corporations. In the cases where Judge Gorsuch has agreed with federal agency rulemaking it was in large part because the company challenging the rule had waived its best arguments, *see* *United States v. Magnesium Corp. of Am.,* 616 F.3d 1129 (10th Cir. 2010), or because the action was favorable to corporate interests, *see* *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement,* 620 F.3d 1227 (10th Cir. 2010).

On at least two occasions Judge Gorsuch has voted to undercut the ability of environmental groups to participate in litigation to vindicate their interests. In *Wilderness Society v. Kane County,* 632 F.3d 1162 (10th Cir. 2011), Judge Gorsuch concurred in a case where the majority dismissed for lack of standing a claim brought by several environmental organizations asserting that a county ordinance

that opened a large stretch of federal land to off-highway vehicle use was preempted by federal law. (Judge Gorsuch agreed with the outcome of the case, but argued that Wilderness Society's claims were primarily moot, and those that were not suffered from redressability problems.) The dissent accused the majority of "misstat[ing] and misconstru[ing] the positions of the parties and the rulings of the trial court to achieve this result." *Id*. at 1180 (Lucero, J., dissenting). The dissent further stated that the holding "will work untold mischief" and "will have long-term deleterious effects on the use and management of federal public lands." *Id.* at 1180, 1195.

In the second case, *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, 540 F. App'x. 877 (10th Cir. 2013), a panel majority allowed intervention as of right to environmental groups because the defendant Forest Service would not adequately represent the environmental groups' interests, or might change its views during the litigation. Judge Gorsuch dissented, arguing that there was no actual difference between the parties and that the Alliance should not be allowed to intervene. The majority noted, however, that, in reaching his conclusion, Judge Gorsuch relied heavily on a plurality en banc opinion in an earlier Tenth Circuit case, even though it involved a much narrower issue and was joined by only three of thirteen judges.

Judge Gorsuch displayed a willingness to overrule an agency's rulemaking when it benefited corporate interests in *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131 (10th Cir. 2010) (en banc). In that case, Judge Gorsuch authored a divided en banc majority opinion in a complex case about federal environmental regulation that upset years of settled law and overturned the EPA's interpretation of an ambiguous statute. In that case, Hydro Resources, Inc. (HRI) wanted to mine its property in northwestern New Mexico. Knowing that it needed to apply for a Safe Drinking Water Act permit, it applied for and received one from the New Mexico Environment Department, whom the EPA had tasked with issuing such permits on all lands except "Indian lands." After HRI received its permit the EPA ruled that its property qualified as "Indian land" and, therefore, HRI had to obtain a permit from the EPA in order to begin mining activities. In a lengthy opinion, Judge Gorsuch rejected the EPA's ruling saying that it had employed a test—the community of reference test—that had been abandoned by the Supreme Court. Instead, Judge Gorsuch concluded that "Indian land" consisted "only of land explicitly set aside for Indian use by Congress (or its designee) and federally superintended." *Id.*at 1148. Accordingly, Judge Gorsuch overturned the agency's ruling. The dissent, authored by Judge Ebel and joined by four other judges, criticized Judge Gorsuch's opinion for overreaching:

> [T]he consequences are likely to be enormous, reintroducing checkerboard jurisdiction into the southwest on a grand scale and disrupting a field of law that had been settled for decades. In overturning our community-of-reference test, the majority today reaches a result not compelled by either Supreme Court or Tenth Circuit precedent. Before all is said and done, this confusion and the serious consequences generated by today's opinion may ultimately require resolution by the Supreme Court.

Id. at 1182 (Ebel, J., dissenting).

Taking a different approach, Judge Gorsuch approved of agency action when it benefitted big business. In *Southern Utah Wilderness Alliance*, Judge Gorsuch joined a divided panel majority opinion that allowed a Utah mine project to proceed. In that case, the Tenth Circuit concluded that federal agencies acted properly when they granted coal leases to UtahAmerican Energy. The environmental

group challenging the agencies' determination had argued that the company's lease had expired and that, in any event, even if the lease was valid, the Office of Surface Mining Reclamation and Enforcement had to issue a new mining plan before mining operations could begin. The court deferred to the agencies' interpretation of the lease agreement and allowed the mining operation to go forward. In interpreting portions of the lease and its suspension order, the dissent accused the majority of inserting ambiguity where none existed:

> The majority suggests that this language is outrageous and that the parties must have meant to say that the suspension would remain in effect throughout the time that the permitting process could be challenged. That may very well have been the parties' intent, but that doesn't render the language ambiguous. Words matter, and here the words chosen for this suspension order are simply not ambiguous.

620 F.3d at 1246 (Ebel, J., dissenting).

In addition, in *Magnesium Corp. of America*, Judge Gorsuch authored a majority opinion upholding the EPA's decision to regulate waste byproducts produced by a magnesium plant and fine the company for failing to comply with the regulations when the company had waived its best challenges. In that case, Judge Gorsuch concluded that the EPA was not bound by a previous tentative regulatory interpretation that exempted the waste byproducts from regulation. The EPA was free to change its tentative interpretation of the regulation to capture the waste byproducts produced by the magnesium plant without a notice and comment rulemaking, Judge Gorsuch said, because the initial interpretation was not binding on the EPA. Judge Gorsuch cautioned that an agency that changes its interpretation must provide a cogent explanation for the newly adopted interpretation and that, under the Due Process Clause, the imposition of penalties for violation of a regulation can only occur if the party receives fair notice. But, because the magnesium plant had not raised a Due Process challenge, nor had it argued that the EPA failed to explain its new interpretation, those arguments were waived.

Finally, Judge Gorsuch authored the majority opinion in *Cook v. Rockwell International Corp.*, 790 F.3d 1088 (10th Cir. 2015), holding that the Price-Anderson Act (PAA) did not preempt state-law nuisance claims brought by property owners harmed by the improper disposal of radioactive waste near their land. In that case, a jury had awarded the plaintiffs a multi-million dollar verdict on both their claims under the PAA and state law. After the Tenth Circuit vacated the judgment on the PAA claim, the plaintiffs abandoned it and pursued only their state law nuisance claims. The district court concluded that the PAA preempted the state claims but the Tenth Circuit disagreed, ordering the district court to reinstate the nuisance claim verdict in favor of the property owners.

VIII. CRIMINAL JUSTICE

A. Habeas Corpus

Nowhere is Judge Gorsuch's hostility toward those accused of committing crime more apparent than in his rulings on habeas corpus petitions. Judge Gorsuch consistently concludes that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) affords the federal courts extremely limited power to review decisions of state courts or lower federal courts. Accordingly, by narrowing the reviewing authority of the federal appellate court, Judge Gorsuch enables constitutionally problematic convictions to stand. Illustrative is a series of cases, *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009), *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc), and *Hooks v. Workman*,

689 F.3d 1148 (10th Cir. 2012), where he dissented from majority decisions of his colleagues who found that claims of ineffective assistance of counsel warranted habeas relief.

In *Williams*, before a trial for first-degree murder, the prosecutor had offered Williams a ten-year sentence in exchange for a guilty plea to second-degree murder. Williams wanted to take the offer, but his attorney threatened to withdraw his representation if Williams accepted the deal. At trial, Williams was convicted of first-degree murder and sentenced to life in prison without the possibility of parole. On direct appeal, the Oklahoma Court of Criminal Appeals determined that Williams's counsel had rendered ineffective assistance during the plea process and ordered that Williams's sentence be modified to life with the possibility of parole, to remedy the constitutional violation. Williams petitioned for habeas relief and the Tenth Circuit ruled that the modification of Williams' sentence was inadequate to remedy the constitutional violation and that the case needed to be remanded for the parties to explore alternative remedies.

Judge Gorsuch dissented. He argued that no Sixth Amendment violation had occurred because, even though counsel's performance had been deficient, Williams was not prejudiced because his subsequent fair trial rendered the ineffective assistance in the plea process inconsequential. The majority, which included George W. Bush appointee Michael McDonnell and George H.W. Bush appointee Paul Kelly, noted that Judge Gorsuch's position—that "no remedy exists because no defendant can ever prove prejudice in rejecting a plea given a subsequent fair trial"—was supported by "*no* federal circuit case." 571 F.3d at 1093.

In *Wilson*, the Tenth Circuit held that a previous panel had properly applied the standard of review in Michael Lee Wilson's habeas corpus case. There, Wilson had been sentenced to die, but argued that his sentence should be overturned because his counsel was ineffective for failing to investigate evidence of his mental health problems. After he had been sentenced to die, Wilson proffered non-record evidence that he claimed demonstrated that his counsel's representation fell below constitutional standards. Wilson requested an evidentiary hearing to present this material to the Oklahoma Court of Criminal Appeal. The request was denied and the OCCA denied Wilson's ineffective assistance claim.
The Tenth Circuit, sitting en banc, concluded that when the state court "refuses to grant an evidentiary hearing to consider material, non-record evidence of ineffective assistance of counsel that the defendant has diligently sought to develop, and then rules on the ineffectiveness claim without consideration of this evidence," the denial of the claim is not entitled to deference under AEPDA. 577 F.3d at 1300. Judge Gorsuch dissented, saying that he would have upheld the state court ruling condemning Wilson to die without full consideration of his evidence of ineffective assistance of counsel.

In *Hooks*, Judge Gorsuch also dissented from a majority opinion written by George W. Bush appointee Jerome Holmes, holding that a prisoner's attorney ineffectively represented him at the sentencing phase of his trial. In that case, Hooks's attorney failed to undertake an adequate investigation for mitigation evidence. In particular, the attorney had not presented adequate evidence of family and social history, nor had he presented adequate mental-health evidence, including that Hooks had been diagnosed with mild or borderline mental retardation and had suffered brain damage as a young adult. Judge Gorsuch dissented, arguing that the mitigation evidence would not have swayed the jury and some of Hooks's attorney's decisions were reasonable strategic choices that the court should not have questioned.

Judge Gorsuch authored the majority opinion in *Wackerly v. Workman,* 580 F.3d 1171 (10th

Cir. 2009), which denied petitioner's ineffective assistance of counsel claim. In that case, Wackerly had been sentenced to death and argued that his attorney had been deficient in failing to investigate and present mitigating evidence during sentencing. Wackerly said that evidence about his history of substance abuse and psychological maladies should have been introduced to the jury. Judge Gorsuch rejected Wackerly's argument and concluded that the aggravating factors presented by the government were strong enough to outweigh any mitigating impact of the evidence proposed by Wackerly: "This is simply not a case where unproduced mitigation evidence is of such a kind and quantity as to call into question the outcome of Mr. Wackerly's penalty phase proceedings." *Id*. at 1182.

In other cases, Judge Gorsuch was in the majority of a divided panel in denying a habeas petition. For example, in *Eizember v. Trammell,* 803 F.3d 1129 (10th Cir. 2015), Judge Gorsuch upheld the Oklahoma Court of Criminal Appeal's (OCCA) denial of Eizember's habeas corpus petition, concluding that the OCCA had not erred when it determined that the trial court properly denied Eizember's motion to dismiss two jurors for cause. In that case, Eizember had been sentenced to death after his request to have two jurors removed from the panel was denied. Eizember argued that those jurors were impermissibly biased in favor of the death penalty. One of the jurors had made particularly troubling remarks about the death penalty, including, "I firmly believe if you take a life you should lose yours," and that she had "no reservations about seeing someone put to death so long as it has been proven the person is guilty." *Id*. at 1136. The juror also expressed her belief that the death penalty was an appropriate punishment because it "[k]eeps taxpayers from having to support a criminal for the remainder of their life." *Id.* Judge Gorsuch concluded that the court could not second-guess the decision of the OCCA because it had applied the correct legal standard.

In her concurrence, Judge McHugh agreed with Judge Gorsuch's ultimate holding because Eizember had forfeited his argument that the lower court applied the wrong legal standard, but disagreed with his assessment that the OCCA had applied the correct legal standard in the case. She explained that "the OCCA's opinion reflects its continuing erroneous belief that a juror may withstand a challenge for cause unless she is 'irrevocably committed to any one punishment. This is no longer a correct statement of the law . . . ." *Id*. at 1163 (McHugh, J., concurring) (internal citation omitted). Moreover, in her partial dissent, Judge Briscoe disagreed with Judge Gorsuch's conclusion that the juror in question did not need to be stricken for cause and would have remanded for resentencing.

In *United States v. Eccleston,* 521 F.3d 1249 (10th Cir. 2008), Eccleston filed a habeas corpus petition seeking to have his federal and state sentences run concurrently. The district court had dismissed the petition without prejudice for failing to exhaust administrative remedies. The majority, including Judge Gorsuch, agreed that Eccleston had failed to exhaust, but concluded that it was prudent to proceed to the merits of Eccleston's arguments and dismiss his petition with prejudice. Judge Lucero dissented. He argued that dismissing the petition without prejudice was more appropriate and would afford Eccleston time to pursue his administrative remedies. Judge Lucero accused the majority's practice of reviewing the merits of an unexhausted claim as violating "strong principles of judicial economy and respect for administrative agency deliberation." *Id*. at 1256 (Lucero, J., dissenting). Moreover, Judge Lucero explained that the majority misread circuit precedent when concluding, on the merits, that Eccleston's claim for relief was foreclosed.

In *Grant v. Trammell,* 727 F.3d 1006 (10th Cir. 2013), Judge Gorsuch wrote a divided panel

opinion rejecting all of the claims for relief of a prisoner who had been sentenced to death. The dissent disagreed with Judge Gorsuch's conclusion that Grant was not entitled to a new sentencing hearing because his attorney's errors in finding and presenting mitigating evidence were harmless. Judge Gorsuch also brushed off the petitioner's argument that the cumulative effect of the numerous errors that occurred throughout every step of his trial warranted relief: "After all, 'it is the rare trial that will be an ideal specimen in all respects, given that even the most well-intentioned trial participants may commit the occasional error.'" *Id*. at 1025 (quoting *United States v. Runyon,* 707 F.3d 475, 520 (4th Cir. 2013)).

B. Rights of the accused

Outside of the context of habeas corpus, Judge Gorsuch has expressed similar dismissiveness to the rights of the accused. In particular, Judge Gorsuch was more willing than his colleagues to conclude that even if rights were violated, convictions should be upheld.

In *United States v. Benard,* 680 F.3d 1206 (10th Cir. 2012), the Tenth Circuit held that Benard, who had pleaded guilty to drug and gun charges and was sentenced to 20 years' imprisonment, should be allowed to withdraw his guilty plea and proceed to trial because the district court erred when it failed to suppress the statements he made while in custody without having received *Miranda* warnings. Judge Gorsuch disagreed. In his dissent, Judge Gorsuch agreed with the majority that the un-*Mirandized* statements were erroneously admitted by the district court, yet he would have held that the error was harmless and refused to allow Benard to withdraw his guilty plea.

In *United States v. Lujan,* 603 F.3d 850 (10th Cir. 2010), Judge Gorsuch joined a divided panel opinion overturning the district court's determination that evidence of certain prior convictions had to be suppressed during the sentencing phase of a capital case. The district court had concluded that the evidence would be unduly prejudicial to the defendant.

Writing in dissent, Judge Henry disagreed with the majority's conclusion because it was required to and did not afford substantial deference to the district court. Judge Henry admitted that he did not know whether he would have excluded the evidence if he were the trial judge, but concluded that it was proper to leave the matter to the district judge unless his decision was an abuse of discretion: "We are reviewing an experienced judge's decision for abuse of discretion in an area where the statute expressly granted the court significant discretion, and in an area that has no easy answers. Accordingly, I would defer to his judgment on this matter." *Id*. at 864 (Henry, C.J., dissenting).

Judge Gorsuch authored the majority opinion in *United States v. Taylor,* 514 F.3d 1092 (10th Cir. 2008), upholding the defendant's conviction for assault despite improper comments by the prosecutor. The defendant, Johnson Kenneth Taylor, was on trial for starting a fight on the Southern Ute Indian Reservation. During opening arguments, the prosecutor encouraged the jury to convict Taylor in order to "end the cycle of violence" on the reservation. Taylor objected to the statement and the judge gave a curative instruction. Taylor was convicted and he appealed the verdict, challenging the prosecutor's misconduct. All three judges on the panel voted to affirm Taylor's conviction. Notably, however, Judge Briscoe concurred in the case, arguing that Judge Gorsuch had applied the incorrect standard of review. Judge Gorsuch concluded that the court should apply the deferential plain error review standard; whereas Judge Briscoe argued that the court should review Taylor's claim de novo. Judge Briscoe noted that Judge Gorsuch's application of a very deferential standard of review "deviates from our usual analysis of

a district court's curative instructions." *Id*.at 1103. Judge Briscoe explained that Judge Gorsuch unnecessarily restricted the ability of the court to review prosecutorial misconduct claims.

In *United States v. Sedillo,* 509 F. App'x 676 (10th Cir. 2013), Judge Gorsuch joined a divided majority opinion that upheld the conviction of Paul Reyes Sedillo of being a felon in possession of a firearm. Sedillo argued that his right to confront a witness against him, namely the DNA expert who found his DNA on the firearm, had been violated. The individual who had testified about the DNA evidence had not herself performed the testing and the DNA report was never submitted into evidence. The majority did not address Sedillo's Confrontation Clause argument, because it concluded that there was enough evidence to support his conviction on a theory of constructive possession: Sedillo lived in the house where the gun was found and his mother was the only other occupant of the home and she denied knowledge of the gun. The dissent would have reversed Sedillo's conviction. Not only were Sedillo's Confrontation Clause rights violated, the dissent argued, but there was no evidence connecting Sedillo to the firearm; its mere presence in the home in a common space was not sufficient to create a presumption that Sedillo possessed the weapon.

In *Cordova v. City of Albuquerque,* 816 F.3d 645 (10th Cir. 2016), three Albuquerque Police Department officers shot Stephan Cordova after he raised a gun in their direction. Cordova survived and was charged with assault, although the charges were later dismissed on speedy trial grounds. Cordova then brought this action under 42 U.S.C. § 1983, claiming, among other arguments, that the assault charges were a malicious prosecution. A unanimous panel of the Tenth Circuit held that Cordova had failed to state a claim for malicious prosecution. The panel found that the dismissal of the assault charges under the Speedy Trial Act is not evidence of Cordova's innocence and thus did not qualify as a favorable termination for purposes of a malicious prosecution action. In a concurrence, Gorsuch went farther than his colleagues and argued that the Fourth Amendment does not provide *any* basis for a malicious prosecution claim, which was contrary to established Tenth Circuit law, *see Wilkins v. DeReyes,* 528 F.3d 790, 797 (10th Cir. 2008). In fact, Judge Gorsuch concluded that the Constitution provides no remedy for a malicious prosecution. He concluded, "I just do not see the case for entering a fight over an element of a putative constitutional cause of action that may not exist and no one before us needs." *Cordova*, 816 F.3d at 666 (Gorsuch, J., concurring). Judge Gorsuch's concurrence displays his disdain for litigants' efforts to use the Constitution to remedy alleged harms.

In *United States v. Ford,* 550 F.3d 975 (10th Cir. 2008), Judge Gorsuch dissented from a panel opinion holding that a defendant was not entitled to a new trial for illegally selling a machine gun when prosecutors failed to disclose an e-mail that the defendant argued would have supported his entrapment defense. The majority held that the documents were not material and there was not a reasonable probability that it would have changed the outcome of the trial, notably because there was ample evidence that the defendant was predisposed to selling the machine gun. Judge Gorsuch reasoned that the e-mail was material because it could help the defendant establish that it was the government's informant that was the initiator of the gun sale.

In *United States v. Hasan,* 526 F.3d 653 (10th Cir. 2008), Judge Gorsuch authored a unanimous opinion holding that the district court erred by failing to consider whether the Court Interpreters Act (CIA) entitled Ali Hasan to an interpreter during grand jury proceedings. In that case, Hasan, who was a refugee from Somalia, was granted asylum in the United States. Seven years later, a federal immigration officer interviewed him

about statements he made in his original asylum application. Hasan was called before two grand juries, the second of which indicted him for lying during the grand jury proceedings. Hasan subsequently was convicted of three counts of perjury. The district court concluded that Hasan was entitled to an interpreter during his trial, but did not consider whether the same was true for grand jury proceedings. Accordingly, the Tenth Circuit remanded the case for the district court to consider in the first instance whether Hasan was entitled to an interpreter during the grand jury proceedings. As Judge Gorsuch noted, given "that the CIA provides a uniform test and guarantee, applicable to grand jury and trial proceedings alike, once the district court *sua sponte* reversed itself and found an interpreter was required at trial in response to Mr. Hasan's CIA-based motions, we see no way it could avoid revisiting the lack of an interpreter during Mr. Hasan's grand jury testimony." *Id*.at 662.

C. Excessive force

Judge Gorsuch has often sided with police on excessive force claims, even in cases where the victims posed no threat to officer safety.

In *Wilson v. City of Lafayette,* 510 F. App'x 775 (10th Cir. 2013), Judge Gorsuch held that a police officer was entitled to qualified immunity from a § 1983 excessive force claim arising from his use of a stun gun that killed a young man. The officers had approached the man "near an area known to be used" to grow marijuana. *Id.* at 776. After the man admitted the plants were his, he fled, and the officer deployed his taser. Judge Gorsuch reasoned that the use of force was reasonable because "[defendant] was resisting arrest by fleeing from officers after they identified themselves—even if the crime of which he was suspected was not itself a violent one, he was likely to be apprehended eventually, and he hadn't harmed anyone yet." *Id*. at 777.

The dissent criticized Judge Gorsuch's analysis, noting that "[i]n the present case, it would be unreasonable for an officer to fire a taser probe at Ryan Wilson's head when he could have just as easily fired the probe into his back. The taser training materials note that officers should not aim at the head or throat unless the situation dictates a higher level of injury risk. Nothing about the situation here required an elevated level of force." *Id*. at 787.

In *Thomas v. Durastanti,* 607 F.3d 655 (10th Cir. 2010), Judge Gorsuch joined a divided panel majority opinion that reversed the denial of qualified immunity to an ATF agent who had shot Thomas. The ATF agents were on patrol, in plain clothes, when they noticed a car travelling at a high rate of speed away from a "high crime area." The agents followed the car and called for a state trooper to respond. The agents, along with the state trooper, followed the car into a gas station parking lot. The agents got out of their unmarked vehicle with guns drawn and approached the car. The men inside the car, fearing they were being robbed, attempted to drive away. The agents opened fire on the car because, the agents said, they were concerned it would hit them. The driver of the car was hit in the head and a passenger was hit in the leg. The occupants of the car sued one of the agents for violation of his Fourth Amendment rights and the agent argued that he was entitled to qualified immunity. Disagreeing with the district court, the Tenth Circuit concluded that the agent was entitled to qualified immunity because the agent's actions were reasonable in light of the danger he faced. The dissent argued that a trial was necessary to sort out the disputed version of events.

Judge Gorsuch also joined a majority opinion holding that a police officer had not used excessive force against a nine-year-old when she put him in a twist-lock hold that broke the child's collarbone. *See Hawker v. Sandy City Corp.,* 591 F. App'x 669 (10th Cir. 2014). In that case, the child was sitting on the floor

of a school hallway after having been detained by school officials for stealing an iPad. Although the child was not combative, and the officer had no reason to believe he would become combative, the officer utilized the hold when the child refused to talk to her.

In *Estate of Bleck v. City of Alamosa,* 643 F. App'x 754 (10th Cir. 2016), Judge Gorsuch authored a majority opinion concluding that officers had not used excessive force against a Vietnam War veteran who was suicidal when they burst into his hotel room unannounced with guns drawn and ended up shooting him. In that case, the officer had been asked to go to Bleck's hotel room after his counselor reported his fear that Bleck might hurt himself. Bleck's estate argued that the officers' tactics were wholly unnecessary because Bleck had not threatened to flee, nor was there any indication that he posed a danger to anyone but himself.

Judge Gorsuch joined two dissents from the denial of a petition for rehearing en banc in *Pauly v. White,* 817 F.3d 715 (10th Cir. 2016). In the underlying case, a panel of the Tenth Circuit concluded that an officer who shot a man to death while he was inside his home was not entitled to qualified immunity. *See Pauly v. White,* 814 F.3d 1060 (10th Cir. 2016). The panel had concluded, among other things, that issues of fact existed about whether it was reasonable for the officer to believe that the decedent posed an immediate threat.

On the other hand, in *Fisher v. City of Las Cruces,* 584 F.3d 888 (10th Cir. 2009), Judge Gorsuch concurred in an opinion allowing a man's excessive force claim to proceed to trial. In that case, a man's wife had called 911 after he had shot himself in the arm and stomach. When officers arrived at the scene, the plaintiff alleged that they unnecessarily handcuffed him in a painful way that worsened his injuries. And Judge Gorsuch dissented from a majority opinion in *A.M. ex rel. F.M. v. Holmes,* 830 F.3d 1123 (10th Cir. 2016), which held that school officials and a police officer were entitled to qualified immunity after the officer arrested and handcuffed a middle school student for interfering with the educational process. In that case, the student had made fake burping noises and engaged in other disruptive behavior during class and school officials called the police. The officer arrested the child and took him to juvenile detention. Judge Gorsuch disagreed with the majority, concluding that the defendants were not entitled to qualified immunity.

D. Cruel and unusual punishment and prison conditions

Judge Gorsuch has displayed disregard for the rights of people who are incarcerated. The burdens for inmates seeking redress for violations of their Eighth and—to a lesser extent—Fourteenth Amendment rights are already significant. But Judge Gorsuch has made it even more difficult, by restricting inmates' ability to join together as a class to vindicate their rights and by misapplying constitutional standards to increase the already substantial burdens.

In *Shook v. Board of County Commissioners,* 543 F.3d 597 (10th Cir. 2008), Judge Gorsuch authored the majority opinion holding that the district court had properly declined to grant class certification to prisoners with serious mental health needs who were being detained at the El Paso County Jail. The plaintiffs in the suit suffered from a number of illnesses: Mary Shook had both Asperger's syndrome and bipolar disorder, Thomas Reinig had paranoid schizophrenia, and Lottie Elliott was prescribed anti-psychotic medicine and attempted suicide while in the prison. Though all the plaintiffs alleged inadequate care by the prison, Judge Gorsuch concluded, the district court had not abused its discretion in declining to certify them as a class where they would require different remedies:

> [P]laintiffs here seek an injunction ordering a wide range of behavior conformed to an essentially contentless standard, bounded only by reference to ambiguous terms like 'reasonable' behavior or 'adequate' treatment. While we do not propose that plaintiffs must come forward with a finished injunction at the class certification stage, they must be able to demonstrate that such injunctive relief—relative to the class—is conceivable and manageable without embroiling the court in disputes over individualized situations and constantly shifting class contours.

Id. at 608. By eliminating the possibility that the inmates could sue as a class, Judge Gorsuch effectively foreclosed their ability to secure proper medicine and adequate treatment from the jail. As the Ninth Circuit noted in rejecting the application of the case to Arizona inmates seeking relief for inadequate medical treatment, "[w]e seriously doubt that the degree of specificity suggested" in Judge Gorsuch's "wide-ranging dicta is properly required at the class certification stage." *Parsons v. Ryan,* 754 F.3d 657 (9th Cir. 2014).

Judge Gorsuch also turned a blind eye to the harm suffered by a death row inmate from a flawed execution. He joined an opinion that upheld the dismissal of several claims brought by the estate of a deceased inmate whose execution had been mishandled by the State. *See Estate of Lockett v. Fallin,* 841 F.3d 1098 (10th Cir. 2016). In that case, Oklahoma had been unable to obtain the drugs necessary to carry out Lockett's execution in compliance with its execution procedures. So, two officials who had no medical training amended the protocol to allow for the use of different drugs that were more readily available. The amended protocol had never been used by any State. On the evening of Lockett's execution, medical personnel inserted an IV and administered the first drug, which was intended to render Lockett unconscious. If the first drug does not render the person unconscious, the second and third drugs cause immense pain. After Lockett was declared unconscious, the second and third drugs were administered. Shortly thereafter, Lockett began twitching and convulsing on the table, he raised his head, said several phrases, and tried to lift himself off the gurney while clenching his teeth and grimacing in pain. Forty-three minutes after the doctor had administered the first drug, Lockett was pronounced dead. The court concluded that the gruesome execution did not violate the Eighth Amendment because Lockett's pain and suffering was not severe enough to amount to a constitutional violation. The court reasoned that Lockett's botched execution was "exactly the sort of 'innocent misadventure' or 'isolated mishap'" that the Supreme Court had excluded from its definition of cruel and unusual punishment. *Id*. at 1110.

In *Harvey v. Segura,* 646 F. App'x 650 (10th Cir. 2016), Judge Gorsuch authored an opinion upholding the dismissal of an inmate's claims that his rights were violated when he was strip searched by a member of the opposite sex in violation of his religious convictions and that his religious head covering was confiscated. In so holding, Judge Gorsuch noted that the guard who had strip searched Harvey was entitled to qualified immunity because it wasn't clear at the time that her conduct violated the law.

Judge Gorsuch authored *Sellers v. Cline*, 651 F. App'x 804 (10th Cir. 2016), which held that corrections officers were entitled to qualified immunity for their roles in allowing other inmates to assault Sellers. Two inmates had assaulted Sellers during the evening shower rush after a guard had opened his cell door three times over the course of a few minutes, even after a supervisor warned the guard that an attack was imminent and not to open the cell door. In fact, the supervisor went as far as to disable the knob that controlled Sellers's cell door. Further, the guard who was operating the

control panel "was new to the job and was juggling the requests of up to twenty inmates to open their cells to allow them to shower." *Id*. at 806.

In a case brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), Judge Gorsuch vacated the grant of summary judgment in favor of a prison that did not allow an inmate to use a sweat lodge. *See* *Yellowbear v. Lampert,* 741 F.3d 48 (10th Cir. 2014). There, the parties agreed that the use of the sweat lodge by Yellowbear was an important part of his religious beliefs. The prison asserted, however, that it was not permitting Yellowbear to use the sweat lodge because it would have posed a security risk that was unreasonably difficult to mitigate: Yellowbear was in protective custody because of the numerous threats he had received from other inmates. Judge Gorsuch disagreed, concluding that the prison had presented no compelling justification for denying Yellowbear access: First, there was no evidence that building a second sweat lodge in the protective custody unit would be financially prohibitive or hazardous. Second, the prison had not adequately explained why Yellowbear could not use the sweat lodge when the prison was on lock down or early in the morning before other inmates had access to it.

In a second case under brought under RLUIPA, however, Judge Gorsuch appeared to take a more limited view of the statute's protections. In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), Judge Gorsuch concurred in a judgment holding that summary judgment in favor of a prison was not appropriate where the inmate, who is Muslim, alleged that officials had denied his requests for a halal diet. Judge Gorsuch wrote separately to stress the narrowness of the court's holding: "The court today holds that the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits the government from forcing a prisoner to choose between following his sincerely held religious beliefs and staying alive." *Id.* at 1324 (Gorsuch, J., concurring). He continued that RLUIPA applies in this case because it, "compels us to address only whether officials can violate RLUIPA by denying an inmate in their charge all means of accessing food he can eat consistent with his (uncontested) sincerely held religious beliefs—thus effectively forcing him to choose between remaining pious or starving." *Id.* at 1326.

E. Government searches and seizures

While Judge Gorsuch has, on occasion, expressed concern about government searches of people's homes, he has repeatedly declined to hold government officials accountable for reckless actions in obtaining search warrants and carrying out searches. The result has been a series of writings showing that Judge Gorsuch typically falls on the side of the government over the individual liberties of everyday Americans.

Judge Gorsuch authored a divided panel opinion in *Kerns v. Bader,* 663 F.3d 1173 (10th Cir. 2011), remanding the case back to the district court to determine if police officers were entitled to qualified immunity after they conducted a warrantless search of a home. In that case, a sniper had shot down a helicopter and police were searching the area for suspects. When they reached Kerns's house, the officers noticed that the door was ajar, music was playing and the lights were off. They then saw a hole in one of the windows that they concluded, on nothing more than a hunch, might have been from the bullet that hit the helicopter. (The hole had actually been created by a golf ball.) After making these observations, the officers entered the home and conducted a search. The district court denied the officers' motion for summary judgment, but Judge Gorsuch disagreed, instructing the district court to examine whether exigent circumstances existed at the time of the search.

Judge Gorsuch joined a divided panel majority

opinion that affirmed the grant of summary judgment on qualified immunity grounds to an agent who provided incorrect information in obtaining a search warrant. *See* *Hernandez v. Conde,* 272 F. App'x 663 (10th Cir. 2008). In that case, an agent had orchestrated a controlled buy of cocaine using a confidential informant. The agent followed the informant to a location with two trailers and did not see which trailer the informant entered. Nonetheless, the agent submitted an affidavit identifying Hernandez's trailer in an application for a search warrant, which was granted by the court. Officers executed the search warrant and, in the course of the search, shot Hernandez. Officers found no evidence of drugs or other illegal activity in Hernandez's trailer. Hernandez filed a civil rights action alleging a violation of the Fourth Amendment. The Tenth Circuit agreed with the district court that the agent who had provided incorrect information in his affidavit had not done so recklessly and, thus, was entitled to qualified immunity. Judge Hartz dissented, arguing that material disputes existed about what the agent knew at the time he submitted his affidavit.

In *Lewis v. Tripp,* 604 F.3d 1221 (10th Cir. 2010), Judge Gorsuch authored the divided panel majority opinion reversing the district court's denial of summary judgment for the President of the Oklahoma Board of Chiropractic Examiners, Dr. Tripp, after he had been accused of violating Dr. Lewis's rights under the Fourth Amendment. In that case, Dr. Lewis's license to practice medicine had been revoked, but Oklahoma authorities believed he was still seeing patients. When the Board was alerted, Dr. Tripp swore out an administrative subpoena requiring Dr. Lewis to turn over his practice's medical records. Dr. Lewis alleged that when the subpoena was carried out by the Board's Executive Director, several documents from his personal desk not covered by the subpoena were taken. The Tenth Circuit concluded that Dr. Tripp was entitled to qualified immunity because he had not participated in any of the alleged unlawful activities. The dissent disagreed both with the majority's application of its power to review the district court's decision and its reading of the facts of the case.

In *Painter v. City of Albuquerque,* 383 F. App'x 795 (10th Cir. 2010), Judge Gorsuch joined a majority opinion holding that police officers had probable cause to arrest Painter after it was discovered that he had attempted to cash a fraudulent cashier's check. The partial dissent disagreed, arguing that Painter's actions were completely innocuous and did not give the officers reason to believe that he had intended to defraud the bank.

Judge Gorsuch concurred in a majority opinion concluding that officers were not entitled to qualified immunity for strip searching an individual after he was arrested for a minor offense when there was no reasonable suspicion that the strip search was necessary. *See* *Webb v. Thompson,* 643 F. App'x 718 (10th Cir. 2016). Judge Gorsuch parted ways with the majority's holding, however, that the officers were not entitled to qualified immunity for unduly prolonging Webb's detention by failing to bring him before a magistrate for a probable cause hearing for five days. Judge Gorsuch argued that Webb had not produced a case imposing a duty on jail correctional officers to ensure that detainees have a timely arraignment.

In *United States v. Rochin,* 662 F.3d 1272 (10th Cir. 2011), Judge Gorsuch authored the majority opinion holding that the district court properly declined to suppress evidence obtained as the result of a pat down. In that case, Rochin was pulled over in a lawful traffic stop. The dispatcher told the officer that Rochin was a suspect in a drive-by shooting. After Rochin was unable to provide a driver's license or registration, an officer ordered Rochin out of the car and conducted a pat down search. The officer felt, and removed, two objects in Rochin's pockets that were long and hard, which turned out to be pipes. Judge Gorsuch

rejected Rochin's argument that the search violated his Fourth Amendment rights. Judge Gorsuch found that it was objectively reasonable for the officer to fear that the objects could have been dangerous.

Judge Gorsuch authored the majority opinion in *United States v. Martin*, 613 F.3d 1295 (10th Cir. 2010), affirming the denial of the defendant's motion to suppress a gun found on his person. There, officers were investigating a shooting. They had approached the apartment building of a woman who they suspected of being in a relationship with the primary suspect. The officers saw a woman matching her description leaving the apartment complex with a man whose clothing matched the description of the suspect. The officers propped open the locked outer door of the apartment building and told the defendant to put his hands on the wall. When he didn't do so and said he had something on him, the officers entered the hallway and handcuffed the defendant. The officers then searched him and found a gun. Judge Gorsuch concluded that the defendant had not been seized until the officers had physically restrained him and placed him in handcuffs, the officers had probable cause to arrest the defendant, and that exigent circumstances justified the officers' entry into the apartment complex.

In *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013), two judges on the Tenth Circuit held that evidence found during a traffic stop had to be suppressed because it was the product of an unconstitutional seizure. A police officer had stopped the defendant for the nonexistent traffic offense of turning left from one road into the rightmost lane of another road. The majority held that an officer's mistake of law could never "justify a probable cause or reasonable suspicion determination for a traffic stop." *Id*. at 1238. Accordingly, the majority concluded that it was objectively unreasonable for the officer to have stopped the defendant, ordered exclusion of the evidence, and vacated the defendant's convictions. *Id*. at 1246–47. Judge Gorsuch dissented from the majority's categorical approach. While he acknowledged that "many" searches initiated due to an officer's mistaken belief about the law "should be held unreasonable and so unconstitutional," he would instead have corrected the district court's legal error about the local ordinance at issue and remanded the case for further fact-finding regarding whether, in the totality of the circumstances, the officer's mistake was reasonable. *Id*. at 1246–59 (Gorsuch, J., dissenting). In *Heien v. North Carolina*, 135 S. Ct. 530 (2014), the Supreme Court subsequently held that a reasonable mistake of law by the police can give rise to "reasonable suspicion necessary to uphold the seizure under the Fourth Amendment." *Id*.at 534.

In *United States v. Dutton*, 509 F. App'x 815 (10th Cir. 2013), a Tenth Circuit panel reversed the denial of the defendant's motion to suppress evidence found in a storage unit. The defendant had been convicted of two counts of possessing unregistered destructive devices. One of the charges was based on evidence obtained from the search of a storage unit conducted after the police had obtained a search warrant. The court, following precedent in *United States v. Gonzales*, 399 F.3d 1225 (10th Cir. 2005), concluded that the evidence from the storage unit had to be suppressed because the affidavit accompanying the warrant application did not connect the storage unit to the defendant. And, the good-faith exception to the exclusionary rule did not apply, because the warrant's defect was clearly apparent. Judge Gorsuch dissented, arguing that the good-faith exception should apply. He acknowledged that *Gonzales* had to "be reckoned with," but argued that subsequent cases limited *Gonzales*'s holding such that "an affidavit need not make a legally necessary point explicitly so long as it is evident from the natural reading of the affidavit." *Dutton,* 509 F. App'x at 821 (Gorsuch, J., dissenting) (internal

quotation marks omitted).

Judge Gorsuch participated in at least two cases involving issues related to the Fourth Amendment and technology. In *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), the appellant, a registered sex offender, argued that the state's requirement that he register "internet identifiers" and the corresponding websites violated the First and Fourth Amendments. Judge Gorsuch joined an opinion rejecting this argument and upheld the statute. The court reasoned that the statute did not run afoul of the First Amendment because "such identification will not unnecessarily interfere with his First Amendment freedom to speak anonymously." *Id*. at 1225. And the statute did not violate the appellant's Fourth Amendment rights, because he had no reasonable expectation of privacy in internet identifiers, which are disclosed to third parties. In *United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007), Judge Gorsuch joined an opinion which concluded that a police officer had acted reasonably under the totality of the circumstances when he searched a defendant's computer. The defendant's 91-year-old father, who lived in the same house as the defendant, had given the officer permission to do so. The majority opinion drew a vigorous dissent from Judge McKay, who took "issue with the majority's implicit holding that law enforcement may use software deliberately designed to automatically bypass computer password protection based on third-party consent without the need to make a reasonable inquiry regarding the presence of password protection and the third party's access to that password." *Id*. at 33 (McKay, J., dissenting).

Judge Gorsuch has, on at least one occasion, argued for expanded Fourth Amendment protection for the home. In *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), Judge Gorsuch dissented from a majority ruling that police officers had not violated the Fourth Amendment when they entered onto the front porch of a home and knocked on the door despite several posted "No Trespassing" signs. Judge Gorsuch argued that the state did not have an irrevocable license to enter the area around the home and that the "No Trespassing" signs adequately revoked that license. While Judge Gorsuch recognized that his argument would make "ferreting out crime . . . marginally more difficult," he remarked that "obedience to the Fourth Amendment always bears that cost and surely bring with it other benefits." *Id.* at 1015. Judge Gorsuch has also questioned the use of Doppler radar devices used by police to gain information about the inside of a home. See *United States v. Denson*, 775 F.3d 1214 (10th Cir. 2014). In that case, however, Judge Gorsuch concluded that other facts had afforded officers probable cause to enter Denson's home to execute an arrest warrant.

In *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016), Judge Gorsuch held that the National Center for Missing and Exploited Children's search of a suspect's private e-mails implicated the Fourth Amendment, because the center was acting like a government agent when it conducted the search. Accordingly, NCMEC was required to obtain a warrant before reviewing the suspect's e-mail.

F. Sentencing

Judge Gorsuch concurred in *United States v. Mendiola*, 696 F.3d 1033 (10th Cir. 2012), which held that a two-year sentence imposed by a district judge for a violation of the defendant's conditions of supervised release was improper. The district court had unlawfully imposed the two-year sentence (where the guideline range was only six to twelve months) only to ensure that the defendant would be eligible for participation in a drug treatment program. The Supreme Court had ruled in *Tapia v. United States*, 564 U.S. 319 (2011), that the law "precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation." *Id.* at 332. And, as the Tenth Circuit noted, "all the circuit courts that have addressed the issue have concluded that, in light of Tapia, a district court imposing

a revocation sentence cannot take into account a defendant's rehabilitative needs," and therefore the lower court committed a plain error. *Mendiola*, 696 F.3d at 1036.

In *United States v. Smith*, 756 F.3d 1179 (10th Cir. 2014), Judge Gorsuch authored a divided panel opinion concluding that a sentencing court could consider the impact of contemporaneously issued sentences as part of its calculus in imposing a sentence. In particular, it was not improper for the district court to consider a § 924(c) conviction and sentence when sentencing a defendant for a related crime of violence. The dissent disagreed, arguing that allowing consideration of the mandatory minimums under § 924(c), could improperly permit the district court to reduce "an otherwise proper sentence for an underlying crime of violence based on the court's concern that the mandatory minimum is excessive." *Id.* at 1195 (Lucero, J., concurring in part and dissenting in part). The Supreme Court has granted review of this exact question in a case out of the Eighth Circuit, *Dean v. United States*, No. 15-9260.

Second, in *United States v. Rentz*, 777 F.3d 1105 (10th Cir. 2015) (en banc), the Tenth Circuit held, by a vote of 10 to 1, that prosecutors can seek only one sentencing enhancement under 18 U.S.C. § 924(c)(1)(A), when a firearm is used only one time, but results in two crimes of violence; the government would have to prove a separate "use, carry, or possession" of a firearm for each charge it brings. In the case, Philbert Rentz was accused of firing a single gunshot that wounded one victim and killed another. The court ruled that the second charge should have been dismissed because the statute was unclear and the rule of lenity operated to the benefit of the defendant. In his majority opinion, Judge Gorsuch cautioned against the use of legislative history to resolve statutory ambiguities: "Legislation is a compromise and it's rare to find a statute that pursues a single purpose unrelentingly. Assuming that *whatever* seems to further a statute's purpose must be the law commits the fallacy of overgeneralization." *Id*. at 1113.

In *United States v. Spaulding*, 802 F.3d 1110 (10th Cir. 2015), Judge Gorsuch dissented from a panel opinion holding that the district court could not allow withdrawal of a guilty plea after a term of imprisonment had been imposed, except under the circumstances in 18 U.S.C. § 3582(c). The majority reasoned that this was true even where the government agreed that the guilty plea should be set aside, because once a term of imprisonment has been imposed, the district court is divested of jurisdiction to sua sponte revisit it. *See* FED. R. CRIM. P. 11(e). Judge Gorsuch disagreed, arguing that the district court retained jurisdiction over the case. Judge Gorsuch lamented that the result of the case would be "additional months and maybe years of needless judicial process to arrive at a result that everyone admits the law requires." *Spaulding*, 802 F.3d at 1128 (Gorsuch, J., dissenting).

IX. NATIVE AMERICAN RIGHTS

In *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015), Judge Gorsuch authored the majority opinion granting an injunction to the plaintiffs who argued that Utah had been prosecuting members of the Ute Tribe for state-law crimes committed within the boundaries of the Tribe's reservation. Earlier rulings had prevented the State from taking such action. Judge Gorsuch chastised the State for reigniting a dispute that had already been settled.

In *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013), Judge Gorsuch overruled the district court in holding that "Osage tribal member headright holders possess the legal right to seek an accounting from the Secretary of the Interior." *Id.*at 1208. The dispute arose over the government's role in collecting royalties earned

from mineral rights it had annexed from tribal lands. The government was required to collect and hold in trust royalties that would be distributed to individual tribe members who had an interest in the mineral rights. Two Osage Tribe members believed that the government was breaching its fiduciary obligations and sued the government for an accounting. Judge Gorsuch reasoned that the statutory structure clearly required the government to provide an accounting to individual tribe members.

X. MISCELLANEOUS

A. Political question doctrine

In *Kerr v. Hickenlooper,* 744 F.3d 1156 (10th Cir. 2014), legislators in Colorado sued, alleging that the Tax Payer Bill of Rights (TABOR), which required all new taxes and spending measures be directly approved by voters, violated the Guarantee Clause. A panel of the Tenth Circuit ruled that the legislators had standing to sue and that their claims were not barred by the political question doctrine. In a dissent from the denial of rehearing en banc, Judge Gorsuch argued that the plaintiffs had proffered no judicially manageable standards for deciding their claim that Colorado's government is not republican in form. *See Kerr v. Hickenlooper,* 759 F.3d 1186 (10th Cir. 2014). The Supreme Court granted review in the case and remanded the case for reconsideration in light of its holding in *Arizona State Legislature v. Arizona Independent Redistricting Commission,* 135 S. Ct. 2652 (2015).

B. Dormant commerce clause

Judge Gorsuch has shown significant skepticism towards the dormant commerce clause, which prevents states from passing laws which interfere with interstate commerce. In two recent decisions, *Energy and Environment Legal Institute v. Epel,* 793 F.3d 1169 (10th Cir. 2015), and *Direct Marketing Ass'n v. Brohl,* 814 F.3d 1129 (10th Cir. 2016), Judge Gorsuch has not so subtly taken digs at the doctrine while acknowledging that it is well established precedent. Writing for the Court in *Energy and Environmental Legal Institute*, Gorsuch wrote,

> [e]mploying what's sometimes called "dormant" or "negative" commerce clause jurisprudence, judges have claimed the authority to strike down state laws that, in their judgment, unduly interfere with interstate commerce. Detractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure. But as an inferior court we take Supreme Court precedent as we find it and dormant commerce clause jurisprudence remains very much alive today.

793 F.3d at 117–1172 (internal citations omitted). Similarly, in *Direct Marketing Ass'n*, Judge Gorsuch opined in his concurrence that "the whole field in which we are asked to operate today—dormant commerce clause doctrine—might be said to be an artifact of judicial precedent" and noted "in dormant commerce clause cases Article III courts have claimed the (anything but dormant) power to strike down some state laws even in the absence of congressional direction." 814 F.3d at 1148.[58] Judge Gorsuch's doubts about the dormant commerce clause are in line with the states' rights jurisprudence of former Justice Antonin Scalia and Justice Clarence Thomas, both of whom were also skeptical about the Court's dormant commerce clause jurisprudence.[59]

C. Medical aid in dying

Gorsuch has written on the debate over whether state governments should permit what he refers to as "doctor-assisted suicide."

58 In 2013, Judge Gorsuch sat on a panel that dismissed the plaintiff's case on the ground that the Tax Anti-Injunction Act stripped the court of jurisdiction. In a unanimous decision, the Supreme Court overturned the Tenth Circuit's decision, and remanded the case for review on the merits. See *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2010), *rev'd* 135 S. Ct. 1124 (2015).

59 Michael C. Dorf, *Is the Dormant Commerce Clause a "Judicial Fraud"*, VERDICT (May 20, 2015), https://verdict.justia.com/2015/05/20/is-the-dormant-commerce-clause-a-judicial-fraud.

Throughout his writings, which include a book and two significant law review articles, he has rejected the underlying legal and moral arguments put forward in support of legislation allowing doctors to assist terminally ill patients to end their lives.[60]

In one comprehensive article he authored on the topic, Gorsuch reviewed the legal and historical context in which the modern debate has occurred. He concluded that legalizing "doctor-assisted suicide" is not supported by the law, by history, or by morality. First, focusing primarily on common law traditions, Gorsuch rejected arguments that legalized assisted suicide is supported by history: "[H]istory does not support a right to assistance in suicide or euthanasia 'right.' To the contrary, there is a long-standing modern consensus aim[ed] at preventing suicide and punishing those who assist it."[61] Next, Gorsuch examined, and rejected, a variety of philosophical arguments invoked to support "doctor-assisted suicide," including the neutrality principle (government should not be involved in making moral judgments about how people live their lives); the harm principle (government's only role is to prevent individuals from harming others); and the utilitarian approach (suggesting that the benefits of assisted suicide outweigh the costs).

Gorsuch's concluding argument against legalizing "doctor-assisted suicide" was that "the intentional taking of a human life by private persons is always wrong."[62] While making exceptions for killing in the context of war and criminal justice, Gorsuch posited that adherence to this principle correctly prevents society from venturing into "troubling territory," where it would "become[] enmeshed in making moral decisions about which [intentional killings] it deems permissible."[63] In support of his view, Gorsuch argued that common law traditions reflect the concept that all "intentional acts against human life" are wrong.[64] He concluded that given the lack of persuasive arguments by the proponents of "assisted suicide," the common law traditions disfavoring the intentional taking of life, and the "persuasive moral reasoning," founded in the "recognition of the sanctity of life," legalizing "assisted suicide and euthanasia, plainly would not be permitted."[65]

60 Gorsuch, *supra* note 39; Neil M. Gorsuch, *The Legalization of Assisted Suicide and the Law of Unintended Consequences*, 2004 WIS. L. REV. 1347 (2004); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 641 (2000).
61 Gorsuch, *The Right to Assisted Suicide and Euthanasia, supra* note 60, at 641.
62 *Id.* at 697.
63 *Id.* at 701.
64 *Id.* at 705.

D. Securities

Judge Gorsuch authored the majority opinion in *MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109 (10th Cir. 2014), which suggested that he would take a narrow view of liability in investor suits. In that case, the question presented was when a defendant was liable for an opinion in a public statement that turned out to be false. Judge Gorsuch's opinion concluded that the plaintiffs' claim was properly dismissed because they failed to allege adequately that the defendant knew the opinion was false when they made it, or that the defendant lacked an objectively reasonable basis for the opinion. In so holding, Judge Gorsuch opined that he doubted "the consistency of [the reasonable basis] test with the statutory text and history," although his opinion did not expressly reject it." *Id*. at 1116. A year later, the Supreme Court in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), approved the idea of liability in cases where a defendant lacked a reasonable basis for an opinion.

E. Term limits

In a law review article defending the constitutionality of term limits, Gorsuch asserted that such limits serve an appropriate and legitimate purpose in regulating congressional elections.[66] The Framers, he argued, failed to include term limits in the Constitution because they believed frequent elections would preclude the continual re-

65 *Id.* at 710.
66 Neil Gorsuch and Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limits*, 20 HOFSTRA L. REV. 341 (1991).

election of incumbents. The advent of standing congressional committees and legislative seniority, however, has increased legislators' incentive to stay in office and thereby undermined the Framers' vision of short electoral terms. Term limits are thus necessary, Gorsuch concluded.

In making his argument for the constitutionality of term limits, Gorsuch emphasized the difference between a legally permissible "manner regulation," which implicates the procedure of an election, and an impermissible "qualification," which augments the three constitutionally-enumerated qualifications: age, residence, and citizenship. He argued that term limits are manner regulations because they involve procedural concerns, such as the general timing of the election, and because, in his view, the Supreme Court had suggested that regulations not involving age, residency and citizenship were manner regulations. In addition, Gorsuch suggested that state-imposed term limits do not hinder the First Amendment rights of free speech and assembly, as elected officials do not have an unfettered right to candidacy, and voters do not have a fundamental right to vote for particular individuals. He also asserted that Fourteenth Amendment equal protection rights are not implicated, as term limits do not discriminate against poor or minority candidates, impose only a minimal burden on incumbents, and work to treat all voters equally. In balancing the interests of candidates and voters against the interests animating term limits, Gorsuch found that term limits would have little negative impact.

Gorsuch's ideal term limit system was modeled on a measure passed in Colorado, which limited U.S. Senators and Representatives to twelve years in office but allowed them to run again after a four-year rotation out of office, though the term-limited former official was allowed to conduct a write-in campaign at any time. For Gorsuch, such a system would promote some of the "most basic and important" governmental interests by "[m]aintaining a representative democracy and limiting the influence of unfair electoral advantages . . . ."[67] The Supreme Court rejected this view. *See* *U.S. Terms Limits, Inc. v. Thornton,* 514 U.S. 779 (1995).

67 *Id.* at 379–80.

CONCLUSION

Alliance for Justice has a long history of examining the records of federal judicial nominees. In every case, we look beyond the nominees' resumes—their educational and professional credentials—to determine what motivates and drives the individual.
We seek to better understand their beliefs, and what kind of judges they have been and will be. In Neil Gorsuch's case, a clear portrait emerged. While his resume may be objectively impressive, his ideology is disqualifying.
Time and again, we found evidence of Judge Gorsuch's ideological pursuit of legal outcomes that systematically denigrate the rights of everyday people. While this is never desirable, it is even more disturbing at a time when the rights and freedoms of so many communities face heightened threats on a daily basis.

We urge Senators charged with evaluating Judge Gorsuch's nomination to use this report as part of an intensive examination of the nominee's fitness for a seat on the Supreme Court. We believe that a thorough analysis will lead to the same conclusion we have reached: that Neil Gorsuch is the wrong choice for a position that demands its occupants embrace the philosophy that the Constitution protects all of us, not just the wealthy and powerful.

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