



EQUAL JUSTICE UNDER LAW

**REPORT ON THE NOMINATION OF
JUDGE NEIL M. GORSUCH AS AN
ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT**

March 2017



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

ABOUT THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today. Among its major areas of work are Educational Opportunities, Fair Housing & Community Development, Voting Rights, Criminal Justice and Economic Justice. Since its inception, the Lawyers' Committee has been committed to vigorous civil rights enforcement, the pursuit of equal justice under law, and fidelity to the rule of law.

1401 New York Avenue NW Suite 400
Washington, DC 20005
Phone: (202) 662-8600
Toll Free: (888) 299-5227
Fax: (202) 783-0857
Contact: press@lawyerscommittee.org



Judge Neil M. Gorsuch

Chief Judge, U.S. Court of Appeals for the Tenth Circuit
Nominated January 31, 2017 to United States Supreme Court

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EXECUTIVE SUMMARY

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to the United States Supreme Court. Judge Gorsuch's nomination is intended to fill the seat vacated by the death of Justice Antonin Scalia. This report examines Judge Gorsuch's record on issues central to the mission of the Lawyers' Committee. As Judge Gorsuch has been on the Court of Appeals for 10 years, the analysis is based primarily on the opinions he has authored or joined as a judge on that court though the analysis includes a review of his entire record.

Prior to becoming a judge, Judge Gorsuch demonstrated that he is politically conservative, and his conservatism is evident in his judicial decisions – this is especially evident in his decisions involving criminal procedure and alleged police misconduct, as well as his skepticism of federal regulatory agencies and his rulings against labor unions and environmental organizations. While Judge Gorsuch has passionately spoken and written about the importance of judicial restraint and providing clarity and certainty in the law, his concept of restraint may be selective, particularly with regard to social issues. For example, although he has not issued an opinion about marriage equality or LGBTQ rights, his writings prior to confirmation expressed skepticism about the use of courts to advance gay marriage. By contrast, several of his rulings on social issues such as access to abortion services and contraception appear to reflect a more activist judicial role in implementing conservative doctrine.

Every term, critical cases on issues of great public importance come before the Supreme Court, including cases concerning the interpretation and application of the Constitution and federal civil rights laws. In evaluating nominees to the Court,

the Lawyers' Committee has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

The Lawyers' Committee believes that Judge Gorsuch satisfies the first prong of our standard. Judge Gorsuch's experience both in private practice and in public service has been broad and extensive. In applying the second prong of this standard, the Lawyers' Committee requires a demonstrated respect for the importance of protecting civil rights based not only on authored opinions, but also statements, scholarly articles and other sources of information.

Overall, we conclude that there is an inadequate record to determine if Judge Gorsuch has a commitment to protecting and safeguarding civil rights and, therefore, we do not believe he satisfies the second prong of our requirement for endorsement. Based upon our review of Judge Gorsuch's record, we have concerns that he has a narrow view of rights that are protected by the Constitution, as well as a skeptical view about the importance of protecting those rights in the courtroom.

In short, Judge Gorsuch's record does not allow us to support his nomination for the Supreme Court at this time. It is of the utmost importance that the Senate Judiciary Committee thoroughly examine the nominee's judicial philosophy – particularly on issues relating to civil rights, including voting rights, racial and economic justice, fair housing and criminal justice. We look forward to working with the Committee to ensure a full examination takes place and, based upon the record, we may supplement the views expressed in this report at a later date.

INTRODUCTION

On January 31, 2017, President Trump nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to the United States Supreme Court. Judge Gorsuch was nominated to fill the seat vacated by the death of Justice Antonin Scalia. This report examines Judge Gorsuch's record on issues central to the mission of the Lawyers' Committee. As Judge Gorsuch has been on the Court of Appeals for just over 10 years, the analysis is based primarily on the opinions he has authored or joined as a judge on that court though the analysis includes a review of his entire record.

Prior to becoming a judge, Judge Gorsuch demonstrated that he is politically conservative. His conservatism is evident in his judicial decisions – this is especially evident in his decisions involving criminal procedure and alleged police misconduct, as well as his skepticism of federal regulatory agencies and his rulings against labor unions and environmental organizations. While Judge Gorsuch has passionately spoken and written about the importance of judicial restraint and providing clarity and certainty in the law, his concept of restraint may be selective, particularly with regard to social issues. For example, although he has not issued an opinion about marriage equality or LGBTQ rights, his writings prior to confirmation expressed skepticism about the use of courts to advance gay marriage. By contrast, several of his rulings on social issues such as access to abortion services and contraception appear to reflect a more activist judicial role in implementing conservative doctrine.

Judge Gorsuch's Jurisprudence in Civil Rights Cases

Judge Gorsuch has a narrow view of rights that are enforceable by the courts. For example, in a 2005 article for the *National Review*, Judge Gorsuch criticized broader efforts to use the courts to promote a “social agenda” such as “gay marriage

to assisted suicide to the use of vouchers.” In fact, the Supreme Court subsequently found that gay couples do have a constitutional right to marry, *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015), and the Court has suggested that there are some limits on government interference in end of life decisions. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). Furthermore, his criminal law decisions do not appear to focus on “vindicating the constitutional rights and liberties of the unpopular” defendants subjected to the criminal justice system.

In other categories of civil rights cases such as housing, voting, and education, Judge Gorsuch does not have many written opinions. Most of the civil rights opinions he has authored are found in employment cases where he has affirmed trial court decisions on behalf of employers. In a wide array of contexts - habeas decisions, consumer arbitration clauses, and environmental cases - Judge Gorsuch has opposed allowing claimants to proceed in federal court creating barriers to protecting civil rights.

As with all nominees, we believe that Judge Gorsuch's civil rights record is an area appropriate for evaluation during Senate hearings.

Jurisprudence on Criminal Justice

Judge Gorsuch has not written any opinions on the criminal justice issues central to the Lawyers' Committee work, such as— racial disparities in arrest, conviction and sentencing rates, clemency for nonviolent offenders, barriers to reentry, right to counsel, and debtors' prisons. With respect to the scores of opinions he has written in criminal appeals, Judge Gorsuch frequently affirms convictions.

In several notable decisions, Judge Gorsuch has taken a narrow view on constitutional rights of defendants, particularly concerning the Fourth Amendment and the exclusionary rule. On several occasions, he found no constitutional violation where other appellate judges disagreed. He has taken a similar approach on habeas

cases, dissenting from a number of decisions where the panel found a violation sufficient to merit further proceedings. He has a narrow view of what federal courts may consider under the Antiterrorism and Effective Death Penalty Act, but has also ruled (fairly consistently) against petitioners on the merits of their claims.

Judge Gorsuch's record on 42 U.S.C. Section 1983 cases involving alleged police misconduct is generally deferential to police officers -- he has found conduct immune in questionable circumstances that moved other appellate judges to disagree. For example, he concluded (over dissent) that a police officer was entitled to qualified immunity when the officer killed a man by shooting him in the head with a taser at close range after the man fled arrest for possession of marijuana. In a concurrence in another case, he questioned whether there should be any relief under Section 1983 for claims of malicious prosecution, writing "the Constitution . . . isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law."¹ By contrast, he has voted to grant relief in a number of cases challenging prison conditions, most notably where a prisoner was seeking accommodation for their religious beliefs.

OTHER CONSIDERATIONS

Experiences and Education

After college at Columbia University and law school at Harvard, Judge Gorsuch clerked for Judge David Sentelle and jointly for Justices Byron White and Anthony Kennedy. He attended Oxford University as a Marshall Scholar where he received his doctorate in legal philosophy. Judge Gorsuch spent several years working at the law

firm of Kellogg Huber and as a senior official in the U.S. Department of Justice. These professional experiences along with his time spent as a federal appellate judge shape the outlook he would bring to bear on issues that come before the Court.

Judicial Philosophy and Style

There are three notable aspects to Judge Gorsuch's decision-making process. First, his writings reflect traditionally conservative political views. This theme runs through his writings, from his undergraduate days,² his Oxford dissertation (which he subsequently published),³ and the opinion pieces he authored as a lawyer.⁴ Judge Gorsuch's conservatism is also clear from his judicial decisions -- frequently holding for prosecutors over criminal defendants or prisoners and for corporations over consumers and environmentalists. His conservatism also animates his disdain for federal bureaucracy and his reluctance to defer to federal administrative agencies. Most notably, across a wide range of substantive subject matters, he has expressed skepticism that administrative interpretations of statutes should receive any *Chevron* deference. His conservatism is also evident in his views regarding the number of federal crimes. In one of the two major speeches he has given as a judge, he stated:

Without question, the discipline of writing the law down -- of codifying it -- advances the law's interest in fair notice. But today we have about 5,000 federal criminal statutes on the books -- most of them added in the last few decades. And the spigot keeps pouring with literally hundreds of new statutory crimes inked every single year. Neither does that begin to count the thousands of regulatory crimes buried in the Federal Register. There are so many crimes cowled in the numbing fine print of those pages that scholars have given

¹ *Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016).

² Gorsuch, Neil. "Progressives: Where have all the protests gone?" *Columbia Daily Spectator*, Volume CXII, Number 105, April 11, 1988; Gorsuch, Neil.

"Let's let the commander in chief lead." *Columbia Daily Spectator*, Volume CXI, Number 69, Jan. 28, 1987.

³ Gorsuch, Neil. *The Future of Assisted Suicide and Euthanasia*. Princeton, NJ: Princeton University Press, 2006.

⁴ Gorsuch, Neil, *Liberals N' Lawsuits*, National Review (2005) <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>

*up counting and are now debating their number...Without written laws, we lack fair notice of the rules we as citizens have to obey. But with too many written laws, don't we invite a new kind of fair notice problem? And what happens to individual freedom and equality when the criminal laws comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity. . . It is an irony of the law that either too much or too little can impair our liberty.*⁵

Second, as a nominee and as a jurist, he has professed views of judicial restraint in the mode of Justice Antonin Scalia. Judge Gorsuch does not believe that the personal views or lived experiences of justices should be brought to bear on cases that come before them. Judge Gorsuch also believes that the judicial tools for statutory interpretation should be limited to canons of construction and adherence to precedent. For example, in his 2016 memorial lecture honoring Justice Scalia, Judge Gorsuch spoke about the importance of these principles:

*[W]hen judges pull from the same toolbox and look to the same materials to answer the same narrow question – what might a reasonable person have thought the law was at the time – we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow.*⁶

Similarly, a theme in many of his concurrences and dissents is that the panel decision has gone further than it needs to go, either by addressing points that are not essential to the decision or introducing complexity to the law.

Third, he has largely been silent on *stare decisis* and the significance of precedent in constitutional

questions. While his non-judicial writings and decisions acknowledge the need to follow Circuit and Supreme Court precedent, generally he has made clear that he thinks these principles are important in matters of statutory interpretation. Even this has its limits, however, as he disagrees with the Supreme Court on *Chevron* deference to administrative agency interpretations of law.

Significantly, we have found nothing in his writings to suggest that a Supreme Court Justice should defer to prior interpretations of the Constitution or that *stare decisis* is an important judicial principle. His failure to speak to this issue is in tension with his views regarding the importance that courts “provide a remarkably stable and predictable set of rules people are able to follow.”

In light of this, we believe it important that the Senate hearings should seek to determine Judge Gorsuch’s views on *stare decisis*.

CONCLUSION

Every term, critical cases come before the Supreme Court concerning issues of great public importance, including cases concerning the interpretation and application of the Constitution and federal civil rights laws. In evaluating nominees to the Court, the Lawyers’ Committee has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation’s civil rights laws.

The Lawyers’ Committee believes that Judge Gorsuch satisfies the first prong of our standard. Judge Gorsuch’s experience both in private practice and in public service has been broad and extensive.

In applying the second prong of this standard, the Lawyers’ Committee requires a demonstrated respect for the importance of protecting civil rights based not only on authored opinions, but also, on statements,

⁵ The 2013 Barbara K. Olson Memorial Lecture https://www.youtube.com/watch?v=VI_c-5S4S6Y

⁶ 2016 Summer Canary Memorial Lecture: *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Re. L. Rev. 905 (2016), available at <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4658&context=caselrev>

scholarly articles or other sources of information.

Overall, we conclude that there is an inadequate record to determine if Judge Gorsuch has a commitment to protecting and safeguarding civil rights and, therefore, we do not believe he satisfies the second prong of our requirement for endorsement. Based upon our review of Judge Gorsuch's record, we have concerns that he has a narrow view of rights that are protected by the Constitution, as well as a skeptical view about the importance of protecting those rights in the courtroom.⁷

In short, Judge Gorsuch's record does not allow us to support his nomination for the Supreme Court. It is of the utmost importance that the Senate Judiciary Committee thoroughly examine the nominee's judicial philosophy – particularly on issues relating to civil rights, racial and economic justice, fair housing and criminal justice. We look forward to working with the Committee to ensure a full examination takes place and, based upon the record, may supplement the views expressed in this report at a later date.

⁷ "Liberals N' Lawsuits," supra note 4, February 7, 2005.

POLICY REGARDING NOMINATIONS TO THE SUPREME COURT

Since its creation in 1963 at the urging of President John F. Kennedy, the Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States. For more than four decades, our nation has been transformed as we have taken important strides in confronting racial discrimination and injustice. Yet the challenges of unlawful discrimination remain, with significant inequities and disparities throughout our society, and continue to obstruct and undermine the principle of equal justice for all.

Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights enforcement plays in our democracy, the Lawyers' Committee has long reviewed the record of nominees to the Supreme Court to determine if the nominee demonstrates views that are manifestly hostile to the core civil rights principles for which the Lawyers' Committee has advocated. With this report, the Lawyers' Committee also evaluates whether Judge Gorsuch's record demonstrates that he possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

Judge Neil McGill Gorsuch, 49, was born on August 29, 1967 in Denver, Colorado to Anne Buford Gorsuch and David R. Gorsuch. His parents were both prominent attorneys in the Denver area. Anne Buford Gorsuch worked as a local prosecutor, corporate attorney for Mountain Bell and a state representative. She subsequently served as President Reagan's EPA Administrator from 1981 to 1983, resigning after she was held in contempt by Congress.⁸ His father was an attorney in private practice at the Denver-based Gorsuch Kirgis firm, which was founded by Judge Gorsuch's paternal grandfather, John Gorsuch.⁹

Judge Gorsuch is a fourth-generation Coloradan, but spent his high school years in Washington, D.C. and graduated from Georgetown Prep high school in Washington, D.C. in 1985. Judge Gorsuch attended Columbia University (*cum laude*, 1988). He was active in Greek life (a member of the Phi Gamma Delta fraternity) and student journalism. In addition to regularly contributing opinion pieces to the mainstream *Columbia Spectator*, he co-founded two conservative-leaning campus publications, the *Federalist Paper* (which he also edited) and the *Morningside Review* magazine.¹⁰ Judge Gorsuch ran for a seat on the Columbia University Student Council Senate but was disqualified for violating a campus rule on election posters.¹¹

Judge Gorsuch attended Harvard Law School (*cum laude*, 1991). He was a Harry S. Truman Scholar, an editor of the *Harvard Journal of Law and Public Policy*, and a member of the Lincoln's

Inn Society. Judge Gorsuch has stated that during his time at Harvard Law School, he volunteered to provide *pro bono* services to indigent prisoners and the poor through the Harvard Prison Legal Assistance Project and the Harvard Defenders program. However, the nature and extent of his role with these programs has been the subject of some debate.¹² He also served as a teaching fellow in the Harvard Government Department. Following his first and second year of law school, Judge Gorsuch worked at Davis, Graham & Stubbs (1989) and at Cravath Swaine & Moore (1990) as a summer associate.

Following law school, Judge Gorsuch worked as a summer associate at Sullivan & Cromwell, and then served as a clerk to Judge David Sentelle until 1992. He subsequently attended Oxford University as a Marshall Scholar for a year, and clerked jointly for Justices Byron White and Anthony Kennedy during the 1993-1994 term. Judge Gorsuch later returned to Oxford and completed his Marshall Scholarship, ultimately earning a D.Phil. in legal philosophy from Oxford in 2004.

Judge Gorsuch worked his way to a partnership at the Kellogg Huber firm in Washington, D.C., where he practiced from 1995 to 2005. He was a member of the D.C., New York, and Colorado bars, and the Republican National Lawyers Association, where he served as head of the Judicial Confirmation Task Force.¹³ Judge Gorsuch's legal practice included a range of matters, from simple contract and fiduciary duty disputes to complex antitrust, securities, and class action cases. At the time of his confirmation hearing for appointment to the 10th Circuit, in 2006, Judge

8 https://en.wikipedia.org/wiki/Anne_Gorsuch_Burford; <http://people.com/archive/the-newlywed-burfords-wont-top-d-c-s-social-a-list-theyre-congress-most-wanted-couple-vol-19-no-9/>

9 http://www.cba.cobar.org/tcl/tcl_articles.cfm?articleid=599

10 Online archives of the *Columbia Spectator* and the *Federalist Paper* are found at <http://spectatorarchive.library.columbia.edu/> and <http://columbiafederalist.com/new-page-2/> (Deep archives).

11 Levey, Jill. "Two election hopefuls disqualified." *Columbia Daily Spectator*, Volume CX, Number 98, March 24, 1986.

12 See, "Few Recall Gorsuch's Volunteer Work at Harvard," *Wall Street Journal*, February 5, 2018: <https://www.wsj.com/articles/few-recall-gorsuchs-volunteer-work-at-harvard-1486342894>

Gorsuch reported that he had tried four jury trials, two as lead counsel.

Judge Gorsuch's list of disclosed cases includes representation of plaintiffs as well as defendants, exclusively in commercial litigation. As a plaintiff's lawyer, he successfully represented (i) the Conwood Corporation in an antitrust suit against U.S. Tobacco, which resulted in a \$1 billion jury verdict in favor of his client,¹⁴ (ii) Zachair, Ltd. in a business tort case against Driggs Corporation,¹⁵ and (iii) the Laura Ashley Company against the Coopers & Lybrand accounting firm in a business torts case.¹⁶ He also represented the California and Florida state pension systems and their trade association, the Council of Institutional Investors, in two separate cases before the U.S. Supreme Court that established the right of absent class members to object to class action settlements that favor the lead class members at the expense of other members.¹⁷ Judge Gorsuch's defense representations included SBC Communications, American Express, Columbia Hospital for Women, and various interests of the Anschutz family (including Regal Cinemas) on antitrust defense, corporate governance, and contract dispute litigation matters.¹⁸ He also prepared two amicus briefs for the U.S. Chamber of Commerce in the U.S. Supreme Court¹⁹ and Second Circuit²⁰ in securities fraud cases.

Judge Gorsuch left private practice in 2005 to become the Principal Deputy to the Associate Attorney General of the U.S. Department of Justice, Robert McCallum, Jr. During his prior confirmation hearing, Judge Gorsuch reported that

his role was "assist[ing] in managing the Department's civil litigating components (antitrust, civil, civil rights, environment, and tax)."

While serving as a federal judge, he also taught antitrust law and ethics at the University of Colorado law school as a visiting professor. Judge Gorsuch has frequently participated in the annual Federalist Society convention, typically as a session moderator. He does not appear to have written or spoken widely during his time on the bench -- our research has identified two speeches: (i) the 2013 Barbara K. Olson Memorial lecture, which is the Federalist Society convention keynote,²¹ and (ii) a 2016 speech on the legacy of Justice Scalia given at Case Western Law School.²²

13 <http://www.mla.org/Newsletter/ViewArticle.aspx?ArticleID=192>

14 *Conwood v. UST*, Case No. 5:98-CV 00108 (W.D. Ky), 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003) (Judge Thomas Russell, W.D. Ky.) (1997 - 2003).

15 *Zachair, Ltd. v. Driggs Corp.*, 762 A.2d 991 (Md. Ct. Spec. App. 2000).

16 *Ashley v. Coopers & Lybrand*, No. CL95-6466 (Albermarle Co. Va.).

17 *California Public Employees' Retirement System v. Felzen*, 525 U.S. 215 (1999) and *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

18 *NCRC v. Columbia Hospital for Women*, No. 00-7308 (D.C. Super.) (Judge Anna Blackburne-Rigsby) (trial 2004).

19 *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005).

20 *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2nd Cir. 2003).

21 https://www.youtube.com/watch?v=V1_c-5S4S6Y

22 2016 *Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Re. L. Rev. 905 (2016), available at <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4658&context=caselrev>

TESTIMONY FROM PREVIOUS CONFIRMATION HEARINGS

The hearings and floor debate regarding Judge Gorsuch's nomination to the Tenth Circuit took place in June and July 2006. Judge Gorsuch was nominated to fill the seat vacated by Judge David M. Ebel. He was jointly presented by Senators Wayne Allard and Ken Salazar, and was reported favorably out of the Judiciary Committee. Judge Gorsuch was rated "well qualified" by the American Bar Association. He was confirmed by voice vote on July 20, 2006.

ANALYSIS OF JUDGE GORSUCH'S TENTH CIRCUIT OPINIONS

The Lawyers' Committee identified and reviewed the relatively few civil rights cases in which Judge Gorsuch has participated during his tenure on the Tenth Circuit. In addition, in order to assess how Judge Gorsuch's approach might impact his analysis of civil rights claims, the Lawyers' Committee reviewed cases that, while not directly addressing core civil rights claims, deal with issues that often are implicated in civil rights cases. Below is a discussion of his decisions in core civil rights areas, including employment discrimination, housing, voting rights, environmental justice, and criminal justice.

EMPLOYMENT

Judge Gorsuch has written a substantial number of opinions on employment law issues. In most of these cases, he has affirmed district court decisions dismissing claims asserted by women, people of color, and people with disabilities. For example, in *Johnson v. Weld County*, 594 F.3d 1202 (10th Cir. 2010), Judge Gorsuch affirmed the summary judgment against a female accountant with multiple sclerosis who claimed that she and three other females were passed over for promotion in favor of the only male applicant. In affirming the district court judgment, Judge Gorsuch wrote that the court need not consider evidence of reports by the plaintiff's supervisor and another co-worker that the hiring director said the plaintiff had been passed over because of her multiple sclerosis. Similarly, in *Montes v. Vail Clinic*, 497 F.3d 1160 (10th Cir. 2007), Judge Gorsuch affirmed the dismissal of a class action filed on behalf of seven Hispanic housekeepers, ruling in part, that the defendant's English-only work rule was

reasonable. In reaching these decisions, Judge Gorsuch typically engages in meaningful factual analysis, applies pre-existing law, and does so without any dissent.²³

In one notable decision, *Almond v. Unified School District*,²⁴ Judge Gorsuch affirmed the dismissal of ADEA claims, but also narrowly construed the Lily Ledbetter Act as applying only to cases involving "discriminatory compensation" and not to cases "alleging discrimination in hiring, firing, demotions, transfers, or the like."

Judge Gorsuch does not always agree with employers and has written a few decisions affirming district court rulings for plaintiffs,²⁵ or reversing rulings for the defendants in cases related to employment discrimination and retaliation. For example, in *Orr v. City of Albuquerque*,²⁶ he reversed the district court's grant of summary judgment for defendants in a Title VII pregnancy discrimination case brought by female police officers, remanding for trial. Similarly, in *Williams v. W.D. Sports N.M., Inc.*,²⁷ which followed the appeal of a defense verdict on Title VII sexual harassment claims, Judge Gorsuch reversed the trial court's entry of summary judgment and a directed verdict on retaliation claims and remanded them for re-trial. In *Simmons v. Uintah Health Care Special*,²⁸ Judge Gorsuch reversed a bench trial verdict on a Section 1983 claim for a municipality where it failed to follow its own termination procedures.

Judge Gorsuch's most revealing opinions may be his dissents. In *Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224 (10th Cir. 2009), the panel reversed and remanded the trial court's dismissal of a female salesperson's Title VII and FMLA claim where the plaintiff claimed hostile treatment and retaliation after

23 See also *Young v. Dillon Companies*, 468 F.3d 1243 (10th Cir. 2006) (affirming summary judgment against African-American on Title VII claims); *Elwell v. Board of Regents of Univ. of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012) (affirming dismissal of female university employee's ADA claim); *Myers v. Knight Protective Services*, 774 F.3d 1246 (10th Cir. 2014) (affirming summary judgment of disabled security guard's claims under ADA and Title VII claims); *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014) (affirming dismissal of female professor's Rehabilitation Act claims).

24 665 F.3d 1174 (10th Cir. 2011).

25 E.g., *Barrett v. Salt Lake Co.*, 754 F.3d 864 (10th Cir. 2014) (affirming jury verdict for a plaintiff asserting retaliation).

26 531 F.3d 1210 (10th Cir. 2008).

27 497 F.3d 1079 (10th Cir. 2007).

28 506 F.3d 1281 (10th Cir. 2007).

she took two weeks medical leave. Judge Gorsuch dissented from the majority's finding of gender discrimination in violation of Title VII, arguing that male employees were also treated poorly and, accordingly, there was no evidence the plaintiff suffered discrimination. Judge Gorsuch's dissent here seemed unsympathetic to allegations of gender discrimination. The measured tone that characterizes many of his dissents was lacking here, as in the *Hobby Lobby* case (discussed below). There, he showed little consideration for workers' rights to the extent that they conflicted with employers' religious views.

Additionally, Judge Gorsuch has written one opinion that conveys anti-union sentiments, ruling against the Teamsters Local Union and in favor of the NLRB. In *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198 (10th Cir. 2014), Judge Gorsuch argued that it is not necessarily true that hiring permanent replacements for locked out union employees would be illegal if the employer did not intend to coerce the locked out employees. This opinion was also notable for Judge Gorsuch's extended discussion of the constitutionality of intra-session recess appointments to the NLRB. Though neither party raised the issue and Supreme Court precedent settled the matter for purposes of the case at hand, Judge Gorsuch dedicated nearly two full pages to the subject.

As a final note, some employment law cases raise questions of administrative law. In these cases, Judge Gorsuch appears loath to defer to administrative agencies on matters of statutory interpretation. In multiple dissents, Judge Gorsuch describes administrative agencies' powers of statutory interpretation with incredulity bordering on sarcasm. For example, in *Compass Env'tl., Inc. v. Occupational Safety & Health Review*

Comm'n,²⁹ Judge Gorsuch characterized an agency decision as a "Delphic declaration" unsupported by evidence and stated that: "Their interpretations of ambiguous statutes control even when most everyone thinks Congress really meant something else. Their regulations bind as long as they can make the modest boast that they haven't behaved arbitrarily or capriciously. Their factual findings rule the day unless someone can show they have not just erred but clearly erred."³⁰ Similarly, Judge Gorsuch criticized the Department of Labor's statutory interpretation while dissenting in *TransAm Trucking, Inc. v. Admin. Review Bd.*³¹ There, he expressed condescension about the level of deference his colleagues were willing to afford to the agency.³²

HOUSING

We have identified only one opinion by Judge Gorsuch on a housing related issue, *Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F.3d 917 (10th Cir. 2012). This case asked whether the city discriminated in failing to grant a zoning variance to a treatment center for persons with mental and emotional disorders. Judge Gorsuch wrote a unanimous opinion affirming the district court's grant of summary judgment for the city. Judge Gorsuch found that plaintiffs lost because they did not provide evidence showing that the city: "(1) intentionally discriminated against the disabled, (2) engaged in conduct that had an unlawful disparate impact on the disabled, or (3) failed to provide a reasonable accommodation for the disabled."³³

VOTING RIGHTS

Judge Gorsuch has not authored any opinions in any voting rights cases. He did join the unanimous opinion in *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012), a case under the National Voter Registration

²⁹ 663 F.3d 1164 (10th Cir. 2011).

³⁰ *Id.* at 1170.

³¹ 833 F.3d 1206 (10th Cir. 2016).

³² *Id.* at 1209.

³³ *Id.* at 919.

Act (“NVRA”) that was litigated by the Lawyers’ Committee and others. The panel affirmed two decisions by the district court that favored the plaintiffs. The first appeal involved Section 7 of the NVRA, which requires public assistance agencies to provide voter registration forms to public assistance clients unless the client specifically declines on the benefit application form. New Mexico’s stated policy was not to provide clients a voter registration application form unless they affirmatively requested the voter registration form either in response to the voter registration question on the benefit application form or orally requested the application. The district court granted the plaintiffs’ motion for partial summary judgment based on the language of the NVRA. *Id.* at 939-40. The Tenth Circuit panel found that “the most reasonable interpretation is the one urged by plaintiff Allers and adopted by the district court.” *Id.* at 947. The second appeal involved the attorneys’ fees associated with the plaintiffs’ other NVRA claim in the case, which involved the defendants’ violation of NVRA requirements regarding providing voter registration opportunities at driver’s license offices. The defendants settled the merits of this claim and agreed as part of the settlement that plaintiffs were entitled to reasonable attorneys’ fees. One of the defendants, the Secretary of State, was not able to reach agreement on the amount of fees and the district court decided the amount. The Secretary appealed. *Id.* at 948. Applying an abuse of discretion standard, the 10th Circuit panel rejected each of the Secretary’s arguments. *Id.* at 948-50.

Because of the fundamental nature of voting rights to civil rights and the likelihood that the Supreme Court will be addressing cases involving constitutional and/or statutory interpretations of federal voting rights protections in the near future, this is a topic that should be raised during the Congressional hearings.

The Constitution contains several provisions relating to voting including the protections under the Fourteenth and Fifteenth amendments, that prohibit racial discrimination in voting, and in the Fourteenth amendment providing for a fundamental right to vote. Both amendments contain clauses that grant Congress the authority to enact legislation that enforces the rights protected in the amendments. The Voting Rights Act is the prime example of legislation that enforces the Fourteenth and Fifteenth amendments and the Supreme Court has issued opinions involving the scope of Congress’s enforcement power as well as statutory interpretations of the Voting Rights Act. Congress also has the authority to regulate federal elections under the Elections Clause.

One particularly important and problematic recent Supreme Court decision in the area of voting rights was *Shelby County, Ala v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), where the Court in a 5-4 decision declared unconstitutional the formula that was used to identify jurisdictions that would be subject to Section 5 of the Voting Rights Act. Prior to the decision, these Section 5 covered jurisdictions had to demonstrate to federal officials that any voting changes they proposed did not have a discriminatory purpose or effect. The effect of the opinion was to essentially render Section 5 -- which had been perhaps the most effective civil rights provision of the modern era -- inoperable. The Supreme Court held that the Congress did not satisfy the normally-deferential rational basis test even though Congress had conducted dozens of hearings and compiled a voluminous record that showed ongoing discrimination when it reauthorized Section 5 and the coverage formula in 2006.

Judge Gorsuch should be asked questions related to his views regarding the enforcement authority of Congress to remedy racial discrimination in voting as well as how he would approach issues regarding the interpretation of federal voting laws such as the Voting Rights Act and the National Voter Registration Act. Judge Gorsuch should also be asked questions regarding what standards he would use in deciding

whether lower court decisions enjoining practices found to violate federal law in advance of an election should be reversed because in several recent federal election years, state defendants have sought expedited federal relief to overturn lower court decisions enjoining election laws.

Additionally, Judge Gorsuch should be probed about his views regarding how he would assess and weigh arguments regarding voter fraud prevention as a justification for voting laws that impede the right to vote such as restrictive voter identification requirements. His support of Hans von Spakovsky raises particular concern that Judge Gorsuch may give too much weight to voter fraud prevention justifications. During Judge Gorsuch's tenure at the Department of Justice when he assisted in managing the Civil Rights Division, Hans von Spakovsky was assigned to oversee the Voting Section of the Civil Rights Division. Von Spakovsky has long been notorious in his assertions that strict voter identification laws and similar provisions are needed to prevent voter fraud and has consistently downplayed the disenfranchising effects of such measures on African Americans, Latinos and other minority groups. When Judge Gorsuch learned that von Spakovsky had been nominated to the Federal Election Commission, his reaction was "Go Hans!"³⁴ The Senate declined to act on von Spakovsky's nomination, largely based on his actions while at the Justice Department, and he ultimately withdrew his nomination.

EDUCATIONAL OPPORTUNITY

Judge Gorsuch appears to have written minimally on the topic of educational opportunity. We have not found any decisions he authored concerning desegregation, affirmative action, school diversity, school financing, vouchers, or curriculum matters. Judge Gorsuch has authored three opinions and one concurrence on appeals regarding educational

services provided under the Individuals with Disabilities Education Act ("IDEA"). In all three of his opinions, he denied the relief requested by the student, construing IDEA narrowly.

In *Thompson R2-J School District v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143 (10th Cir. 2008), Judge Gorsuch ruled that the student was not entitled to funding for education in a residential placement, overturning the decisions of the district court, the Administrative Law Judge, and the Impartial Hearing Officer. Judge Gorsuch stressed that "[IDEA] does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program." *Id.* at 1155.

In *Garcia v. Board of Education of Albuquerque Public Schools*, 520 F. 3d 1116 (10th Cir. 2008), he upheld a district court decision to deny the student-plaintiff a remedy under IDEA due to "skepticism of whether [the student] will in fact choose to benefit from the compensatory services that she might receive from the court," owing to her record for truancy and disciplinary issues. Despite noting in the opinion that he might not have come to the same conclusion had he ruled on the case originally, *id.* at 1130, the case still sets a concerning precedent that courts can deny remedies sought under IDEA to students with disabilities due to behavioral concerns, when improper or inadequate services could very well contribute to the student's behavioral problems.

In *A.F. ex rel Christine B. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), he affirmed (over a dissent) a district court finding that a plaintiff had not exhausted administrative remedies where she had settled the claim through mediation and subsequently filed suit. He stressed that her arguments directly contradicted statutory text and precedent and that policy arguments were not sufficient to overcome the

34 FN Berman, Ari, *In E-Mails, Neil Gorsuch Praised a Leading Republican Activist Behind Voter Suppression Efforts*, The Nation (March 17, 2017).

established law, but he noted that the plaintiff might have had other meritorious arguments that she failed to raise. *Id.* at 1247-50.

Judge Gorsuch wrote a concurrence in *Jefferson County School District R-1 v. Elisabeth E. ex. rel. Roxanne B.*, 702 F.3d 1227 (10th Cir. 2012), in which the majority opinion identified a new test for determining whether a private school placement is eligible for funding from the student's public school district. Judge Gorsuch wrote separately to clarify "a private placement under IDEA is permissible *only* if it is necessary to supply the child with a meaningful *educational* benefit the public school has proven unable or unwilling to supply—not to address purely social, emotional, or medical needs." *Id.* at 1244 (Gorsuch, J., concurring) (emphasis in original).

In *Simpson v. University of Colorado, Boulder*, 500 F.3d 1170 (2007), Judge Gorsuch joined a unanimous panel opinion that reversed a district court opinion dismissing a Title IX sexual assault claim on summary judgment. In *Simpson*, plaintiffs were female students at the University of Colorado who claimed that they had been raped by football recruits during their visit to the university. The plaintiffs provided a history of incidents involving the football team's poor handling of past complaints of sexual assaults including one that occurred two months before the incident at issue in the litigation. The panel stated that "[t]he central question in this case is whether the risk of such an assault during recruiting visits was obvious. In our view, the evidence could support such a finding." *Id.* at 1180-81.

ENVIRONMENTAL LAW AND JUSTICE

The Lawyers' Committee reviewed Judge Gorsuch's opinions dealing with environmental law because of its involvement in environmental justice issues. The Lawyers' Committee believes that America's environmental laws and policies should protect all communities, regardless of race, color, national origin or income level. All too

often, communities of color bear a disproportionate burden of the effects of environmental pollution, and citizen suits have been critical to the enforcement of environmental laws in minority and low-income communities.

Prior to the Supreme Court's ruling in *Alexander v. Sandoval*,³⁵ Title VI of the Civil Rights Act of 1964 was an important tool for minority communities challenging the discriminatory impact of conduct by recipients of federal funding. Since the *Sandoval* case, however, individuals can no longer assert disparate impact claims under Title VI. As a result, fair and equitable environmental protection through the use of environmental laws has become increasingly vital to these highly vulnerable populations.

As a judge on the Tenth Circuit, Judge Gorsuch has authored nine published opinions that roughly pertain to environmental issues and participated in seven published cases where he did not issue an opinion. These cases involved challenges brought under the Resource Conservation and Recovery Act (RCRA), the Quiet Title Act (QTA) and the Stock-Raising Homestead Act of 1916; Constitutional challenges to state statutes pertaining to water and energy; challenges to the rules, plans, regulations and decisions of various federal administrative agencies; a challenge to a local government's rights pertaining to federal land; and a tort case in which property owners brought claims against a nuclear weapons manufacturing plant to recover for property damage. None of these opinions provides substantial insight into Judge Gorsuch's disposition concerning environmental justice issues.

Judge Gorsuch often finds ways to dispose of environmental justice cases. He stated that several cases should be resolved on procedural grounds. For example, he has written two decisions arguing that environmental groups either lacked standing to bring a suit or that they were not entitled to intervene as of right in a case where the Forest Service was a defendant. *See Wilderness Society v. Kane County, Utah*, 632 F.3d 1162 (10th Cir. 2011) (writing a

35 532 U.S. 275 (2001).

concurring *en banc* decision that the environmental organization both lacked standing and the case was moot because the defendant had rescinded the challenged regulation); *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, 540 Fed. Appx. 877 (10th Cir. 2013) (dissenting from panel decision finding that environmental group had sufficient interests to intervene as of right).

Similarly, Judge Gorsuch has concluded that other disputes did not belong before the Tenth Circuit, holding that claims were moot or that they involved “nationally applicable” standards requiring transfer of the case to the District of Columbia Circuit. *See Wyoming v. United States Dep’t of Interior*, 587 F.3d 1245 (10th Cir. 2009). Panels he participated on reached a similar conclusion in two other matters. *See WildEarth Guardians v. United States Environmental Protection Agency*, 759 F.3d 1196 (10th Cir. 2014); *ATK Launch Systems, Inc. v. United States Environmental Protection Agency*, 651 F.3d 1194 (10th Cir. 2011).

In two opinions, Judge Gorsuch, either as the author or as a member of a panel, rejected Constitutional challenges to state statutes on the basis of the Dormant Commerce Clause. *See Tarrant Regional Water District v. Herrmann*, 656 F.3d 1222 (10th Cir. 2011); *Energy & Environmental Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015). Of note, Judge Gorsuch’s opinion in *Energy & Environmental Legal Institute*, suggests skepticism about the viability of the Dormant Commerce Clause doctrine, citing a dissenting opinion of Justice Scalia and an opinion of Justice Thomas concurring in part and dissenting in part. 793 F.3d at 1171.

The opinion closest to providing substantive insight into Judge Gorsuch’s views of environmental justice is *Scherer v. United States Forest Service*, 653 F.3d 1241 (10th Cir. 2011).

Scherer affirms a judgment in favor of the Forest Service that its “amenity fee” implementation plan is not facially inconsistent with its authorizing statute, which prohibits the imposition of fees for engaging in certain activities within national forests, such as parking, picnicking, walking and horseback riding. *Id.* at 1242-43. *Scherer* reasons that to show the “amenity fee” implementation plan is facially invalid, the plaintiffs would have had to show “‘no set of circumstances’ in which the challenged regulation might be applied consistent with the agency’s statutory authority.” *Id.* at 1243. *Scherer*, however, suggests that the “amenity fee” implementation might be vulnerable to an “as applied” challenge, which was not the challenge the plaintiff had made. *Id.* 1244.

JURISPRUDENCE ON CRIMINAL JUSTICE

Overview

As to criminal justice issues which are central to the Lawyers’ Committee’s concerns – racial profiling by police, over-incarceration, discriminatory enforcement of criminal laws, clemency for non-violent offenders, rights of formerly incarcerated persons, etc. – Judge Gorsuch has not authored opinions of direct relevance.

Judge Gorsuch generally takes a conservative approach to his criminal docket, rarely voting to reverse criminal convictions. Over his tenure he has taken a narrow view on constitutional rights of defendants, particularly concerning the Fourth Amendment. On several occasions, he has found no violation where other appellate judges did. He has taken a similar approach on habeas cases, dissenting from a number of decisions where the panel found a violation sufficient to merit further proceedings. He has a rigid view of what federal courts may consider under the Antiterrorism and Effective Death Penalty Act (AEDPA), but has also ruled (fairly consistently) against petitioners on the merits of their claims.

Judge Gorsuch’s record on Section 1983 cases involving alleged police misconduct is generally deferential to police officers. He has found conduct is

immune in questionable circumstances where other appellate judges have disagreed. For example, he concluded (over dissent) that qualified immunity applied when a police officer killed a man by using a taser to shoot him in the head at close range.³⁶

In a concurrence in another case, he questioned whether there should be any relief under Section 1983 for claims of malicious prosecution, writing “the Constitution . . . isn’t some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law.”³⁷ He has also voted to grant relief in a number of prison condition cases, most notably where a prisoner was seeking accommodation for their religious beliefs.

General Criminal Appeals

Criminal Procedure and Substantive Criminal Law

Judge Gorsuch is generally deferential to police decisions on searches and seizures, typically affirming the district court’s finding of probable cause. *See, e.g., United States v. Martin*, 613 F.3d 1295 (10th Cir. 2010) (holding that officers had probable cause to arrest defendant); *United States v. Rochin*, 662 F.3d 1272 (10th Cir. 2011) (holding that the officer did not exceed the scope of a permissible protective frisk). Judge Gorsuch is not a proponent of the exclusionary rule and has dissented in a number of cases where the panel found a constitutional violation and ordered evidence suppressed, including:

- *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013): The panel found that a search based on a traffic stop for a turn that was not illegal should be suppressed. Judge Gorsuch dissented, writing that “our constitutionally assigned task is to assess the reasonableness of government conduct” and suggested the case be remanded for the District Court to make findings whether the officer’s conduct was not merely premised on a mistaken view of the

law, but unreasonable.

- *United States v. Dutton*, 509 Fed.Appx. 815 (10th Cir. 2013): The panel reversed a conviction finding that because the search warrant did not provide a basis for connecting the location to be searched with the defendant, there was no good faith basis to search the location. Judge Gorsuch dissented, concluding that “a law enforcement officer is presumed to act in good faith” when acting on a search warrant, and the presumption had not been overcome.
- *United States v. Bernard*, 680 F.3d 1206 (10th Cir. 2012): The panel found that questioning of the suspect after arrest was interrogation and suppressed his statement. Judge Gorsuch dissented, suggesting that because of the “high burden of showing harmless error” the conviction should be affirmed.
- *United States v. Cos*, 498 F.3d 1115 (10th Cir. 2007): The panel affirmed the lower court’s decision to suppress evidence, finding that the defendants’ friend lacked actual or apparent authority to consent to a search of the defendants’ apartment. Without addressing the merits, Judge Gorsuch dissented to say that the government had failed to meet the deadline to file an interlocutory appeal and accordingly the appellate court lacked jurisdiction.

Conversely, Judge Gorsuch dissented in at least two cases where the panel found that suppression was not warranted. In *United States v. Ford*, 550 F.3d 975 (10th Cir. 2008), the government failed to turn over emails to the defense that would have corroborated the defendant’s entrapment defense. While the panel found that this was a Brady violation, it concluded it was not material and affirmed the conviction. Judge Gorsuch dissented, concluding that the emails were material. Similarly, in *United States v. Carlross*, 818 F.3d 988 (10th Cir. 2016), the panel concluded that there was no Fourth Amendment violation when police officers disregarded a “no trespassing” sign and knocked on the suspect’s front door before talking

³⁶ *Wilson v. City of Lafayette*, 510 F. App’x (10th Cir. 2013).

³⁷ *Cordova v. City of Albuquerque*, 916 F.3d 645 (10th Cir. 2016).

with him and being invited into his house. Judge Gorsuch dissented, expressing skepticism for “knock and talk” consent cases.

In one notable case, Judge Gorsuch reversed a conviction after finding that the law was not written clearly enough for the defendant to know he had violated the law. In *United States v. Games-Perez*, 667 F.3d 1136 (10th Cir. 2012), Judge Gorsuch concurred in the Court’s judgment affirming the defendant’s conviction, but he argued that *United States v. Capps*, 77 F.3d 350 (10th Cir. 1996), which held that a defendant need not know he was a felon to be convicted of 18 U.S.C. § 922’s felon-in-possession-of-a-handgun crime, had been wrongly decided.

Habeas Litigation and Death Penalty

Judge Gorsuch has taken a narrow approach on habeas petitions, including in death penalty cases. He has taken a strict view in interpreting the various procedural bars under the Antiterrorism and Effective Death Penalty Act (AEDPA), including dissenting from a number of decisions where the majority found a violation and afforded some measure of relief:

- *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011), Judge Gorsuch upheld the district court’s denial of the prisoner’s petition for habeas relief, holding that the prisoner’s motion to vacate his sentence was not “inadequate or ineffective” for purposes of 28 U.S.C. § 2255(e) solely because the prisoner had failed to raise a novel statutory interpretation. He wrote: “[T]he clause is concerned with process--ensuring the petitioner an *opportunity* to bring his argument --not with substance--guaranteeing nothing about what the *opportunity* promised will ultimately yield in terms of relief.”
- *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009), Judge Gorsuch dissented from the

panel’s grant of a certificate of appealability for ineffective assistance of counsel where the trial attorney told the client that if he accepted a ten-year plea deal, the lawyer would withdraw from the case. The client took the case to trial, lost and was sentenced to life without parole, later modified to life with the possibility of parole. Judge Gorsuch dissented from the panel’s grant, arguing that there was no prejudice (because the evidence was sufficient to convict). He subsequently dissented from the denial of *en banc* review. *Williams v. Jones*, 583 F.3d 1254 (10th Cir. 2009).

- *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009), Judge Gorsuch dissented from the majority’s holding that a state court denial of an ineffective assistance of counsel claim based on Rule 3.11 did not amount to an adjudication on the merits and did not warrant deferential review under the AEDPA when the state court had not considered non-record evidence and had denied an evidentiary hearing on the claim. In his dissent, Judge Gorsuch argued that the ineffective assistance claim had been considered and rejected by the state courts and accordingly was barred by AEDPA. The majority’s holding in *Wilson* was subsequently overturned in *Lott v. Trammel*, 705 F.3d 1167 (10th Cir. 2013), where Judge Gorsuch joined a unanimous panel holding that the AEDPA barred consideration of ineffective assistance of counsel claims that were considered by state courts even where there was no evidentiary hearing.
- *Eizember v. Trammell*, 803 F.3d 1129 (10th Cir. 2015), Judge Gorsuch wrote a majority decision (over dissent) affirming the denial habeas relief in a death penalty case where trial counsel’s for-cause strike of two pro-death penalty biased jurors was denied. One of the challenged jurors had responded, “I firmly believe if you take a life you should lose yours” to a question on a written questionnaire.
- *Hooks v. Workman*, 689 F.3d 1148 (10th Cir.

2012), the panel concluded that the defendant had a constitutional right to counsel in his post-conviction *Atkins* proceeding and that defendant's counsel was ineffective in presenting mitigation evidence of mental retardation at the sentencing phase of his original trial. Accordingly, the panel vacated the death sentence. Judge Gorsuch dissented in part, writing that trial counsel's performance did not prejudice the petitioner because there was no reasonable probability that the jury would have concluded petitioner's circumstances did not warrant death. Judge Gorsuch also argued that it was not necessary to reach the issue of a constitutional right to counsel at a post-conviction *Atkins* proceeding.

Police Misconduct and Qualified Immunity

Similar to his views regarding matters of criminal procedure, Judge Gorsuch has shown deference to police officers in a number of excessive force decisions, finding that officers enjoyed qualified immunity in a number of cases that split the court.

For example, in a wrongful death decision, Judge Gorsuch (over dissent) found that an officer had qualified immunity when the officer tasered a suspect in the head at close range. *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013) (reasoning that a reasonable officer in the same circumstances would not have realized his actions amounted to excessive force in violation of the Fourth Amendment).

Similarly, Judge Gorsuch dissented from a decision to deny *en banc* review where a panel found that an officer was not immune from suit when the officer shot and killed a suspect who had previously fired two shots. *Pauly v. White*, 817 F.3d 715 (10th Cir. 2016) (arguing that the court's decision would "second-guess[] officers' split-second judgments" and "create[] new precedent with potentially deadly ramifications for law

enforcement officers.") Judge Gorsuch also dissented in part in the *en banc* decision *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), concluding that the officers were entitled to qualified immunity for the seizure and excessive force claims (but concurring that there was no immunity for the wrongful arrest claim).

Even in cases where he concurred that there was no qualified immunity, Judge Gorsuch has questioned whether Section 1983 claims in federal court are the proper vehicles to advance claims of police misconduct. For example, in a concurrence in *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016), which concerned allegations *inter alia* that police officers filed charges in bad faith, Judge Gorsuch suggested that malicious prosecution may not entail a constitutional violation that would allow recovery under Section 1983.

In *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), Judge Gorsuch wrote for the panel affirming a wrongful death decision concluding that an off-duty officer did not have qualified immunity where the officer had crashed into the plaintiff at high speed. However, Judge Gorsuch also wrote a concurrence (to his own majority decision) commenting that "a state court could provide relief using established tort principles" and that "there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983."

In one particularly notable case in which Judge Gorsuch argued against qualified immunity for a police officer, *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016), the court held that a student resource officer was entitled to qualified immunity when a minor student's mother brought a § 1983 action against the officer who handcuffed and arrested the student after he was faking burps in gym class. Dissenting, Judge Gorsuch wrote, "My colleagues suggest the law permits [the arrest of a burping thirteen-year-old student] and they offer ninety-four pages explaining why they think so. Respectfully, I remain unpersuaded." The *Holmes* case is also notable

for Judge Gorsuch's discussion of his views on the role of the judiciary. Concluding his dissent, Judge Gorsuch explained "it is (or should be) emphatically our job to apply, not rewrite, the law enacted by the people's representatives." Judge Gorsuch goes on to express admiration for the judges' ability to reach undesirable results through faithful application of the law, writing: "a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels. So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands--and in that I see the best of our profession and much to admire."

Prisoner's Rights and Prison Condition Cases

Judge Gorsuch has been somewhat more permissive in allowing Section 1983 suits to challenge prison conditions. In *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), for example, he held that staff members at a juvenile detention center were not entitled to qualified immunity in a Section 1983 suit for using a restraint chair to punish a detainee.

Judge Gorsuch also has favored protection of religious liberties for inmates, writing in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), that "[w]hile those convicted of crime in our society lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the sincere exercise of religion should not be among them--at least in the absence of a compelling reason."

ECONOMIC JUSTICE

Judge Gorsuch has published a number of decisions involving commercial litigation disputes, and appears to have a particular interest in the types of matters he handled in private practice: antitrust disputes, securities fraud claims, and complex litigation. His rulings in these matters

have generally affirmed district court victories for corporate defendants. With regard to issues of economic justice, his writings are relatively scant.

In one notable dissent involving a class action challenge to a "consumer credit repair" agency, the panel found that the arbitration clauses in the relevant contracts were not enforceable because there were conflicting provisions. Judge Gorsuch dissented, concluding that the fact that there were arbitration clauses in six separate agreements signified that the parties intended to arbitrate. *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016).

In a bankruptcy appeal concerning the validity of a second mortgage on an "underwater" home that was unsupported by collateral, Judge Gorsuch affirmed a ruling on behalf of Citibank that the mortgage was valid under binding Supreme Court precedent. *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012). In his decision, Judge Gorsuch went out of his way to suggest that there was an alternate legal theory that would have potentially allowed relief that the petitioner had rejected.

SOCIAL ISSUES

Abortion & Contraception

Judge Gorsuch has written minimally on abortion rights issues. We have identified two cases in which the decision impacted abortion rights:

- *Planned Parenthood of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016): Following the release of videos suggesting that Planned Parenthood was engaged in the sale of fetal tissue, Utah suspended its funding. The district court denied Planned Parenthood's request for a preliminary injunction, but a 10th Circuit panel reversed and the parties subsequently stipulated to the entry of an injunction. Although not requested by the parties, the Tenth Circuit considered *en banc* review. Judge Gorsuch dissented from the denial of *en banc* review, on procedural grounds, noting that the panel failed to give deference to the district court's factual findings that Utah had not intended to act in

a retaliatory way. Judge Briscoe’s concurrence argued the procedural irregularity of Judge Gorsuch’s decision, concluding that the parties had not requested *en banc* review and subsequently stipulated to the entry of an injunction.

- *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007): Oklahoma allows motorists to select a “Choose Life” plate, with a portion of the license fee going to non-profit organizations that promote adoption. Under state law, license plate funds could not be provided to any organization that is “involved or associated with any abortion activities.” Plaintiffs challenged the law under the First Amendment and sought injunctive relief. The district court dismissed plaintiffs’ claims, ruling that they were barred by the Tax Injunction Act and the Eleventh Amendment. Judge Gorsuch affirmed that certain claims were barred by the Tax Injunction Act, but reversed and remanded the injunctive relief claims, holding they were not barred by the Eleventh Amendment.

Judge Gorsuch also joined or wrote two prominent decisions concerning objections to the Affordable Care Act’s requirement that employers provide contraceptive coverage.

- *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013): The case concerns a challenge under the Religious Freedom Restoration Act and Free Exercise Clause to regulations promulgated under the Affordable Care Act requiring provision of contraceptive coverage. The district court denied a preliminary injunction and this decision was initially affirmed by a Tenth Circuit panel. After hearing *en banc*, Judge Gorsuch joined in the Tenth Circuit reversal (and was ultimately upheld by the Supreme Court). Judge Gorsuch wrote a separate concurrence arguing both that the individual owners of Hobby Lobby had

independent standing to pursue the claims and that the Anti-Injunction Act’s bar of the claim (i.e., whether the ACA was a tax) was not jurisdictional. On the first point, despite his rhetorical flourish (“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”), he arguably conflated the plaintiffs’ assertion of sincerity in their religious belief with the assertion that their exercise of religious belief is burdened.

- *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315 (10th Cir. 2015): This is the follow on case to *Hobby Lobby*, where the plaintiff declined to apply for the religious-nonprofit accommodation to the contraceptive requirement and filed a suit seeking a preliminary injunction, which was denied. The denial was affirmed by a Tenth Circuit panel. Judge Gorsuch joined a dissent written by Judge Hartz from the denial of *en banc* consideration that concludes, “All the plaintiffs in this case believe that they will be violating God’s law if they execute the documents required by the government.” Without assessing whether such an action constituted a burden on the exercise of religion, the dissent appears to have assumed that it was based solely upon the plaintiffs’ belief that they would violate God’s law by executing the documents.

LGBTQ Rights

We have not identified opinions authored by Judge Gorsuch concerning LGBTQ rights or discrimination on the basis of sexual orientation. We did note in his 2005 *National Review* article, *Liberals N’ Lawsuits*, he was critical of efforts to use the courts to advance gay marriage, writing: “Liberals may win a victory on gay marriage when preaching to the choir before like-minded judges in Massachusetts. But in failing to

out and persuade the public generally, they invite exactly the sort of backlash we saw in November when gay marriage was rejected in all eleven states where it was on the ballot.”³⁸

Second Amendment

Judge Gorsuch does not appear to have ruled on any challenges to firearm regulations. He joined in at least four decisions where criminal convictions for firearm possession were affirmed over Second Amendment challenges. In the one decision he authored, *United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010), Judge Gorsuch expressly declined to address the merits, instead holding that the defendants’ motion to dismiss the indictment could not have been resolved prior to trial because the defense required establishment of facts beyond what was pled in the indictment.

The Lawyers’ Committee is committed to promoting judicial diversity at every level of our local, state and federal judiciary. Diversity, particularly with respect to race and gender, should always be a positive factor in both the selection and review of a nominee. Given our particular mission, and the current makeup of the Court, we believe increasing the racial and ethnic diversity of the Court is of particular importance to ensure that the Court reflects the diversity of our society and appropriately weighs a wide range of viewpoints in its evaluation of cases. While Judge Gorsuch’s nomination does not advance diversity on the Supreme Court, we recognize that this is not the dispositive factor for the President or Senate, nor is it for the Lawyers’ Committee in determining the qualifications of a nominee to the Court.

A judicial clerkship is an invaluable experience for a young lawyer. Many law clerks go on to become masterful litigators and judges. Indeed, of the eight

sitting Supreme Court justices, five served as federal law clerks. In fact, Judge Gorsuch was a law clerk for Justices White and Kennedy. Diversity within the law clerk pipeline is of the utmost importance at every level of the judiciary. This is especially true at the federal Circuit level, which serves as a direct pipeline to Supreme Court clerkships. Judge Gorsuch is currently listed as one of the top ten judges in the country to pipeline law clerks on the Supreme Court.

Judge Gorsuch’s own commitment to principles of diversity and inclusion is an appropriate line of inquiry at his nomination hearing. The Lawyers’ Committee researched 40 former law clerks using a variety of sources. Our findings suggest that 10 of these clerks (25%) are white females, three are Asian-American males (7.5%), one is an Asian-American female (2.5%) and the balance are white males (65%). We have found no evidence that suggests that Judge Gorsuch ever hired an African-American law clerk.

³⁸ <http://www.nationalreview.com/article/213590/>

The Lawyers' Committee is committed to promoting judicial diversity at every level of our local, state and federal judiciary. Diversity, particularly with respect to race and gender, should always be a positive factor in both the selection and review of a nominee. Given our particular mission, and the current makeup of the Court, we believe increasing the racial and ethnic diversity of the Court is of particular importance to ensure that the Court reflects the diversity of our society and appropriately weighs a wide range of viewpoints in its evaluation of cases. While Judge Gorsuch's nomination does not advance diversity on the Supreme Court, we recognize that this is not the dispositive factor for the President or Senate, nor is it for the Lawyers' Committee in determining the qualifications of a nominee to the Court.

A judicial clerkship is an invaluable experience for a young lawyer. Many law clerks go on to become masterful litigators and judges. Indeed, of the eight sitting Supreme Court justices, five served as federal law clerks. In fact, Judge Gorsuch was a law clerk for Justices White and Kennedy. Diversity within the law clerk pipeline is of the utmost importance at every level of the judiciary. This is especially true at the federal Circuit level, which serves as a direct pipeline to Supreme Court clerkships. Judge Gorsuch is currently listed as one of the top ten judges in the country to pipeline law clerks on the Supreme Court.

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CONCLUSION

In evaluating nominees for the Supreme Court, the Lawyers' Committee for Civil Rights Under Law requires a demonstrated respect for the importance of protecting civil rights as evidenced by judicial opinions as well as the nominee's statements, scholarly articles or other sources of information. Based upon our review, we are concerned that Judge Gorsuch's views reflect a very narrow definition of what constitutes a civil right and an undue skepticism about the importance of protecting those rights in the courtroom. Overall, we do not believe that there is a sufficient record on civil rights matters to conclude that he has met the second prong of our requirement for endorsement.

It is of the utmost importance that the Senate Judiciary Committee thoroughly examine the nominee's judicial philosophy – particularly on issues relating to civil rights including voting rights, racial and economic justice, fair housing, and criminal justice. We look forward to working with the Senate Judiciary Committee to ensure that a full and thorough examination takes place. Based upon the confirmation hearing record, we reserve the opportunity to amend our position on this nomination.



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