Testimony of Peter N. Kirsanow Before the Senate Judiciary Committee on the Nomination of Judge Neal Gorsuch to the U.S. Supreme Court

Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I speak as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to study and collect information relating to discrimination or denials of equal protection because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection, and serve as a national clearinghouse of information relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function, and with the help of my assistant, I have examined the approximately 200 opinions related to civil rights that Judge Gorsuch drafted as a circuit judge. These opinions, summaries of which are appended hereto, include, *inter alia*, cases involving race, sex, and national origin discrimination and retaliation cases under Title VII; disability discrimination cases under the ADA, IDEA, and Rehabilitation Act; age discrimination cases under the ADEA; as well as disparate treatment and disparate impact cases under the Equal Protection Clause. Our examination shows that Judge Gorsuch's approach to civil rights cases is consistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions. None of his opinions in this area contravene governing precedent.

Several of the civil rights opinions reviewed also include religious discrimination. And religious freedom cases, including those under RLUIPA. Although First Amendment freedoms of speech and religion are the subjects of much commentary, in current practice they often have been cabined and subject to caveats. (The Commission recently issued a report on religious liberty. The witness testimony and public comments we received in the course of writing this report, in addition to the multitude of lawsuits brought as a result of Obamacare's contraceptive mandate, suggested an evolving precariousness for religious freedom.[1] Also, as Congress recognized when it passed RLUIPA, prisoners can face particular difficulty in exercising their religion because there are multiple and conflicting interests at stake in the prison context.)[2]

Judge Gorsuch's decisions take First Amendment rights seriously, regardless of whether the matter at issue appears trivial, the plaintiff seems unsympathetic, or a plaintiff's beliefs are at odds with prevailing norms.

Yellowbear v. Lampert[3] was one such case. Andrew Yellowbear was convicted of killing his young daughter.[4] Once imprisoned, he sought access to a sweat lodge as part of the practice of his Native

---

[1] U.S. COMMISSION ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF.

[2] Cutter v. Wilkinson, 544 U.S. 709 (2005); U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prison (2008), http://www.usccr.gov/pubs/STAT2008ERFIP.pdf.

[3] Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014).

[4] Anthony Lane, *Defiant Yellowbear gets life sentence*, CASPER STAR-TRIBUNE, June 2, 2006, http://trib.com/news/top_story/defiant-yellowbear-gets-life-sentence/article_c0b44749-6b13-5c37-bad7-

American religious beliefs, but such access was denied. Yellowbear sued under RLUIPA, and his case came before Judge Gorsuch who determined that the case must be remanded for trial, noting that even convicted child-murderers have free exercise rights, and Yellowbear had been denied any access to a sweat lodge whatsoever, which constituted a "substantial burden" within the meaning of RLUIPA. The prison's argument that it would be too complicated and expensive to shuttle Yellowbear between the protective custody unit and the sweat lodge was too cursory to determine that this burden on Yellowbear's religious exercise was unavoidable. Furthermore, the prison failed to demonstrate that its "policy of no access, ever … represent[ed] the least restrictive means of accomplishing that [compelling] interest."[5]

Judge Gorsuch also voted to protect the free exercise rights of Hobby Lobby, Mardel, and the Little Sisters of the Poor. He joined Judge Tymkovich's *Hobby Lobby* majority opinion that held that these corporations had demonstrated a likelihood of success on their RFRA claim, which was affirmed by the Supreme Court. Judge Gorsuch wrote a concurring opinion in which he expressed his view that the individual members of the Green family, in addition to the corporations they controlled, were protected by RFRA because they faced a "Hobson's choice" between "abiding their religion or saving their business."[6] Judge Gorsuch also joined Judge Hartz's dissent from the 10th Circuit's denial of rehearing *en banc* in *Little Sisters of the Poor*.[7]

Judge Gorsuch's concern for a citizen's interest in vindicating his First Amendment rights against the government is reflected in his free speech cases as well. In *Van Deelen v. Johnson*, plaintiff alleged that the County Board of Commissioners intimidated him into dropping a dispute over a property tax assessment, including using threats by law enforcement.[8] The district court had ruled against Van Deelen because it did not consider his dispute over property taxes to be a matter of "public concern." Judge Gorsuch reversed and remanded, writing, "the constitutionally enumerated right of a private citizen to petition the government for the redress of grievances does not pick and choose its causes but extends to matters great and small, public and private."[9]

Judge Gorsuch does not, however, mechanically side with individuals who challenge government policy. In *Ali v. Wingert*, a prisoner challenged a prison policy that required his mail to include the name under which he was committed in addition to the religious name he adopted in prison.[10] Judge Gorsuch determined that there was no substantial burden in this case because Ali admitted that his religious beliefs did not forbid any use of his former name and the prison required only that his mail include both his religious name and his committed name.[11] Judge Gorsuch held that if Ali's religious beliefs or prison policy were different there might have been a substantial burden.

Judge Gorsuch's opinions in qualified immunity cases reveal a judge who faithfully and carefully applies the law. In *Blackmon v. Sutton*, Judge Gorsuch held that officials at a juvenile detention facility were not entitled to qualified immunity when a former detainee alleged that he had been punished by being

---

9b620f35cb08.html; Anthony Lane, *A troubled life cut short*, CASPER STAR-TRIBUNE, Mar. 5, 2006, http://trib.com/news/top_story/a-troubled-life-cut-short/article_2fd1dc87-fd28-55d4-bff7-ce2adb99293d.html.

[5] Yellowbear v. Lampert, 741 F.3d 48, 62 (10th Cir. 2014).

[6] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1152, 1156 (10th Cir. 2013)(Gorsuch, J., concurring).

[7] Little Sisters of the Poor Home for the Aged, Denver, Colorado, v. Burwell, 799 F.3d 1315 (10th Cir. 2015).

[8] Van Deelen v. Johnson, 497 F.3d 1151 (10th Cir. 2007).

[9] *Id*. at 1153.

[10] Ali v. Wingert,569 Fed. Appx. 562 (10th Cir. 2014).

[11] *Id.* at 564.

restrained in a chair with wrist, waist, chest, and ankle restraints when subjected to pretrial detention.[12] A corrections officer who allegedly sat on the boy's chest and officials in charge of mental health services who allegedly ignored the boy's need for mental health services similarly were not entitled to qualified immunity.[13] Judge Gorsuch determined, however, that the director of the juvenile detention facility *was* entitled to qualified immunity because plaintiff's claim against the director was that she failed to transfer him to a residential shelter as he wished, due to the fact that there is no clearly established right for a pretrial detainee to be transferred to a facility of his choice.[14] Similarly, in his dissenting opinion in *A.M. v. Holmes* Judge Gorsuch would have denied qualified immunity to a police officer who arrested a thirteen year old for disrupting his class by making belching noises.[15] In *Martinez v. Carr*, however, Judge Gorsuch held that a police officer who issued a misdemeanor citation requiring later appearance at trial was entitled to qualified immunity.[16] "We conclude that issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure".[17]

Judge Gorsuch's adherence to plain textualism is demonstrated in his dissenting opinion in *TransAm Trucking v. Administrative Review Board*[18] and his majority opinion in *Genova v. Banner Health*.[19] In *TransAm Trucking*, the panel majority concluded that a statutory provision that prohibited an employer from discharging an employee because the latter "refuses to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition" meant that an employee could not be discharged for *operating* a vehicle in defiance of the employer's instructions.[20]

Judge Gorsuch dissented, writing:

> It might be fair to ask whether TransAm's decision was a wise or kind one. But it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one. The Department of Labor says that TransAm violated federal law, in particular 49 U.S.C. § 31105(a)(1)(B). But that statute only forbids employers from firing employees who "refuse[] to operate a vehicle" out of safety concerns. And, of course, nothing like that happened here. . . .
> [I]t seems to me that the statute is perfectly plain – and plainly doesn't capture the conduct here – just as TransAm suggests. The term "refuse" means "[t]o decline positively, to express or show a determination not to do something." Meanwhile, "operate" means "[t]o cause or actuate the working of; to work (a machine, etc.)." Putting this together, employees who voice safety concerns about their vehicles may *decline to cause those vehicles to work* without fear of reprisal. And that protection,

---

[12] Blackmon v. Sutton, 734 F.3d 1237 (10th Cir. 2013)
[13] *Id.* at 1244-46.
[14] *Id.* at 1246-47.
[15] A.M. v. Holmes, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J, dissenting).
[16] Martinez v. Carr, 479 F.3d 1292 (10th Cir. 2007).
[17] *Id.* at 1299.
[18] TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206 (10th Cir. 2016)(Murphy, J.)(Gorsuch, J., dissenting).
[19] Genova v. Banner Health, 734 F.3d 1095 (10th Cir. 2013).
[20] TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206, 1211-1212 (10th Cir. 2016)("under the ARB's interpretation, the refusal-to-operate provision could cover a situation in which an employee refuses to use his vehicle in the manner directed by his employer, even if that refusal results in the employee driving the vehicle.").

> while significant, just does not give employees license to *cause* those vehicles to work in ways they happen to wish but an employer forbids. Indeed, my colleagues' position would seem to require the addition of more than a few new words to the statute. In their view, an employee should be protected not just when he "refuses to operate a vehicle" but also when he refuses to operate a vehicle *in the particular manner the employer directs and instead operates it in a manner he thinks safe*. Yet those words just aren't there; the law before us protects only employees who refuse to operate vehicles, *period*. . . .
>
> [W]hen the statute is plain it simply isn't our business to appeal to legislative intentions. And it is a well-documented mistake, too, to assume that a statute pursues its putative (or even announced) purposes to their absolute and seemingly logical ends. . . . The fact is that statutes are products of compromise, the sort of compromise necessary to overcome the hurdles of bicameralism and presentment. And it is our obligation to enforce the terms of that compromise as expressed in the law itself, not to use the law as a sort of springboard to combat all perceived evils lurking in the neighborhood.[21]

Similarly, in Genova v. Banner Health, a doctor argued that he had been fired in violation of the Emergency Medical Treatment and Labor Act (EMTALA)[22] because the emergency room where he worked continued accepting patients when he believed patients should be sent to other hospitals so they could be treated more quickly.[23] The provisions of EMTALA at issue provide: ""[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action, obtain those damages available for personal injury"[24] and "a participating hospital may not penalize or take adverse action [1] against a qualified medical person … or physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or [2] against any hospital employee because the employee reports a violation of a requirement of this section."[25]

Judge Gorsuch found that the actions protected by the statute are almost exactly the opposite of the reason the doctor was fired.

> [T]he personal harm provision and the second clause of the "whistleblower protection" provision. . . . protect those who are directly harmed by or report a 'violation' of EMTALA. But Dr. Genova doesn't claim that he was harmed by or retaliated against for reporting a failure by the hospital to examine a patient, stabilize a patient, or transfer a patient who couldn't be stabilized – violations of EMTALA all. Instead, he claims he was retaliated against for reporting his medical opinion that patients would be better served if directed to other facilities. . . . His complaint wasn't about an EMTALA violation but more nearly its inverse.
>
> The same problem repeats itself when we turn to the (remaining) first clause of the whistleblower protection provision. It protects those who refuse to authorize the

---

[21] TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206, 1215-1217 (10th Cir. 2016)(Gorsuch, J., dissenting)(citations omitted).

[22] For an overview of EMTALA, please see U.S. COMMISSION ON CIVIL RIGHTS, PATIENT DUMPING (2014), http://www.usccr.gov/pubs/2014PATDUMPOSD_9282014-1.pdf.

[23] Genova v. Banner Health, 734 F.3d 1095, 1096 (10th Cir. 2013).

[24] 42 U.S.C. § 13955dd(d)(2)(A).

[25] 42 U.S.C. § 1395dd(i).

> premature or improper transfer of a patient with an emergency condition. . . . Instead of complaining that Banner retaliated against him for *refusing* to transfer patients, Dr. Genova complains that Banner retaliated against him for *wanting* to send patients elsewhere. And EMTALA simply does not speak to that issue.[26]

Judge Gorsuch notes that this does *not* mean that Dr. Genova's concerns were not well-founded or that continuing to "hoard" patients might not lead to a tipping point where the hospital would begin to dump patients in violation of EMTALA.[27] But EMTALA does not include a cause of action for instances where it might be better to send patients to another hospital because of overcrowding, nor a cause of action for situations where an EMTALA violation may occur in future.[28] "When, as here, 'the statute's language is plain' and not absurd on its face, 'the sole function of the courts … is to enforce it according to its terms.' Whatever our policy views on the question of protecting reports of prospective violations, it is Congress's plain directions, not our personal policy preferences, that control."[29]

These two cases demonstrate, Judge Gorsuch is a textualist mindful of the limits of the counts and the prerogatives of the legislative branch.

Judge Gorsuch's record shows him to be in the judicial mainstream. My assistant and I have examined almost 200 cases involving civil rights, constitutional law, or qualified immunity in which Judge Gorsuch took part. Judge Gorsuch was in the minority in only 10 of these cases. In 43 of these cases, Judge Gorsuch was on a three-judge panel where the other two judges were appointed by Democratic presidents. In 40 of those cases, Judge Gorsuch either joined the majority opinion or concurred in the result.

In short, a review of Judge Gorsuch's record indicates that he is a careful judge with great respect for our constitutional order. He respects the role of Congress and the corresponding limits on the power of the judiciary. His opinions are within the jurisprudential mainstream. It appears he will faithfully apply the law to protect the rights of all Americans.

Thank you for giving me the opportunity to testify today.

---

[26] Genova v. Banner Health, 734 F.3d 1095, 1098 (10th Cir. 2013).
[27] *Id.* at 1098.
[28] *Id.* at 1099.
[29] *Id.*

Cases Cited

Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014).
Prison officials denied Yellowbear *any* access to the in-prison sweat lodge because they said it would require a lockdown for security purposes for him to be escorted to the sweat lodge, which is expensive and administratively inconvenient. However, the prison never quantified the monetary costs of the lockdown, simply asserted that it would be expensive, and Yellowbear presented evidence that lockdowns happened on a daily, sometimes even hourly, basis for other reasons. The prison's claim that allowing Yellowbear access to a sweatlodge would result in a flood of requests to visit the sweat lodge is likewise unavailing. Prison officials were unable to show that they had a compelling interest in denying Yellowbear any access to the sweat lodge. Furthermore, they were also unable to meet the least restrictive means requirement, because they did not address the alternatives Yellowbear presented in his brief, but simply rejected them out of hand while saying that they would not allow him to access a sweat lodge. So the prison was unable to show that denying him any access at all to a sweat lodge was the least restrictive means of ensuring prison safety. Judge Gorsuch notes that the analysis would be different if Yellowbear were allowed some access to a sweat lodge but wanted more access, because the relative strength of the two parties' interests would be different.

Hobby Lobby v. Sebelius, 723 F.3d 1114, 1152 (10th Cir. 2013)(Gorsuch, J., concurring).
Judge Gorsuch joined majority opinion reversing grant of summary judgment to HHS, and wrote separately to explain why RFRA also protected the Greens as individuals and why the Anti-Injunction Act did not apply. He argued that the Greens' situation was similar to that in *Thomas v. Review Board* and *United States v. Lee* because all three cases turned upon the question of complicity in sin. Thus, he believed the Greens had Article III standing to pursue their own RFRA claims. Furthermore, the Greens were undeniably persons within the meaning of RFRA. Lastly, the Anti-Injunction Act did not apply because it was a waivable defense and the government had expressly waived reliance on it.

Van Deelen v. Johnson, 497 F.3d. 1151 (10th Cir. 2007).
Van Deelen had a long-running dispute with the county regarding his property tax assessment. Things became heated between Van Deelen and county officials. Van Deelen alleged that county officials and county law enforcement engaged in verbal and physical intimidation and deterred him from continuing to pursue his claims. The district court granted summary judgment on his First Amendment claims because it said his claims were not a matter of public concern, but only concerned his personal financial interests. Judge Gorsuch found that Van Deelen had alleged sufficient facts on his First Amendment claim regarding the right to petition for redress of grievances to survive summary judgment. The public concern test is applied only to the First Amendment claims of public employees, not of private citizens. The defendants then invoked qualified immunity. Judge Gorsuch found that the defendants were not entitled to summary judgment on the basis of qualified immunity, because a reasonable public official should have understood that verbal and physical threats intended to chill a person's speech would violate the First Amendment. Judge Gorsuch affirmed the district court's grant of summary judgment in regard to plaintiff's due process claims and a number of other First Amendment claims.

Blackmon v. Sutton, 734 F.3d 1237 (10th Cir. 2013).
An eleven-year old boy was sent to a juvenile detention facility while awaiting trial on charges of rape. (The charges were eventually thrown out.) While he was there, staff often confined him to a chair called the "Pro-Straint" chair to keep him from attempting suicide or banging his head into walls. However, there is evidence that at other times he was confined to the chair as a punishment. The district court found that this treatment violated the Eighth Amendment prohibition on cruel and unusual punishment.

However, Judge Gorsuch writes, existing law makes clear that under the 14th Amendment pretrial detainees cannot be subject to *any* punishment, so it is not necessary to reach the Eighth Amendment issue to determine that the officials are not entitled to qualified immunity at the summary judgment stage. Similarly, Blackmon alleged that one of the officials directed a subordinate to sit on Blackmon's chest because Blackmon did not answer a question. The official did not dispute that he had done this, and offered no further information about why he had done this. Therefore, it was impossible to rule out that this had been done to punish Blackmon, and the official was not entitled to qualified immunity at the summary judgment stage. Judge Gorsuch also held that two other officials were not entitled to qualified immunity at this stage, because they had arguably violated Blackmon's Eighth Amendment rights by not providing him with mental health care when they were aware that he was engaging in self-harm, etc.

Blackmon also claimed that the director of the juvenile detention facility violated his constitutional rights by failing to transfer him to a nearby unlocked shelter. He had previously been housed at the shelter, but had run away and a bench warrant issued for his arrest. Judge Gorsuch found that although pretrial detainees have the right to be free from punishment, there is no freestanding constitutional right to be housed in the facility of their choice. Therefore, reversing the district court, Judge Gorsuch found that the director of the facility was entitled to qualified immunity.

A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016)(Holmes, J.).

F.M., then in seventh grade, disrupted his P.E. class by fake burping. He refused to obey the teacher when she asked him to stop making the noises, and she had him sit in the hallway. He kept leaning into the classroom and making the burping noises. The teacher was unable to continue teaching the class because of the disruption, so she called the school resource officer. The school resource officer arrested F.M. pursuant to a state statute that prohibits interfering with the educational process, although he could instead have issued a citation. The school resource officer notified the principal that he was arresting F.M. She prepared a one-day suspension slip, patted down F.M. and handcuffed him, and took him to a juvenile detention facility.

The next school year, F.M. was searched at school. A student reported to a school official that he or she believed she had seen several students engaging in drug transactions. The school resource officer then looked at security camera footage and recognized five students involved in the suspicious transaction. All five were searched, including F.M. The search revealed only that F.M. had $200 in cash and a couple of dress code violations (a bandanna in gang colors and a marijuana leaf belt buckle). F.M.'s mother confirmed why he was carrying so much cash, so he was not disciplined for anything involving the suspected drug transaction. However, he was given a three-day in-school suspension for dress code violations, gang-related activity, and disruptive conduct.

The panel majority ruled that the officer was entitled to qualified immunity on the arrest because a reasonable officer could have reasonably believed he had probable cause to arrest the kid under the applicable New Mexico statute. The majority also held that a reasonable officer would not have thought he was committing a Fourth Amendment violation by handcuffing a minor pursuant to a lawful arrest. The majority also found that, given the circumstances and statements from other students, it was reasonable to search F.M. for marijuana. The principal was also entitled to qualified immunity on a retaliation claim, because there was no evidence her decision to search F.M. was substantially motivated by retaliation. The equal protection claim fails because it was unclear if F.M. was the only student directed to remove clothing, and even if he was, there is no evidence he was treated differently than *similarly situated* students.

Judge Gorsuch dissented. He believed that the officer was not entitled to qualified immunity because he should have known that these sorts of minimal disruptions did not fall within the conduct contemplated by the statute. Judge Gorsuch pointed to decisions from the New Mexico Court of Appeals and other

state courts only applied the statute to students who caused substantial disruption that interfered with the actual functioning of the school, not brief disruptions in a single classroom. The majority believed that the New Mexico decision, *Silva*, was inapplicable because it interpreted a statute regarding protests at *colleges*, but Judge Gorsuch argued that *Silva* was applicable because the relevant language of the two statutes is identical.
Judge Gorsuch did not address the qualified immunity issues regarding the search for marijuana.

Martinez v. Carr, 479 F.3d 1292 (10th Cir. 2007).
Martinez was intercepted by police officers at a fair who took him to the police substation at the fair. At that substation, Officer Carr (who was otherwise uninvolved with the incidents surrounding Martinez) wrote him a citation and told him he could either sign the citation (which meant that he agreed to appear in court) or go to jail. This was in accord with New Mexico law. Martinez signed and then sued, claiming that signing the citation constituted a Fourth Amendment seizure. The district court ruled that this did constitute a seizure and that Carr was not entitled to qualified immunity. Judge Gorsuch rejected this contention and reversed and remanded the case for entry of judgment in favor of Carr. "We conclude that issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure".

TransAm Trucking, Inc. v. Administrative Review Board, 833 F.3d 1206 (10th Cir. 2016)(Murphy, J.)(Gorsuch, J., dissenting).
A trucker was about to run out of gas, and then the brakes on the trailer locked up due to frigid temperatures. He called for help and waited, but the heater in his truck wasn't working and it was very cold. His torso was numb and he was having trouble breathing. The supervisor at his trucking company told him to either sit there and wait for help or to drag the trailer down the road with the locked brakes. Instead, he unhitched the truck from the trailer and drove off, returning a few minutes later when help arrived. The trucking company fired him a week later for abandoning his load. After he was fired, he filed a complaint with OSHA, arguing that he was fired in violation of the whistleblower provisions of the STAA. After OSHA dismissed his complaint, he requested a hearing before a DOL ALJ, who ruled in his favor. The ALJ found that the trucker engaged in protected activity when he reported the frozen brake issue to TransAm and again when he ignored the supervisor's suggestion that he drive the truck while dragging the trailer, and that this protected activity was inextricably entwined with TransAm's decision to fire him for leaving the load. The panel majority affirmed the decision of the ARB under a different provision of the STAA that prohibits an employer from discharging an employee who "refuses to operate a vehicle … because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." The panel majority said that deference was owed under *Chevron*, and agreed with the ARB that "the refusal to operate provision could cover a situation in which an employee refuses to use his vehicle in the manner directed by his employer." Furthermore, the STAA was enacted for health and safety reasons, and this interpretation furthers the cause of health and safety.
Judge Gorsuch dissented, arguing that *Chevron* deference is not warranted in this case because DOL never even contended that the statute was ambiguous or that *Chevron* applied. Furthermore, the statute isn't ambiguous. Even though "refuse to operate" is not defined in the statute, we can look at the dictionary definitions of words. In short, "refuse to operate" should not be read to encompass "insist on operating." Furthermore, if we say that the statute's purpose of promoting health and safety justifies a preferred interpretation, almost any interpretation is possible because everything is in some way related to health and safety.

Genova v. Banner Health, 734 F.3d 1095 (10th Cir. 2013).

Judge Gorsuch held that Dr. Genova did not have a cause of action under EMTALA for his termination. Genova claimed he was fired because he accused his hospital emergency room of hoarding patients instead of sending them to other hospitals. However, Judge Gorsuch said, EMTALA only prohibits *dumping* patients on other hospitals – in other words, the opposite of what Dr. Genova alleged was happening. The statute also protects medical personnel who refuse to sign off on transferring patients which again was the opposite of what he wanted to do. Furthermore, when he complained, no EMTALA violation had yet occurred. It was possible that hoarding patients might in the near future lead to an overwhelmed emergency room dumping patients on other emergency rooms, but there is no cause of action for possible future EMTALA violations. The doctor then retreats to an argument about statutory purpose. He argued that "we should read EMTALA as affording damages to anyone who is retaliated against for reporting imminent but as-yet unrealized statutory violations of *any* kind – not just the kind mentioned in the first clause of the whistleblower protection provision." This argument misunderstands the judicial role. When the text is plain, the judge must go with the text.