THE CIVIL RIGHTS RECORD OF JUDGE NEIL M. GORSUCH

A REPORT BY THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Founded by Thurgood Marshall in 1940, LDF has worked to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation for over 75 years. To this end, LDF is committed both to ensuring that the federal judiciary fairly reflects the diversity of this nation and protecting the central role played by the courts in the enforcement of civil rights laws and the Constitution's guarantee of equal protection. LDF therefore plays an active role in evaluating nominations to the Supreme Court and other courts across the nation.

Because the addition of an individual justice to the Supreme Court can change its balance and dynamic in both subtle and dramatic ways, each nomination is extraordinarily important to the future of our country. For this reason, LDF reviews the record of Supreme Court nominees to understand their views and positions on civil rights issues. LDF seeks to determine whether prospective members of the Court demonstrate a strong commitment to preserving and furthering civil rights and advancing the progress our nation has made toward fair and equal justice. LDF's purpose is not necessarily to endorse or oppose a nominee. In fact, LDF does not take a position on every Supreme Court nominee. Instead, LDF shares its conclusions about a nominee's record in order to contribute to the public's full understanding of a nominee's civil rights record, support the Senate's constitutional obligation to "advise and consent" on such nominations, and ensure that the Supreme Court's role in vindicating the civil rights of those who are most marginalized is fully recognized in the confirmation process.[1]

To prepare this report on the nomination of Tenth Circuit Judge Neil M. Gorsuch, LDF reviewed Judge Gorsuch's judicial record, encompassing approximately 900 written opinions, with a focus on the civil rights and constitutional issues that are of greatest relevance to the clients LDF represents. This process entailed analyzing all of his written opinions and dissents that bear on issues of employment and housing discrimination, criminal justice, voting rights, and access to the courts—as well as his votes in relevant cases in which other judges authored the decision. LDF also examined Judge Gorsuch's legal record from his work in private practice and his service as Principal Deputy to the Associate Attorney General at the U.S. Department of Justice (DOJ).[2] Additionally, LDF conducted

[1] LDF acknowledges the significant contributions made to this report by the law firm of Orrick, Herrington & Sutcliffe LLP; Professor Rena Steinzor; and John Vail.

[2] LDF has not yet had the opportunity to thoroughly review Judge Gorsuch's work at DOJ. Our FOIA request with the Department remains pending, and DOJ did not respond to the Judiciary Committee's bipartisan request for material until it produced over 144,000 pages of documents on March 8. And even that production has proven incomplete, as Ranking Member Dianne Feinstein described in a March 14 letter requesting additional material related to Judge Gorsuch's work at

research into Judge Gorsuch's publications and speeches, personal background, and work outside of the law.

Based on our review of his record, LDF opposes the confirmation of Judge Gorsuch to the Supreme Court.

i. Background

On February 1, 2017, President Donald Trump nominated Judge Gorsuch to the Supreme Court vacancy created when Justice Antonin Scalia died unexpectedly in early 2016. The circumstances surrounding this vacancy are unique. Judge Gorsuch is a nominee only because Senate Republicans refused to allow President Barack Obama to exercise his constitutional authority to appoint Justice Scalia's replacement. President Obama nominated D.C. Circuit Chief Judge Merrick Garland just a month after Justice Scalia's death, but the Senate's Republican majority refused to grant Judge Garland a confirmation hearing, and the nomination was returned to the White House when the 114th Congress adjourned.

This obstruction was not specific to Judge Garland. Indeed, the strategy was preemptively announced less than an hour after Justice Scalia's death, and more than a month before President Obama even nominated Judge Garland.[3] The stated rationale was that President Obama should not be able to make an appointment during his eighth and final year in office. But history does not support that view. Rather, it shows that, since 1875, every nominee to the Supreme Court had received either a hearing or a vote, and the Senate had never taken more than 125 days to act on a Supreme Court nomination.[4] In addition, despite the relative infrequency of Supreme Court vacancies, one need only look back to 1988 for a Justice confirmed in the last year of a two-term presidency, when a Democratic Senate confirmed President Ronald Reagan-appointee Anthony Kennedy 97-0.

Without question, this context bears heavily on the questions before the United States Senate as it evaluates Judge Gorsuch and fulfills its "advise and consent" function. We are also mindful of this context. This report, however, is focused solely on an evaluation of the civil rights record amassed by Judge Gorsuch as a judge and lawyer.

DOJ. *See* Press Release, Feinstein: Gorsuch Documents Incomplete (March 14, 2017), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=BA438530-CD69-437B-9E7E-BA425C7F1CC7.

[3] *Compare* Press Release, Remarks by the President on the Passing of the U.S. Supreme Court Justice Antonin Scalia (Feb. 13, 2016), *with* Press Release, Statement by Leader Mitch McConnell on the Passing of Justice Scalia (Feb. 13, 2016).

[4] Nearly a quarter of all U.S. Presidents (10) have appointed a total of fourteen (14) Supreme Court justices who were confirmed during election years.

ii. Biographical Summary

Judge Neil McGill Gorsuch was born in Denver, Colorado in 1967. He graduated from Columbia University *cum laude* in 1988, where he was inducted into Phi Beta Kappa, wrote for the *Columbia Daily Spectator*, and co-founded the student newspaper *The Federalist Paper*. Directly after college, he proceeded to Harvard Law School, graduating *cum laude* in 1991. He also received Truman and Marshall Scholarships and studied at Oxford University at various times in the 1990s, ultimately obtaining a Doctor in Philosophy in 2004.

Judge Gorsuch clerked for Judge David Sentelle (appointed by President Reagan) on the U.S. Court of Appeals for the D.C. Circuit from 1991 to 1992, and then for Justice Byron White (appointed by President John F. Kennedy) and Anthony Kennedy on the Supreme Court of the United States during the October 1993 term. He then entered private practice at the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC, becoming partner in 1998, and working there until 2005. From 2005 to 2006, he served in the Department of Justice as Principal Deputy Associate Attorney General, one of the highest ranked positions in the Department, and also as Acting Associate Attorney General. In May 2006, he was nominated by President George W. Bush for a seat on the U.S. Court of Appeals for the Tenth Circuit. The Senate confirmed Judge Gorsuch via voice vote on July 20, 2006.

According to his Senate Judiciary Questionnaire, Judge Gorsuch has been active in a number of civic and professional associations, including the Federalist Society, the Republican National Lawyers Association (prior to 2005), Truman and Marshall Scholar-related events, the Council on Foreign Relations, and various judicial committees, associations, and inns of court.

Judge Gorsuch's trajectory from Ivy League graduate to Supreme Court nominee reflects an all-too-familiar trend. LDF continues to believe that the Supreme Court, like all courts, would benefit from greater diversity. This should include nominees with a broader range of legal experience, such as a background in criminal defense and/or civil rights law. In this regard, we are mindful of the contributions to the Court made by our founder, Thurgood Marshall, who, as Justice Byron White explained, "brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match."[5]

OVERVIEW OF JUDGE GORSUCH'S CIVIL RIGHTS RECORD

Without question, Judge Gorsuch has impressive academic and professional credentials, and is a gifted writer with a keen intellect. But an elite resume is only the start of assessing whether a Supreme Court nominee is qualified to serve with

[5] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

life tenure on the nation's highest court. Nominees must also be able to fairly and impartially decide critical legal issues, including questions about access to justice, constitutional interpretation, the future of civil rights, and even life and death.

Nor can Judge Gorsuch's judicial philosophy and record be boiled down to the proposition that he "will interpret [laws] as written."[6] That cannot be the end of the inquiry—at least because when the Constitution was written, the courts and the country countenanced a variety of laws we now consider to be odious: for example, state-enforced segregation, bans on interracial marriage, and the criminalization of gay and lesbian individuals. The interpretation of the Constitution and of federal laws affects all Americans in a host of profound ways. And so, in performing its constitutional obligation to "advise and consent," the Senate must go beyond platitudes and obfuscation to rigorously explore Judge Gorsuch's views on a broad range of issues of national import.

In conducting our review of Judge Gorsuch, we found that his record raises serious concerns about the enforcement and advancement of civil rights and suggests that he is deeply ideological and conservative. Overall, Judge Gorsuch's record suggests he would take a narrow view of—if not affirmatively weaken—the fundamental and hard-fought civil rights of African Americans and other historically marginalized communities. Across a range of issues, including when race is directly or indirectly implicated, Judge Gorsuch has regularly favored the interests of the privileged and powerful—whether the government, corporations, or wealthy individuals—at the expense of those who are most marginalized and thus most dependent on the promise of equal justice under law.

i. Judicial Philosophy and Ideology

Judge Gorsuch's longstanding bona fides as a conservative legal thinker are well established. As an undergraduate at Columbia University, he co-founded two publications—a newspaper and a magazine—to counteract what he perceived to be liberal bias in the campus discourse.[7] His writing at the time included criticism of progressive protesters,[8] a defense of President Reagan's foreign policy and his role in

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[6] Full Transcript and Video: Trump Picks Neil Gorsuch for Supreme Court, THE NEW YORK TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/full-transcript-video-trump-neil-gorsuch-supreme-court.html?_r=0.

[7] *See* Aidan Quigley, *At Columbia, Gorsuch blasted progressive protestors, defended free speech*, POLITICO (Feb. 1, 2017), http://www.politico.com/story/2017/02/neil-gorsuch-viewpoints-opinion-columbia-234498.

[8] Neil Gorsuch, *Where have all the protests gone?*, COLUMBIA SPECTATOR, Vol. CXII, Number 105 (Apr. 11, 1988) ("Our protestors, it seems, have a monopoly on righteousness. In all their muddled thinking, however, our 'progressives' have become anything but truly progressive.").

the Iran-Contra affair,[9] and an embrace of "conservatism" with a harsh emphasis on "equality of opportunity." According to the young Neil Gorsuch, "[p]roperly practiced social inequality would allow men to reach their natural positions in society based accurately on their abilities and their desires." Such "inequality" would allow "men of different abilities and talents to distinguish themselves as they wish, without devaluing their innate human worth as members of society."[10] These views reflect a philosophy that is antithetical to the evolving principles of equality in our current jurisprudence. And while a student's writings and activities in college are not always indicative of future leanings, here they are remarkably consistent with his subsequent approach to public life.

Judge Gorsuch's conservative commentary continued during his legal career. In 2005, shortly before his appointment to the Tenth Circuit, Judge Gorsuch wrote an op-ed for *National Review* lambasting the use of constitutional litigation to protect equal rights. He observed that "American liberals are addicted to the courtroom," and specifically noted "gay marriage" as part of the liberal "agenda" improperly pursued through the courts.[11]

While serving on the bench, Judge Gorsuch has expressly praised the jurisprudence of Justice Scalia and held himself out as an originalist of the same ilk.[12] Indeed, commentators have recognized that Judge Gorsuch's approach to judicial decision-making mirrors that of Justice Scalia in both substance and style.[13] Likewise, we have found Judge Gorsuch's record mirrors and, in some areas, may exceed, the conservativism of Justice Scalia, most prominently in his opposition to longstanding Supreme Court precedent on the role of federal agencies. That is a disturbing proposition, as Justice Scalia, through both his votes and written opinions, was a regressive force on issues of civil rights and race. His backward-looking

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[9] Neil Gorsuch, *Let's let the Commander in Chief lead*, COLUMBIA SPECTATOR, Vol. CXI, Number 69 (Jan. 28, 1987), http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19870128-01.2.12&srpos=14&e=-------en-20--1--txt-txIN-neil+gorsuch-----#.

[10] Neil M.T. Gorsuch, *A Tory Defense*, THE MORNINGSIDE REVIEW, Vol. V., No. 3 (Oct. 1986).

[11] Neil M. Gorsuch, *Liberals'N'Lawsuits*, NATIONAL REVIEW (Feb. 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6. In this same article, Judge Gorsuch did note *Brown v. Board of Education* among "critical civil-rights victories" of which he approves.

[12] *See*, *e.g.*, *Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring) (rejecting a constitutional prohibition on malicious prosecution, and explaining that "[o]urs is the job of interpreting the Constitution. And that document isn't some inkblot on which litigants may project their hopes and dreams . . . but a carefully drafted text judges are charged with applying according to its original public meaning."); *see also* The Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905 (Summer 2016).

[13] Eric Citron, *Potential nominee profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017), http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/.

jurisprudence is reflected in cases involving fair housing,[14] voting rights,[15] diversity in higher education,[16] capital punishment,[17] minority set asides,[18] and school desegregation,[19] among other issues.

ii. Summary of Tenth Circuit Record

Judge Gorsuch's deep conservatism is reflected in his decade of judicial decisions on the U.S. Court of Appeals for the Tenth Circuit. Our issue-by-issue analysis begins with two areas in which Judge Gorsuch has a substantial and troubling record: Administrative Law and Access to Justice. These topics, which often involve intricate but profoundly important procedural questions, overlap with and cut across LDF's practice areas and a wide swathe of civil rights issues. We turn next to the substantive areas at the core of LDF's work for which Judge Gorsuch has the most extensive judicial record: Capital Punishment (along with other criminal justice issues) and Employment Discrimination. Finally, we address other areas of LDF's practice, including LGBTQ Equality, Education, and Political Participation, where Judge Gorsuch has developed a record to varying degrees.

- In the technical but highly consequential realm of **administrative law**, Judge Gorsuch espouses extreme views about the legal value of regulations that are issued in furtherance of federal law. He has gone out of his way to argue that the Supreme Court should overturn the principle of agency deference articulated in *Chevron U.S.A., Inv. v. NRDC, Inc.*,[20] (known as "*Chevron* deference"), which requires courts to defer to agencies' reasonable interpretations of ambiguous statutes. He has also argued that the Supreme Court should revive the "nondelegation doctrine" to dramatically restrict Congress's ability to rely on federal agencies. The nondelegation doctrine is an

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[14] *See Tex. Dep't of Hous. and Cmty Affairs v. Inclusive Cmtys Project, Inc.*, 135 S. Ct. 2507, 2532 (2015) (Alito, J., dissenting, joined by Roberts, C.J., Scalia & Thomas, JJ.) (arguing that the Fair Housing Act does not provide for disparate impact liability).

[15] *See Shelby Cty, Ala. v. Holder*, 133 S. Ct. 2612 (2013) (striking down the Voting Rights Act's requirement that states with a history of racial discrimination in voting preclear all changes to electoral law with either DOJ or a federal court).

[16] *See United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting); Tr. Oral Arg., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (asking why Black students should not attend "less-advanced," and "slower-track" schools, "where they do not feel that they're being pushed ahead in classes that are too fast for them"), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_p8k0.pdf.

[17] *See Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring) (calling Justice Breyer's critique of the death penalty "gobbledy-gook").

[18] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part) (arguing that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction").

[19] *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down school integration plans).

[20] 467 U.S. 837 (1984).

archaic principle that has largely laid dormant since the 1930s, when a reactionary Supreme Court used it to invalidate programs under the New Deal. If adopted by the Supreme Court today, Judge Gorsuch's approach would undermine enforcement of civil rights laws and have disastrous consequences for public health and safety that would disproportionately impact African Americans and other communities of color.

- A restrictive approach to **access to justice** in federal courts is an important aspect of Judge Gorsuch's record with powerful implications for civil rights claimants. Whether through his review of pretrial motions like motions to dismiss or for summary judgment, invoking abstention doctrine, or applying rigid procedural bars, Judge Gorsuch has consistently upheld the disposal of viable claims, including civil rights claims, before they ever reached a jury.

- Judge Gorsuch's record reveals a consistent opposition to granting relief in **capital punishment** cases. This is, at some level, difficult to square with his forcefully articulated legal arguments in opposition to physician-assisted suicide, which is premised on the sanctity of life. His record on other **criminal justice** issues is more mixed. In cases dealing with policing—including Fourth Amendment challenges to traffic stops and excessive force—Judge Gorsuch sets a high bar for claims of racial discrimination, and often grants qualified immunity to police officers when they are sued for violating constitutional rights. In these cases, Judge Gorsuch brings a perspective that places a greater emphasis on deference to and concern for law enforcement than on inequities in our criminal justice system. However, Judge Gorsuch has ruled more favorably to criminal defendants on sentencing issues, where in multiple cases he has resolved statutory ambiguity—sometimes over dissent—to rule in favor of a more lenient sentence.

- Judge Gorsuch has often ruled against claims of **employment discrimination**, harassment, and retaliation. Such cases often involved disputed facts that Judge Gorsuch construed in favor of the employer to dispose of claims on motions to dismiss or for summary judgment. And concurring in *Hobby Lobby Stores, Inc. v. Sebelius*,[21] Judge Gorsuch helped breathe new life into the long-discredited notion that personal religious beliefs can justify discrimination against others—reasoning that has had profound and dangerous consequences in the realm of employment discrimination and other areas.

- Regarding questions of **equality for lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals**, his relatively slim record indicates that he is significantly out of step with the Supreme Court and other federal courts

[21] 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

around the country, and would broaden religious exemptions to the detriment of LGBTQ rights. Among his decisions in this area, Judge Gorsuch denied relief to a transgender woman who was denied access to the women's bathroom at work for "safety reasons,"[22] and ruled against an incarcerated transgender woman who had been denied regular access to hormone therapy.[23] In his public commentary, he has also been critical of the constitutional right to marriage equality.

- Judge Gorsuch has a slim record on the issues of **political participation** and **education** (two key areas of LDF's work), yet his limited writing in these areas gives rise to concerns. For example, Judge Gorsuch has suggested that courts should apply "strict scrutiny"—the most exacting level of constitutional review—to any limitation on political spending. Such reasoning could strike down the few remaining safeguards protecting our democracy from the influence of money, and further exacerbate inequality in our political system by granting even greater influence to an elite (and predominantly white) donor class.[24] Likewise, in his few education-related cases, Judge Gorsuch has taken a narrow view of the Individuals with Disabilities Education Act (IDEA), which would make it harder for students with disabilities to obtain a quality public education.

There are other important constitutional and statutory areas of law for which Judge Gorsuch has had little opportunity to rule or comment, likely due to the geography and docket of the Tenth Circuit, history and demography of the states contained therein,[25] and perhaps the court's panel assignment procedures. These include diversity in higher education, racial gerrymandering, school segregation, and the Voting Rights Act (VRA). These are matters that should be explored rigorously during his confirmation hearing. There are also instances where Judge Gorsuch's writing acknowledges the importance of Equal Protection and civil rights cases. But his adherence to these principles is called into question by his self-proclaimed adherence to originalism, the outcomes he reaches in challenges based on equality principles, and his public criticism of constitutional litigation as a "wasting addiction among American progressives."[26]

Judge Gorsuch's record also reveals a broader, trans-substantive problem about his approach to the law. At the ceremony announcing his nomination, Judge Gorsuch proclaimed that "[a] judge who likes every outcome he reaches is very likely

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[22] *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009).
[23] *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015).
[24] *See* Adam Lioz, *Stacked Deck: How the racial bias in our big money political system undermines our democracy and our economy*, DEMOS (Dec. 2014), http://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.
[25] The Tenth Circuit has appellate jurisdiction over federal courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
[26] Gorsuch, s*upra* note 11.

a bad judge stretching for results he prefers rather than those the law demands."[27] This is also a frequent refrain in his judicial decisions.

But Judge Gorsuch's actions speak louder than his words. In a variety of ways, big and small, his decisions regularly go further than necessary to push the law in a certain direction, advance conservative views on issues that were not raised or preserved by the parties, propose that well-settled and widely-accepted Supreme Court precedent was wrongly decided or incomplete, or suggest that the *en banc* court should use an opportunity to move the doctrine. Given that Judge Gorsuch did all this not as a Supreme Court justice, but as one of roughly twenty co-equal judges on the Tenth Circuit, we have serious questions about his commitment to judicial modesty and what he would do once empowered with one seat out of nine on the Supreme Court.

All told, based on a holistic review of Judge Gorsuch's record, LDF must oppose his confirmation. Purely on the merits, Judge Gorsuch's judicial decisions suggest he would interpret and apply many civil rights laws narrowly, and would restrict the right of claimants seeking racial justice to have their claims heard and fully adjudicated in federal court.

The details of Judge Gorsuch's record are set forth below.

A. ADMINISTRATIVE LAW

There is no area in which Judge Gorsuch has more clearly to set forth his own personal judicial philosophy than administrative law. An ardent opponent of the modern regulatory state and the Supreme Court cases that have recognized deference to agency authority, Judge Gorsuch has left little doubt that he would work aggressively to weaken the traditional deference afforded federal agency interpretation of statutory obligations as a Supreme Court justice. If adopted by the Supreme Court, Judge Gorsuch's vision would hasten a substantially deregulated America, undermine enforcement of critical civil rights laws, and have disastrous consequences for public health and safety that would disproportionately impact African Americans and other communities of color.

Given the complexity of modern society and industry, Congress has tasked agency experts with crafting regulations that protect workers and consumers, preserve the environment, guarantee equal opportunity in the workplace, and ensure the safety of food and drugs. In Judge Gorsuch's view, however, both Congress and the courts have improperly abdicated their constitutional authority to executive agencies. In his view, agencies exercise too much authority too often. He often

[27] Full Tr. and Video: Trump Picks Neil Gorsuch for Supreme Court, s*upra* note 6.

describes a dystopian "titanic administrative state"[28] that produces a blizzard of regulations with which the American public—and, in some cases, agencies themselves—cannot keep pace.[29] "[T]hanks to generous congressional delegations,"[30] he has said, "the number of formal rules these agencies have issued . . . has grown so exuberantly it's hard to keep up."[31]

Judge Gorsuch's primary solution is overturning so-called "*Chevron* deference," the procedural rule that applies when agencies interpret the statutes they administer.[32] Under *Chevron*, whenever a "statute is silent or ambiguous with respect to the specific issue" under review, "the court must defer to a reasonable interpretation made by the administrator of [the] agency,"[33] even if the agency's reading is not the most natural reading of the statute. This is true even when there is judicial precedent contrary to the agency's interpretation—in that case, the agency's interpretation overrules the judicial ruling.[34]

Chevron's rationale is that through ambiguity in a statutory scheme, Congress has delegated authority to implementing agencies to interpret the law and issue regulations. The practical rationale is that agency experts are better equipped than judges to deal with highly technical and complex areas of law, and to the extent resolving ambiguity requires value judgments, it is best done by politically accountable officials rather than unelected, life-tenured judges.[35] *Chevron* applies *only* when the statute is ambiguous, and it remains for courts to decide whether the plain meaning of the statute can resolve the dispute.

Judge Gorsuch took a hard stance against *Chevron* deference last year when he concurred (to his own majority opinion) in *Gutierrez-Brizuela v. Lynch*.[36] In that case, the issue was whether an agency interpretation of law that conflicts with judicial precedent can be applied retroactively to govern conduct that occurred when the court's decision, not the agency's, was controlling law.

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[28] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).
[29] *See Caring Hearts Personal Home Servs., Inc. v. Burwell*, 824 F.3d 968, 976 (10th Cir. 2016) (finding that Centers for Medicare & Medicaid Services applied the wrong regulation to deny coverage for home health services, and concluding: "This case has taken us to a strange world where the government itself—the very "expert" agency responsible for promulgating the 'law' no less—seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are so 'voluminous they cannot be read[.]'").
[30] *United States v. Baldwin*, 745 F.3d 1027, 1030 (10th Cir. 2014).
[31] *Caring Hearts*, 824 F.3d at 969.
[32] *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).
[33] *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).
[34] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).
[35] *See* Michael C. Dorf, *Judge Gorsuch's Misguided Quest to End Judicial Deference to Administrative Agencies*, VERDICT (Feb. 8, 2017), https://verdict.justia.com/2017/02/08/judge-gorsuchs-misguided-quest-end-judicial-deference-administrative-agencies.
[36] 834 F.3d at 1149 (Gorsuch, J., concurring).

Gutierrez-Brizuela involved two competing provisions of federal immigration law: One provision gives "the Attorney General discretion to 'adjust the status' of those who have entered the country illegally and afford them lawful residency," while a second says that "persons who have entered this country illegally more than once are categorically prohibited from winning lawful residency" for ten years. So does the Attorney General retain discretion when the petitioner has "entered this country illegally more than once"? The Tenth Circuit had answered "yes" in a case called *Padilla-Caldera v. Gonzalez*,[37] while the Board of Immigration Appeals took the opposite position two years later.[38] But before the Tenth Circuit could apply *Chevron* to the BIA's interpretation and explain that the agency's rule now controls,[39] Hugo Gutierrez-Brizuela applied for an adjustment of immigration status in reliance on the court's holding in *Padilla-Caldera*. When this petition reached the Tenth Circuit, the court unanimously held that—notwithstanding *Chevron* and the BIA's authority to issue decisive interpretations of ambiguous immigrations laws—the government could not apply the BIA's decision retroactively to Mr. Gutierrez-Brizuela.

The retroactivity issue resolved the dispute, but Judge Gorsuch used this case to launch a broadside against *Chevron* deference. "There's an elephant with us in the room today," his concurrence began. "We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution[.]"[40] In Judge Gorsuch's view, *Chevron's* finding of congressional delegation where there is ambiguity is "no more than a fiction,"[41] and *Chevron*—what he calls "the goliath of modern administrative law"—should be overruled.[42]

Yet Judge Gorsuch would go even further. He doesn't just argue that *Chevron* was wrongly decided. He argues that even if Congress really did intend to delegate rulemaking authority and rely on agency expertise in the way *Chevron* envisions, then such transfer of power would violate the Constitution.[43] To make this argument, Judge Gorsuch endorses a broad view of the "nondelegation doctrine," an archaic rule that has laid largely dormant since 1935,[44] when a reactionary Supreme Court issued a series of decisions to invalidate New Deal programs.[45] Under current precedent,

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[37] 426 F.3d 1294 (10th Cir. 2005).
[38] *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007).
[39] *See Padilla-Caldera v. Holder (Padilla II)*, 637 F.3d 1140, 1148-52 (10th Cir. 2011).
[40] *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J. concurring).
[41] *Id*. at 1153.
[42] *Id*. at 1158.
[43] *Id*. at 1153-54.
[44] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[45] *See United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing *en banc*) (arguing that provision of Sex Offender Registration and Notification Act that

Congress is free to delegate rulemaking authority so long as it provides an "intelligible principle" to guide agency action—an approach that Judge Gorsuch has both criticized and applied more strictly than the Supreme Court.[46]

Judge Gorsuch's views on both *Chevron* and the nondelegation doctrine are indeed radical, and are more conservative than those of Justice Scalia. Justice Scalia generally defended *Chevron* as "a highly important decision" that "will endure and be given its full scope . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs."[47] And in rejecting a nondelegation challenge to the Clean Air Act, Justice Scalia wrote that the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[48]

Some consequences of the deregulated state for which Judge Gorsuch advocates are obvious. Free from the constraints of agency rules, corporations could pursue profits with more freedom to pollute, underpay employees, defraud consumers, and endanger the safety of their workers and the public.

Perhaps less obvious is how this would erode civil rights and deepen racial inequality. For one, certain federal civil rights statutes depend on agency guidance and rulemaking for their full enforcement, including Title IX, the ADA, and the ADEA, among others. For example, in 2013 the U.S. Department of Housing and Urban Development (HUD) authoritatively interpreted the Fair Housing Act to include disparate-impact liability[49] before the Supreme Court agreed in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[50] Another example is the Education Department's Office for Civil Rights' (OCR) 2015 opinion letter providing that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." In 2016, the Fourth Circuit gave this opinion "controlling weight" when it ruled in favor of a transgender student who brought a Title IX challenge against bathroom restrictions in a Virginia public school district.[51]

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allows the Attorney General to decide whether and on what terms sex offenders convicted before SORNA's enactment should be required to register violates the nondelegation doctrine).

[46] *See Nichols*, 784 F.3d at 672-76.

[47] The Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (June 1989), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj.

[48] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001).

[49] *See* 24 C.F.R. § 100.500.

[50] 135 S. Ct. 2507 (2015); *see also Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring) (applying *Chevron* deference to EEOC rule recognizing disparate-impact liability under the ADEA, and calling it "a classic case for deference to agency interpretation.").

[51] *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir 2016); *vacated and remanded by Gloucester Cty. Sch. Bd. V. G.G.*, --- S. Ct. ---, 2017 WL 855755 (March 6, 2017).

Other examples include DOJ regulations under Title II of the ADA that require public entities to provide "integrated settings" that "enable[] individuals with disabilities to interact with nondisabled persons to the fullest extent possible,"[52] and EEOC regulations extending ADEA protections to apprenticeship programs—an interpretation that courts have upheld under *Chevron* deference.[53] And though not involving *Chevron* specifically, Judge Gorsuch's anti-deference approach was evident when he declined to apply EEOC guidance to a college professor recovering from cancer who asked for a reasonable accommodation—in the form of additional leave time—under the Rehabilitation Act.[54] In addition, the harmful effects of deregulation, including increased pollution, will be disproportionately felt by African Americans and other communities of color.[55]

Finally, it is important not to mistake Judge Gorsuch's opposition to deference to federal agency's interpretation of statutory obligations, and what he sees as oppressive bureaucracy with a willingness to place a check on executive authority. It is one thing to argue that agencies should relinquish rulemaking authority, it is quite another to challenge the president's authority when he acts unilaterally—by, for example, issuing a ban on refugees that discriminates against Muslims—or to reign in the Executive on national security matters.[56]

Indeed, the evidence in Judge Gorsuch's record suggests that he would be unwilling to do so. For example, in *Planned Parenthood Association of Utah v. Herbert*,[57] Judge Gorsuch dissented and argued that the court should have allowed Utah's Republican Governor to strip $272,000 in federal funding from Planned Parenthood. Judge Gorsuch argued that the court should have credited the Governor's professed intention in blocking the funding.[58] Judge Gorsuch's reluctance to check executive authority is also reflected in his excessive force decisions, discussed below, in which he defers to police officers and places unusually high burdens on plaintiffs who bring suit for constitutional violations.[59]

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[52] 28 C.F.R. pt. 35, App. A.
[53] *See*, *e.g.*, *EEOC v. Seafarers Int'l Union,* 394 F.3d 197 (4th Cir. 2005).
[54] *Hwang v. Kansas State University*, 753 F.3d 1159, 1162-63 (10th Cir. 2014).
[55] For example, *Whitman*, the unanimous decision in which Justice Scalia upheld the Clean Air Act against a nondelegation challenge, involved EPA efforts to reduce smog and particulate matter in major American cities. Both pollutants exacerbate asthma and other respiratory diseases that have a major impact on the health of African Americans who live in so-called "non-attainment areas" with poor air quality.[55] Given his fringe views on the nondelegation doctrine, it is likely that Judge Gorsuch would have voted to invalidate Congress's delegation of power in the Clean Air Act, striking down vital EPA regulations in the process.
[56] *See* Charlie Savage, *Neil Gorsuch Helped Defend Disputed Bush-Era Terror Policies*, THE NEW YORK TIMES (MARCH 16, 2017), https://www.nytimes.com/2017/03/15/us/politics/neil-gorsuch-torture-guantanamo-bay.html?rref=collection%2Fbyline%2Fcharlie-savage.
[57] 839 F.3d 1301 (10th Cir. 2016) (Gorsuch, J., dissenting from denial of rehearing *en banc*).
[58] *Id*. at 1310.
[59] *See*, *e.g.*, *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013) (granting qualified immunity to officer who shot and killed nonviolent, fleeing suspect with a Taser).

In sum, Judge Gorsuch's views on administrative law are both extreme and harmful, and would have a deleterious effect on civil rights enforcement and racial justice. Importantly, Judge Gorsuch's opinions make clear that his dispute with the administrative state is as much policy driven as it is based on concerns over separation of powers and the Constitution. Like President Trump and other administration officials,[60] Judge Gorsuch has repeatedly lamented the scope and sheer number of federal regulations, and has identified overturning *Chevron* and reviving the nondelegation doctrine as the means to his preferred outcome.

B. ACCESS TO JUSTICE

A crucial but sometimes overlooked part of the Supreme Court's docket involves access to justice—that is, the initial question of whether a court will even hear a plaintiff's claim. This question—whether a plaintiff will have his or her day in court—is profoundly important in the civil rights context and cuts across a wide range of statutes and issue areas. Courts are entrusted to provide equal justice under the law, and to ensure that civil rights laws are enforced even against politically powerful and wealthy defendants, including the government and large corporations. Without access to courts and judicial remedies, fundamental rights cannot be vindicated and are rendered meaningless. Indeed, the right to sue is itself fundamental, as the Supreme Court has held that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."[61]

The courthouse doors can be shut by a variety of means, including motions to dismiss and motions for summary judgment before cases go to a jury; procedural bars, such as the requirement to exhaust all claims in an administrative forum before proceeding to court; restrictions on the use of class actions that prevent plaintiffs from challenging systemic civil rights violations; arbitration clauses that divert claims from courts into private, one-sided proceedings; and challenges to a litigant's standing to bring suit. Many of these issues involve the application of highly subjective standards—whether a claim is "plausible," for example—and so the personal views and perspectives of the judges who decide them, even when acting impartially, inevitably come into play.

It is no coincidence that many of the Supreme Court's most important cases in these areas involve the claims of civil rights plaintiffs.[62] These are also areas in which,

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[60] *See* Nolan D. McCaskill & Matthew Nussbaum, *Trump signs executive order requiring that for every one new regulation, two must be revoked*, POLITICO (Jan. 30, 2017), http://www.politico.com/story/2017/01/trump-signs-executive-order-requiring-that-for-every-one-new-regulation-two-must-be-revoked-234365.

[61] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984).

[62] *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555

through a series of closely-divided cases, the Supreme Court has done substantial harm in the last decade. That harm includes *Wal-Mart Stores, Inc. v. Dukes*,[63] a 5-4 decision that weakened the class action device and raised the bar for civil rights plaintiffs to pursue claims of widespread discrimination—essentially creating a *de facto* "too big to be sued" defense for defendants who discriminate on a large enough scale. The Roberts Court has also endorsed a broad view of the Federal Arbitration Act,[64] a law that corporations have used essentially to opt out of the civil justice system and force claims into private arbitration proceedings that are stacked in favor of corporate defendants.[65] In both *AT&T v. Concepcion*[66] and *American Express Co. v. Italian Colors Restaurant*,[67] the Court allowed corporate defendants to dismantle class actions and force claims into individual arbitration proceedings that all agreed were "a fool's errand."[68] In light of these cases, corporations have used arbitration clauses in the fine print of standard employee and consumer agreements to avoid lawsuits of all kinds, including those alleging racial discrimination.[69]

In that same vein, Judge Gorsuch has been highly critical of some who rely on the courts to protect equal rights. In a 2005 article published shortly before his nomination to the Tenth Circuit, Judge Gorsuch wrote that "American liberals have become addicted to the courtroom,"[70] improperly using constitutional litigation to "effect[]their social agenda[] on everything from gay marriage to assisted suicide to the use of vouchers for private-school education."[71] Notably absent from his piece was any criticism of conservatives using the courts to attack, for example, diversity in education,[72] the Voting Rights Act,[73] gun regulations,[74] and campaign finance laws.[75]

(1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Conley v. Gibson*, 355 U.S. 41 (1957); *Hansberry v. Lee*, 311 U.S. 32 (1940).

[63] 564 U.S. 338 (2011).

[64] 9 U.S.C. § 2.

[65] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

[66] 563 U.S. 333 (2011).

[67] 133 S. Ct. 2304 (2013).

[68] *Id*. at 2313 (Kagan, J., dissenting).

[69] *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that arbitration clause in employee agreement was enforceable and barred employment discrimination lawsuit under California's Fair Employment and Housing Act); *Selden v. Airbnb, Inc.*, No. 16-cv-00933, 2016 WL 6476934 (D.D.C. Nov. 1, 2016) (holding that arbitration clause barred class action alleging racial discrimination in services provided by Airbnb).

[70] Neil Gorsuch, *supra* note 11.

[71] *Id*.

[72] *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

[73] *See Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

[74] *See District of Columbia v. Heller,* 554 U.S. 570 (2008).

[75] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

During his tenure on the Tenth Circuit, Judge Gorsuch has often upheld the disposal of claims before plaintiffs can present their case to a jury. While there are some exceptions noted in the discussion that follows, Judge Gorsuch has typically held plaintiffs to strict pleading standards, erred on the side of granting or affirming summary judgment against plaintiffs in close cases, and adopted a robust view of qualified immunity that imposes a heavy burden on plaintiffs who allege violations of constitutional rights against police officers. Moreover, in several cases Judge Gorsuch has advocated a limited role for federal courts, departing from his colleagues to argue that courts should "abstain" for "prudential" reasons from deciding even meritorious claims.

In our view, Judge Gorsuch has not sufficiently protected access to courts consistent with governing legal standards, and we are concerned that, if he is confirmed, the Supreme Court will cause further harm for civil rights claimants.

i. Motions to Dismiss and Motions for Summary Judgment

Two common ways cases are resolved before a jury trial are motions to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) and motions for summary judgment under Rule 56.[76] Motions to dismiss challenge the sufficiency of allegations in the complaint to state a claim that would entitle the plaintiff to relief. Motions for summary judgment are filed after the parties conduct discovery, and are granted when there are no remaining factual disputes for a jury to resolve and one party is entitled to judgment as a matter of law. Appellate courts review the grant or denial of such motions *de novo*, meaning without deference to the trial court's decision.[77] In both scenarios, Judge Gorsuch has held plaintiffs to exacting standards, making it harder for plaintiffs alleging discrimination and other rights violations to exercise their right to a jury trial.

a. Motions to Dismiss

Turning first to motions to dismiss, Rule 8 of the Federal Rules of Civil Procedure requires plaintiffs to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief,"[78] and defendants can move to dismiss when a complaint is noncompliant. In several cases, Judge Gorsuch has articulated a notably strict view of Rule 8 and imposed tougher pleading standards than other judges on the Tenth Circuit.

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[76] Fed. R. Civ. P. 12(b)(6); Fed. R. Civ. P. 56.

[77] *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015); *see also Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853 (10th Cir. 2016).

[78] Fed. R. Civ. P. 8(a)(2).

In *Pace v. Swerdlow*,[79] for example, Judge Gorsuch wrote separately—concurring in part and dissenting in part—to go beyond the issues presented and argue that the complaint should be dismissed rather than remanded. The defendant in *Pace*, Dr. Swerdlow, had been an expert witness hired by the plaintiffs in a medical malpractice case. The plaintiffs ultimately lost that case after Dr. Swerdlow changed his medical opinion during the course of discovery, and the plaintiffs then sued Dr. Swerdlow for a variety of claims including professional malpractice, breach of fiduciary duty, and breach of contract. Dr. Swerdlow moved to dismiss under Rule 12(b)(6) for failure to state a claim, and on appeal the issue was whether the plaintiffs had sufficiently alleged that Dr. Swerdlow's change of opinion caused their failed malpractice suit. Judge Gorsuch and the panel agreed that they had, and so the case was remanded for further proceedings.

But Judge Gorsuch alone argued that he would have dismissed the complaint on other grounds not raised on appeal—namely, that the plaintiffs had not alleged sufficient facts to show that Dr. Swerdlow breached a duty of care, an essential element for liability even if he caused their damages.

In so doing—and most importantly for our assessment of Judge Gorsuch's broader views—Judge Gorsuch adopted a robust reading of the Supreme Court's "plausibility" standard for assessing civil complaints under Rule 12(b)(6). Before 2007, a court would dismiss a complaint only if "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[80] But the Supreme Court fashioned a higher standard in its 2007 decision *Bell Atlantic Corp. v. Twombly*,[81] when it held that, under Rule 8, civil complaints must contain sufficient facts to make the claim for relief "plausible." In *Pace*, Judge Gorsuch argued that the plausibility standard, then just a year old, must be applied strictly "to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of 'a largely groundless claim.'"[82]

In addition to his telling remark on the "costly machinery" of discovery,[83] Judge Gorsuch's opinion is important for two reasons. First, at the time it was unclear

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[79] 519 F.3d 1067 (10th Cir. 2008).
[80] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
[81] 550 U.S. 544, 564 (2007).
[82] *Pace*, 518 F.3d at 1076 (Gorsuch, J., concurring in part and dissenting in part) (quoting *Twombly*, 550 U.S. at 557).
[83] In a 2016 article, Judge Gorsuch endorsed certain amendments to the Federal Rules of Civil Procedure, including a new 2016 rule that makes "proportionality" the governing principle of discovery (Judge Gorsuch called the proportionality rule an "important change[]"). Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 JUDICATURE 3 (Autumn 2016). But the "proportionality" requirement places an artificial limit on the discovery plaintiffs can obtain, especially plaintiffs seeking injunctive relief, because the scope of discovery is determined in part by "the amount in controversy." Fed. R. Civ. P. 26(b)(1). *See also* Testimony of Sherrilyn Ifill Before the U.S. Senate Comm. on the Jud., Subcomm. on Bankr. and the Courts, "Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave

whether the new plausibility standard would apply to all civil complaints, or just complaints alleging antitrust violations, as was the case in *Twombly*. After all, *Twombly* itself framed the issue even more narrowly, explaining that the Court "granted certiorari to address the proper standard for pleading *an antitrust conspiracy through allegations of parallel conduct*[.]"[84] And before the Tenth Circuit decided *Pace*, the Second Circuit, in a high-profile national security case, outlined "conflicting signals" in the *Twombly* opinion that "create some uncertainty as to the intended scope of the Court's decision."[85] Thus, Judge Gorsuch's hardline application of *Twombly* was hardly compelled, and is therefore more illustrative of his own views. Second, recent scholarship shows that the plausibility standard has been harmful to civil rights plaintiffs, and that "[i]ndividuals have fared poorly under the . . . regime . . . compared to corporate and governmental agents and entities."[86]

Similarly, in *London v. Beaty*,[87] Judge Gorsuch joined a majority opinion that appeared to raise the pleading standard for plaintiffs who allege constitutional violations against cities and municipalities under § 1983—imposing a standard inconsistent with the actual scope of § 1983 municipal liability.

The panel in *London* unanimously agreed the plaintiff failed to state a claim for relief because he merely recited the legal elements for each cause of action and offered no specific facts. But the majority went further, saying that the complaint failed to allege municipal liability because it did not identify a specific policymaker, and a specific action taken by that policymaker, to show that the city violated his constitutional rights. Judge Moritz thought this reasoning both unnecessary and unfair, since municipal liability can come in many forms, including based on custom rather than formal policy, and on "the alleged failure of *any* policymaker to take *any* action,"[88] when doing so is necessary to avoid the constitutional violation. "Given the nature of [the plaintiff's] claim," Judge Moritz wrote, "the omissions identified by the majority should not necessarily torpedo his complaint, particularly considering the lack of any authority or explanation to support the majority's conclusion."[89]

An exception to Judge Gorsuch's strict approach appears when he considers the civil complaints of *pro se* prisoners. Judge Gorsuch has written two notable

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Americans Without Access to Justice," (Nov. 5, 2013), http://www.naacpldf.org/files/our-work/Sherrilyn%20Ifill%20Access%20to%20Justice%20Rules-%20Senate%20Testimony.pdf.

[84] *Twombly*, 550 U.S. at 553 (emphasis added).

[85] *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007). The Supreme Court subsequently granted cert in this case to clarify the plausibility standard and hold that it also applied outside the antitrust context. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[86] Alex Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603273&rec=1&srcabs=2600556&alg=1&pos=1.

[87] 612 F. App'x 910 (10th Cir. 2015).

[88] *Id.* at 916 (Moritz, J., concurring).

[89] *Id.*

opinions finding that a district court abused its discretion when it dismissed a prisoner complaint. In *Nasious v. Two Unknown B.I.C.E. Agents*,[90] Judge Gorsuch described a *pro se* prisoner's "difficult to comprehend" 63-page amended complaint that listed at least 42 defendants and was "arguably worse" than the originally dismissed complaint.[91] Nonetheless, Judge Gorsuch reinstated the complaint because the district court did not properly consider all relevant factors before dismissing it. Judge Gorsuch's opinion was based in part on special concern for *pro se* litigants. In such cases, he wrote, "the court should carefully assess whether it might appropriately impose some sanction other than dismissal [with prejudice], so that the party does not unknowingly lose its right of access to the courts because of a technical violation."[92] Judge Gorsuch took a similar approach in *Stanko v. Davis*,[93] when he reversed the district court and found that the *pro se* prisoner's civil rights complaint provided sufficient notice to each of the named defendants.

b. Motions for Summary Judgment

Judge Gorsuch has also been highly demanding of plaintiffs in cases appealed at the summary judgment stage, appearing to show greater concern for the interests of efficiency and resolving cases quickly than the sanctity of the jury trial in our civil justice system. In some cases, Judge Gorsuch's deference toward law enforcement raises the bar for plaintiffs who bring suit for constitutional rights violations.

As discussed below, Judge Gorsuch's disposition toward affirming grants of summary judgment is evident in his employment discrimination cases, as he has disposed of cases even where there is evidence susceptible to conflicting interpretations. That was true in *Zamora v. Elite Logistics, Inc.*,[94] in which Judge Gorsuch ignored conflicting evidence to affirm a grant of summary judgment in favor of an employer accused of racial and national origin discrimination for firing a Mexican national and lawful permanent resident. In that divided *en banc* decision, the employer had continued to question the plaintiff's authorization to work in the United States, despite having already been provided with proof of his legal permanent residence and social security number. Judge Gorsuch joined the majority opinion holding that such evidence was insufficient to create a factual dispute for jury resolution.

Another example is *Pinkerton v. Colorado Department of Transportation*,[95] a sexual harassment suit in which Judge Gorsuch joined the majority opinion affirming a grant of summary judgment for the employer. As explained below, *Pinkerton* is

[90] 492 F.3d 1158 (10th Cir. 2007).
[91] *Id.* at 1162.
[92] *Id.* at 1163 (quoting *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 n.3 (10th Cir. 1992)).
[93] 297 F. App'x 746 (10th Cir. 2008).
[94] 478 F.3d 1160 (10th Cir. 2007).
[95] 563 F.3d at 1052 (10th Cir. 2009).

troubling both because Judge Gorsuch and the court resolved a debatable factual question against the employee on a summary judgment appeal—to wit, whether the employee delayed reporting the alleged harassment in the hopes it would stop—and because it relied on narrow, unrealistic assumptions about how victims react when subjected to sexual harassment at work. In another case, *Bergersen v. Shelter Mutual Insurance Company*,[96] an employee was fired after complaining to a state agency that his employer insurance company had been discriminating against Latino insureds. Affirming a grant of summary judgment, Judge Gorsuch rejected the plaintiff's state-law retaliatory discharge claim even though only seven weeks had elapsed between the plaintiff's complaint and his termination, and the plaintiff had recently been rewarded for his work performance on multiple occasions.

Judge Gorsuch's defendant-friendly approach to analyzing facts in summary judgment appeals is not unique to discrimination cases. For example, in a recent wrongful death case alleging negligence *per se* and fraud, Judge Gorsuch wrote a divided opinion affirming a grant of summary judgment for the defendant rafting company. In *Espinoza v. Arkansas Valley Adventures, LLC*,[97] a rafting company argued that a standard release form shielded it from liability for the death of a women who fell into the river and was killed on a commercial white water rafting trip. Judge Gorsuch concluded that while the rafting company initially misled the decedent about the dangers of white water rafting, the company's release cured that misstep by clearly stating all potential risks, including "the risk of physical injury and/or death." But as the dissent argued, merely stating the potential risks says nothing about the *probability* they will actually happen.[98] Rather than allow a jury to decide whether the decedent had properly understood not just the possible risks but their likelihood, Judge Gorsuch ended the case by affirming summary judgment.

Also, as discussed more fully below, in cases where plaintiffs sue police officers under § 1983 for constitutional rights violations, Judge Gorsuch's factual analyses reflect tremendous deference to police in the face of alleged misconduct and sweeping concern for officer safety. This deference results in frequent affirmances of grants of summary judgment for law enforcement when qualified immunity is asserted.[99] In addition to how Judge Gorsuch evaluates the *facts* alleged against law enforcement officers, he has also adopted a pro-law enforcement view of the *law* in § 1983 cases. This combination raises the bar even higher for plaintiffs seeking to vindicate rights violations in court.

To defeat an officer's claim of qualified immunity, plaintiffs must allege that the officer violated a "clearly established" constitutional right. Other Tenth Circuit judges have criticized Judge Gorsuch for applying an unfairly demanding standard

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[96] 229 F. App'x 750 (10th Cir. 2007).
[97] 809 F.3d 1150 (10th Cir. 2016).
[98] *Espinoza*, 809 F.3d at 1158 (Hartz, J., dissenting).
[99] *See* Part D.i.a., *infra*.

to determine which rights are "clearly established." In *Cortez v. McCauley*,[100] the majority wrote that "[t]he approach taken by . . . Judge Gorsuch is tantamount to requiring a case on all fours before government officials could be held liable—all that is required is that 'in light of preexisting law the unlawfulness must be apparent."[101] And in *Hernandez v. Story*,[102] Judge Lucero concurred to explain that Judge Gorsuch's opinion needlessly faulted the plaintiff "on the . . . qualified immunity analysis merely because he failed to cite analogous case law."[103] As Judge Lucero pointed out, "it would place 'an impracticable burden on plaintiffs if we required them to cite a factually identical case before determining they showed the law was 'clearly established' and cleared the qualified immunity hurdle.'"[104]

Finally, a significant case in which Judge Gorsuch voted to reverse a district court's grant of summary judgment is *Simpson v. University of Colorado*,[105] a Title IX suit in which female students at the University of Colorado (CU) sued the school after they were sexually assaulted by university football players and recruits. While Judge Gorsuch ruled in favor of the plaintiffs, there was overwhelming record evidence demonstrating the university's "deliberate indifference" to the likelihood of sexual assault. Among other things, the evidence included an official school policy of showing football recruits a "good time," knowledge by football coaches and school administrators of previous sexual assaults on campus, and an unheeded recommendation from an Assistant District Attorney that CU develop written policies and procedures for supervising recruits, and offer football players annual training on sexual assault.[106] With the combination of this evidence and CU's inaction, a different result in this case would have been shocking.[107]

ii. Class Actions and Forced Arbitration

The class action device—governed in the federal rules by Rule 23[108]—was created in large measure to "vindicate[e] the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[109] The "impact of class suits in civil rights cases is substantial."[110] Because it broadens "the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of

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[100] 478 F.3d 1108 (10th Cir. 2007).
[101] *Cortez*, 478 F.3d at 1122.
[102] 459 F. App'x 697 (10th Cir. 2012).
[103] *Id*. at 701 (Lucero, J., concurring).
[104] *Id*. (quoting *Clanton v. Cooper*, 129 F.3d 1147, 1156-56 (10th Cir. 1997)).
[105] 500 F.3d 1170 (10th Cir. 2007).
[106] *See id.* at 1181-85.
[107] *See id*.
[108] Fed. R. Civ. P. 23.
[109] *Sykes v. Mel S. Harris & Assocs., LLC*, 780 F.3d 70, 81 (2d Cir. 2015).
[110] Hon. Jack B. Weinstein et al., *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973).

solutions aimed at systemic reform."[111] Moreover, class proceedings allow victims to obtain and present the evidence necessary to prove broad-based discrimination, through either intentional patterns and practices or disparate impact.

The Supreme Court's 1954 decision in *Brown v. Board of Education* is but one example of how civil rights class actions have contributed to dismantling pernicious, systemic racism and promoting equal opportunity for all Americans.[112] Class actions have also led to many of the key employment discrimination precedents under Title VII of the Civil Rights Act of 1964,[113] exposed and remedied widespread fair housing violations,[114] and have been indispensable in reducing economic discrimination in various forms.[115]

In recent years, by narrow margins, the Supreme Court has undermined class actions in several 5-4 (and one 5-3) cases. This includes the aforementioned *Wal-Mart* decision that made it harder to use the class action device to challenge widespread systemic discrimination,[116] and cases like *Concepcion* and *Italian Colors*, which allow corporations to place class action waivers in standard, "take it or leave it" contracts.[117] These waivers are typically embedded in "forced" arbitration clauses and require all claims against the corporation—including those alleging discrimination—to be brought individually in private arbitration rather than as a class in front of a judge and jury. Arbitration clauses and class action waivers, often deployed against unwitting consumers and employees, can effectively distinguish civil rights litigation before it even begins.[118] Importantly, arbitration, and the extent to which arbitration agreements must be enforced, remains a live issue before the Court—and one on which the next associate justice may provide a decisive vote.[119]

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[111] Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 678 (2003).
[112] 347 U.S. 483 (1954).
[113] *See*, *e.g.*, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).
[114] *See*, *e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
[115] *See*, *e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).
[116] *See Wal-Mart*, *supra* note 63.
[117] *See Concepcion*, *supra* note 66; *Italian Colors*, *supra* note 67, and accompanying discussion.
[118] *See* Letter from Janai Nelson, Associate Director-Counsel, LDF to Richard Cordray, Director, CFPB re: Forced Arbitration Clauses in Consumer Contracts (Aug. 22, 2016), http://www.naacpldf.org/files/case_issue/LDF%20Comment%20on%20Consumer%20Financial%20Protection%20Bureau%20Arbitration%20Agreements.pdf.
[119] In the current October 2016 term, for example, the Supreme Court is considering whether the arbitration clauses in nursing home contracts are enforceable when signed by those given powers of attorney and not the residents themselves. *Kindred Nursing Centers Limited Partnership v. Clark*, No. 16-32, argued on Feb. 22, 2017; *see also* Ronald Mann, *Argument Preview: Justices to consider (once again) state-court decision limiting pre-dispute arbitration contracts*, SCOTUSBLOG (Feb. 15, 2017), http://www.scotusblog.com/2017/02/argument-preview-justices-consider-state-court-decision-limiting-pre-dispute-arbitration-contracts/.

Judge Gorsuch's approach to class actions is not entirely clear, as he has not decided many cases on the use of class actions, and district court denials of class certification are reviewed only for abuse of discretion. Nonetheless, some of his writing gives rise to concerns. When Judge Gorsuch was in private practice, for example, he wrote a paper recommending policy changes to restrict securities fraud class actions. Similar to his concerns about the "costly machinery" of discovery, Judge Gorsuch lamented that "[b]ecause the amount of damages demanded in securities class actions is frequently so great, corporations often face the choice of 'stak[ing] their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy" into settling.[120] These views were echoed in an amicus brief that Judge Gorsuch filed on behalf of the Chamber of Commerce in *Dura Pharmaceuticals v. Broudo*.[121]

Among Judge Gorsuch's Tenth Circuit decisions on class certifications, *Shook v. Board of Commissions of the County of El Paso*,[122] a civil rights suit brought on behalf of prisoners with mental illness, provides some insight. The suit alleged that conditions at the El Paso County Jail violated the Eighth Amendment because of, among other things, inadequate mental health care, insufficient protections against self-inflicted injuries and suicide, inadequate medication distribution and mental health screenings, and the improper use of special detention cells, restraints, and Tasers against mentally ill prisoners. One plaintiff who suffered from Asperger Syndrome and bipolar disorder alleged that he was denied his medication for three weeks. Another plaintiff with bipolar and schizoaffective disorder alleged that he was confined to a special detention cell while restrained with leg irons and subjected to electric shocks. A third plaintiff, who arrived at the Jail after spending three days in a hospital psychiatric ward, alleged that the Jail altered her medications without consulting or warning her, and would not allow her to see a psychiatrist. That plaintiff later attempted suicide.

The district court denied the prisoners' motion for class certification, and Judge Gorsuch, writing for the panel, affirmed that decision. The district court found that the class would be unmanageable because it would be difficult to craft relief to address all of the County Jail's many alleged shortcomings and provide relief to all prisoners on a class-wide basis. Judge Gorsuch affirmed this assessment after reviewing for abuse of discretion, while noting that the Circuit "may very well have made a different decision had the issue been presented to [it] as an initial matter."[123]

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[120] Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASHINGTON LEGAL FOUNDATION, 3-4 (2005), http://www.wlf.org/upload/0405WPGorsuch.pdf.

[121] 544 U.S. 336 (2005); *see* Brief of Amicus Curiae for the United States Chamber of Commerce, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (No. 03-932) (opposing class certification of investors alleging securities fraud).

[122] 543 F.3d 597 (10th Cir. 2008).

[123] *Id*. at 603.

Despite the deferential standard of review, it is not clear that Judge Gorsuch and the panel were compelled to affirm. First, other Tenth Circuit precedent provided a legal basis to certify the class. In *Penn v. San Juan Hospital*,[124] for example, the Tenth Circuit reversed a district court's denial of class certification in a case alleging that a hospital denied Native Americans medical treatment on account of their race. Second, class certification rules provide flexibility for just these sorts of suits; for example, by permitting the use of subclasses to tailor injunctive relief. Judge Gorsuch mentioned this possibility, but blamed the prisoners and their counsel for not properly raising the issue.[125]

Finally, *Shook* undermines the use of class actions to address the common phenomena of systemic civil rights violations in prisons.[126] Without the class action device, it is difficult if not impossible to remedy the sort of structural constitutional deficiencies alleged by the prisoners in the El Paso County Jail. Other courts have recognized as much in declining to follow Judge Gorsuch's opinion. For example, in a factually analogous case, the Ninth Circuit affirmed a class of prisoners in Arizona's prison system who alleged statewide Eighth Amendment violations based on inadequate healthcare (including mental health) and the improper use of isolation cells.[127] In so doing, the court expressed "serious[] doubt that the degree of specificity suggested in *Shook*[]'s wide-ranging dicta is properly required at the class certification stage," and that "is particularly true in prison cases" where the precise contours of a remedy should be developed "through fact-finding, negotiations, and expert testimony"[128]—not made part of class certification.

On the issue of arbitration, Judge Gorsuch's dissent in *Ragab v. Howard*[129] is noteworthy. In *Ragab*, a suit brought against a financial institution for allegedly violating several consumer repair statutes, the majority affirmed the district court's denial of a motion to compel arbitration. The majority noted that the parties had entered into a series of six commercial agreements that contained conflicting terms on how claims would be arbitrated, and reasoned that, despite "a 'liberal federal policy favoring arbitration agreements,'"[130] the parties "failed to have a meeting of

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[124] 528 F.2d 1181 (1975).
[125] 543 F.3d at 610-11.
[126] *See* David Kaiser & Lovisa Stannow, *The Shame of Our Prisons: New Evidence*, THE NEW YORK REVIEW OF BOOKS (Oct. 24, 2013) (outlining statistical evidence of sexual abuse in prison and noting that "it is well documented that inmate health care of every kind is substandard, and prisons and jails are especially ill-suited to give psychiatric care. Far from serving as therapeutic environments, they are too often places of trauma and abuse where the strong prey on the vulnerable."), http://www.nybooks.com/articles/2013/10/24/shame-our-prisons-new-evidence/?pagination=false.
[127] *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014).
[128] *Id.* at 689 n.35; *see also DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010) (affirming class of 10,000 Oklahoma foster children alleging numerous and wide-ranging deficiencies in state foster care practices and policies).
[129] 841 F.3d 1134 (10th Cir. 2016).
[130] *Id.* at 1137 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

the minds with respect to arbitration."[131] Judge Gorsuch dissented and argued that the existence of arbitration clauses in all six agreements should control, even if the precise terms of each were different and even conflicting.[132]

To be sure, *Ragab* is not the paradigmatic forced arbitration case involving the fine print of a contract of adhesion thrust upon a consumer or employee. Nor does it involve the use of a class action waiver to force claims into individual arbitration. But it is notable because Judge Gorsuch's dissent relies on some of the same reasoning used to expand the enforcement of arbitration agreements, and to weaken efforts by state legislatures and judges to protect access to the courts. For example, Judge Gorsuch emphasized that the "Supreme Court has held that the [Federal Arbitration Act] preempts state laws that single out arbitration clauses for disfavored treatment,"[133] including on the question of whether a contract is formed in the first place.[134] Some of those state laws include the protections for class actions that met their demise in *Concepcion* and *Italian Colors*. Standing alone, this opinion does not tell us the extent to which Judge Gorsuch would impose arbitration as a Supreme Court justice. But his departure from a panel majority to enforce conflicting arbitration clauses—partly in the name of the FAA—warrants further questioning and close scrutiny on this issue before the Senate votes on his confirmation.

iii. Justiciability: Mootness, Standing, and Abstention

Questions of justiciability relate to whether a claim is properly before a court for judicial review. Such issues include Article III's jurisdictional requirements that federal courts decide only "Cases" or "Controversies"[135] between parties (as opposed to pure policy matters) and that plaintiffs have standing to sue. They also include less formal "prudential" doctrines, which allow courts to decline their authority to exercise judicial review even when jurisdictional requirements are otherwise met.

When these questions arise—or, in some cases, when Judge Gorsuch goes out of his way to raise them—he takes a narrow view of federal court jurisdiction and, even where there is no dispute that jurisdiction is proper, routinely defers to state courts and other bodies if there is any arguable basis to do so. Rather than allow some flexibility so that constitutional protections are enforced through judicial review, Judge Gorsuch appears to be more concerned with preserving a limited role for federal courts. In his dissents and concurrences, he often cautions that "[f]ederal

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[131] *Id*.
[132] *Id*. at 1139 (Gorsuch, J., dissenting).
[133] *Id*. at 1141 (Gorsuch, J., dissenting) (citing *Doctor's Assocs., Inc v. Casarotto*, 517 U.S. 681, 687 (1996)).
[134] *Id*. (citing *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993)).
[135] U.S. Const. art. III, § 2; *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

judges aren't free to intervene in any old dispute and rule any way they wish,"[136] and worries that courts will enter areas where "judicially manageable standards [do not] exist, and [courts] have no business intervening."[137]

Judge Gorsuch's views on justiciability, as demonstrated by the cases discussed below, risk depriving plaintiffs with legitimate claims of an adequate remedy, and give short shrift to the notion that federal courts are uniquely equipped to handle certain claims, particularly those involving civil rights suits brought against state officials.

The first pair of cases touch on an important principle that ensures defendants cannot evade liability simply by ceasing a challenged practice—a policing policy involving stop and frisk, for example—and then resuming the same conduct once a suit is dismissed. According to the Supreme Court, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[138] This rule ensures that courts can fulfill their role as protectors of important rights by barring defendants from manipulating the civil justice system to shirk accountability. Yet in two significant cases Judge Gorsuch undermined this principle, arguing that the court should defer to defendants' "remedial promises" rather than resolve ongoing disputes.

In *Wilderness Society v. Kane County, Utah*,[139] a group of environmental organizations challenged a county ordinance that opened a large stretch of federal land to "off-highway vehicles"—all-terrain vehicles, dirt bikes, and the like—on the grounds that it was preempted by a federal land management plan, and was therefore invalid under the Supremacy Clause. The district court granted summary judgment in favor of the plaintiff-environmental organizations and a Tenth Circuit panel affirmed. On *en banc* review, the full Tenth Circuit reversed, finding that the environmental groups lacked "prudential standing" to challenge the ordinance. Judge

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[136] *Kerr v. Hickenlooper*, 759 F.3d 1186, 1193 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of rehearing *en banc*).

[137] *Id.*; *see also Wilderness Soc'y v. Kane Cnty, Utah*, 632 F.3d 1162 (10th Cir. 2011) (*en banc*) (Gorsuch, J., concurring) ("We are courts of limited jurisdiction, with a written charter and prudential doctrines aimed at cabining our discretion, cautioning restraint in the face of temptation, and protecting us from improvident decisions); *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that courts should abstain from deciding certain constitutional claims out of respect for "comity" and "federalism"); *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that courts should abstain from deciding constitutional claims based on malicious prosecution, and stating that the Constitution "isn't some inkblot on which litigants may project their hopes and dreams . . . [it is] a carefully drafted text judges are charged with applying according to its original public meaning").

[138] *Friends of Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and citations omitted).

[139] 632 F.3d 1162 (10th Cir. 2011).

Gorsuch concurred in the outcome, but wrote separately to explain that he would have dismissed the case as moot.

Early in the litigation, the county had withdrawn the challenged ordinance and removed the decals from county road signs that gave approval for the use of off-road vehicles. For Judge Gorsuch, this meant that the environmental groups "won exactly the relief [they] sought,"[140] and the "suit is long dead, gone, moot."[141] But what of the possibility the county would simply revive the ordinance and replace the decals once the suit was over? Judge Gorsuch would not consider it unless the legislature openly expressed its intention to reenact the challenged the law, an intention not evidenced in the record. Instead, Judge Gorsuch focused on the limited jurisdiction of courts:

> We are courts of limited jurisdiction, with a written charter and prudential doctrines aimed at cabining our discretion, cautioning restraint in the face of temptation, and protecting us from improvident decisions. We may only address the questions put to us, and we may do so only when we have clear jurisdiction and legal authority. That much is lacking here.[142]

In dissent, Judge Lucero criticized the majority for dismissing this important case and leaving the dispute unresolved. "Although this sort of lawlessness may play well in a wild-west style fantasy," he wrote, "the majority's decision causes real and serious harm to the litigants, to the United States, and to the responsible residents of the affected communities seeking a resolution to this apparently interminable dispute."[143] On the issue of mootness, Judge Lucero argued that Judge Gorsuch had ignored abundant evidence that withdrawing the ordinance was merely a ploy to dispense with the litigation. For example, the county rescinded the ordinance specifically to "secure the most successful legal resolution to current federal roads litigation."[144] Further, a county press release announced that rescission was required "because litigating the ordinance simultaneously with the ownership of the roads is too big a bite of the apple *at one time*,"[145] and one county commissioner testified that he continued to believe that the county had authority to authorize the use of off-highway vehicles on the lands in question.[146] Taken together, Judge Lucero thought this "precisely the type of strategic manipulation of district court jurisdiction the voluntary cessation doctrine is intended to preclude."[147]

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[140] *Id.* at 1174-75 (Gorsuch, J., concurring).
[141] *Id.* at 1180 (Gorsuch, J., concurring).
[142] *Id.*
[143] *Id.* at 1195 (Lucero, J., dissenting).
[144] *Id.* at 1192 (Lucero, J., dissenting).
[145] *Id.* (emphasis added by Lucero, J.).
[146] *Id.*
[147] *Id.*

Judge Gorsuch employed similar reasoning in *Winzler v. Toyota Motor Sales USA, Inc.*,[148] a consumer safety case alleging that a certain model Toyota had an engine defect. After the suit was filed, Toyota initiated a nationwide recall of the car under the Motor Vehicle Safety Act. That statute required Toyota to notify owners of the defect and repair or replace faulty parts at no cost. It also placed the recall process under the oversight of the National Highway Transportation Safety Administration, which has the authority to issue fines for failing to carry out the recall.

On appeal, Judge Gorsuch wrote a unanimous panel decision dismissing the suit as moot—not because the case was no longer live or the plaintiff had obtained relief, but for the "prudential" reason that Toyota had voluntarily entered into a government-supervised recall process, and therefore there was "not enough value left for the courts to add . . . to warrant carrying on with the business of deciding [the case's] merits."[149] Judge Gorsuch acknowledged that dismissal would be inappropriate if the plaintiff could make the "modest" showing that "there exists some cognizable danger of recurrent violation"[150] or that the recall would fall short of providing a full remedy, but he found no such danger here. This reasoning expanded the traditional use of "prudential mootness" beyond cases where the government is party to the suit or actively expending resources to resolve it.[151] And the decision appeared motivated at least in part by a disfavor of plaintiffs' lawyers who bring consumer cases. Judge Gorsuch wrote:

> Our intervention would, as well, surely add new transaction costs for Toyota and perhaps reduce the incentive manufacturers have to initiate recalls (as Toyota did here), all while offering not even a sliver of additional relief for Ms. Winzler and members of the class she seeks to represent. Perhaps the lawyers would benefit if this would-be class action labored on through certification, summary judgment, and beyond. But it's hard to see how anyone else could.[152]

In addition to mootness, Judge Gorsuch has been a strong advocate of dismissing cases on abstention grounds—particularly in § 1983 suits that bring constitutional civil rights claims against police officers. In at least two cases, he has written opinions arguing that federal courts should abstain from deciding constitutional claims "when a state tort suit can provide the same relief as a federal § 1983 claim and there's no reason to suppose a state court won't fairly hear the claim[.]" In one case, *Browder v. City of Albuquerque*,[153] he even filed a concurrence to his own majority opinion to make the point. In another, *Cordova v. City of*

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[148] 681 F.3d 1208 (10th Cir. 2012).
[149] *Id*. at 1211.
[150] *Id*.
[151] *See id*. at 1211 ("To be sure, [the plaintiff's] suit isn't one against the government and in that formal respect differs from many prudential mootness cases.")
[152] *Id*.
[153] 787 F.3d 1076 (10th Cir. 2015).

Albuquerque,[154] he concurred to argue for abstention even after the panel unanimously affirmed qualified immunity and summary judgment for the defendants.

Judge Gorsuch argues that abstention is appropriate in these cases to show "respect for comity and federalism," and because courts should avoid deciding potentially difficult constitutional questions whenever possible. But this approach misunderstands the importance of having an open federal forum to bring constitutional civil rights claims—especially when the defendants are state or local police officers, or challenge is made to an unconstitutional state policy. And while Judge Gorsuch does acknowledge certain potential advantages of federal court jurisdiction—including avoiding conflicts of interest—he also appears to burden plaintiffs with showing why such advantages apply in a particular case,[155] creating yet another hurdle to get through the courthouse doors.

iv. Procedural Bars: Exhaustion of Administrative Remedies

Finally, Judge Gorsuch has strictly applied administrative exhaustion requirements to deny access to justice in a variety of cases, including those involving the rights of disabled school children and challenges to deportation orders.

Congress has expressly guaranteed that asserting claims under the IDEA does not necessarily preclude also seeking relief under other statutes that protect students with disabilities.[156] The only requirement is that plaintiffs first exhaust all administrative avenues to relief that IDEA provides. Over a dissent, Judge Gorsuch took a strict, form-over-substance approach to this exhaustion requirement in *A.F. ex rel Christina B. v. Espanola Public Schools*.[157] Judge Gorsuch held that a student could not pursue claims under the ADA and the Rehabilitation Act because her mother had already settled her IDEA claims during mediation, and reaching settlement at that stage was a failure to exhaust all administrative paths to relief.

In dissent, Judge Briscoe rightly characterized this result as an absurd outcome that ignored both the structure and remedial purpose of IDEA. "The majority's interpretation," he wrote, "forces a claimant to choose between mediating a resolution to her IDEA claim . . . and thereby obtaining some or all of the relief sought under IDEA, . . . or forgoing any relief at all and waiting (while the child ages and potentially continues to receive something other than the requisite "free

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[154] 816 F.3d 645 (10th Cir. 2016).
[155] *See Browder*, 787 F.3d at 1084 ("Of course, *if a plaintiff can establish* that state law won't remedy a constitutional injury . . . the doors of the federal courthouse should remain open") (Gorsuch, J., concurring).
[156] *See* 20 U.S.C. § 1415(l).
[157] 801 F.3d 1245 (10th Cir. 2015).

appropriate public education") in hopes of later filing suit."[158] That "was clearly not the intent of Congress and, ironically enough, harms the interests of the children that IDEA was intended to protect."[159]

In *Garcia-Carbajal v. Holder*,[160] Judge Gorsuch rejected a challenge to a removal order because the petitioner did not exhaust his arguments in front of the Board of Immigration Appeals (BIA). Before the BIA, the petitioner's removal order was upheld because he had been convicted of assault in Colorado, and that assault was deemed to be a "crime of moral turpitude." It was that determination—that his conviction involved moral turpitude—that the petitioner challenged.

On appeal in the Tenth Circuit, Judge Gorsuch explained that petitioners must exhaust all issues during administrative proceedings before raising them in court. And here the petitioner failed to do so, according to Judge Gorsuch, because the legal arguments he raised before the Circuit differed from those he presented to the BIA. Before the BIA, the petitioner argued that the Immigration Judge had used the wrong *process* to decide whether a crime is one of moral turpitude. Before the Circuit, however, he argued that the *substance* of the determination was wrong—that his conviction was not a crime of moral turpitude.

This reasoning is strained for two reasons. For one, the BIA apparently *did* reach the substance of the issue, finding that "the Immigration Judge correctly determined that the crime involved moral turpitude."[161] Second, under Tenth Circuit precedent, "when the BIA *sua sponte* considers arguments not advanced by the petitioner, the Board effectively exhausts the available administrative remedies for the petitioner, so that the petitioner may later pursue those arguments in court."[162] Thus the BIA's express determination on the petitioner's claim could—and perhaps should—have been sufficient to satisfy the exhaustion requirement. Judge Gorsuch's strict application of the rule places a heavy burden on immigrants challenging removal orders to preserve arguments[163] and exhaust agency relief, and further narrows the exception to that rule for claims the BIA considers *sua sponte*.

Overall, Judge Gorsuch's ample record on a wide range of access to justice matters consistently provides cause for significant concern. While some discrete issues—such as his views on class actions and pre-dispute arbitration clauses—must be further explored, Judge Gorsuch has generally taken a highly restrictive approach

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[158] *Id*. at 1256-57 (Briscoe, J., dissenting).
[159] *Id*. at 1251 (Briscoe, J., dissenting).
[160] 625 F.3d 1233 (10th Cir. 2010).
[161] *Id*. at 1236.
[162] *Id*. at 1235 (citing *Sidabutar v. Gonzales*, 503 F.3d 1116 (10th Cir. 2007)).
[163] *See also Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10th Cir. 2012) (holding that defendant in Title VII suit did not have immunity from suit, but that plaintiff's claims must be dismissed for failing to preserve arguments).

to access issues that could severely harm civil rights litigants who depend on the federal courts to provide fair and equal justice.

C. CAPITAL PUNISHMENT

LDF has long pursued the fair and unbiased administration of the criminal justice system in general, and the death penalty in particular. Since its inception, LDF has played a prominent role in challenging the constitutionality of the death penalty and its disproportionate imposition against African Americans. For example, LDF litigated *Furman v. Georgia*,[164] the 1972 case in which the Supreme Court declared the death penalty unconstitutional, and *McCleskey v Kemp*,[165] the 1985 case challenging racial discrimination in the death penalty. Just this term, in a 6-2 decision (with Chief Justice Roberts writing the majority opinion), LDF secured a majority victory in the Supreme Court on behalf of a death-sentenced prisoner who was condemned to death after his own lawyer introduced "expert" testimony that he was more likely to commit criminal acts of violence in the future because he is Black.[166]

LDF has also appeared as amicus curiae in landmark cases such as *Roper v. Simmons* (holding that the Eighth Amendment prohibits the execution of juvenile offenders);[167] and *Kennedy v. Louisiana* (holding that the Eighth Amendment prohibits execution for crimes that do not result, and were not intended to result, in death).[168] Given LDF's extensive work in this area, Judge Gorsuch's judicial record on cases involving the death penalty and death-sentenced prisoners is of central importance to our assessment of his nomination.

Winning federal habeas relief from any judge is a challenge. Winning federal habeas relief from Judge Gorsuch is a near impossibility. While federal law sets a high bar for habeas relief and requires deference to the factual and legal determinations of state courts—and deference to the U.S. district court on collateral review of federal convictions—the trends that emerge from Judge Gorsuch's opinions show that he is particularly demanding of petitioners. If a petitioner needs a certificate of appealability—the prerequisite for a habeas appeal—Judge Gorsuch will almost certainly deny it.[169] If a petitioner lost a claim in federal district court,

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[164] 408 U.S. 238 (1972).
[165] 481 U.S. 279 (1987).
[166] *Buck v. Davis*, No. 15-8049, ___ S. Ct. ___, 2017 WL 685534 (Feb. 22, 2017).
[167] 543 U.S. 551 (2005).
[168] 554 U.S. 407 (2008).
[169] *See, e.g.*, *United States v. Fishman*, 608 F. App'x 711 (10th Cir. 2015); *United States v. Garton*, 501 F. App'x 838 (10th Cir. 2012); *United States v. Gehringer*, 474 F. App'x 751 (10th Cir. 2011); *United States v. Fernandez*, 437 F. App'x 647 (10th Cir. 2011); *United States v. Bayazeed*, 465 F. App'x 810 (10th Cir. 2012).

Judge Gorsuch will generally affirm the district court opinion.[170] Judge Gorsuch has demonstrated a reluctance to conclude that a petitioner has identified a legitimate error[171] and often finds that any such error is harmless.[172] These trends apply to capital and non-capital petitioners alike.

Judge Gorsuch's consistent refusal to find prejudice in federal habeas petitions is apparent in *Hooks v. Workman*.[173] Mr. Hooks was convicted of murder and sentenced to death. On appeal to the Tenth Circuit, he argued that his death sentence was invalid because he has an intellectual disability and because his trial counsel provided ineffective assistance at the sentencing phase of his trial. The majority opinion rejected his disability claim, but held that individuals who pursue post-conviction intellectual disability claims are entitled to counsel, and Mr. Hooks was entitled to a new sentencing hearing because his trial counsel was ineffective. With respect to the former holding, the majority wrote: "The idea that a mentally retarded defendant has a right not to be executed by the State, but not a right to counsel in proceedings where the question of mental retardation will be determined, smacks of the absurd. Can a person with 'diminished capacities to understand and process information . . . be expected to argue his own condition to a court or jury?"

Judge Gorsuch dissented in part from the court's ruling, arguing that the court had no need to decide the question of whether a right to counsel exists in certain post-conviction proceedings and voicing various concerns about the majority's decision. In particular, with respect to the question of ineffectiveness, the majority found that Mr. Hooks' trial counsel rendered deficient performance in the investigation and development of Mr. Hooks' family and social history, in the presentation of the mitigating mental health evidence, and by bolstering the government's case in aggravation. The majority concluded that these failures prejudiced Mr. Hooks. In the majority's view, the sentencing phase presentation was "painfully brief" and left the jury with "almost nothing to weigh in the balance" against the facts of the crime.

Yet Judge Gorsuch characterized the powerful, unpresented facts in mitigation as a "mixed bag" and "equivocal" and concluded that there was no reasonable probability that counsel's failures undermined confidence in the outcome of the proceedings.

Judge Gorsuch's opinion in *Eizember v. Trammell*[174] is also illustrative. The petitioner in *Eizember* sought a writ of habeas corpus following a state court trial in which he was convicted of murder and sentenced to death. Mr. Eizember claimed,

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[170] *Twitty v. Davis*, 407 F. App'x 331 (10th Cir. 2011); *United States v. Cornelio-Legarda*, 514 F. App'x 771 (10th Cir. 2013); *Turner v. Jones*, 407 F. App'x 289 (10th Cir. 2011).
[171] *Eizember v. Trammell*, 803 F.3d 1129 (10th Cir. 2015).
[172] *See, e.g., Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) (Gorsuch, J. dissenting); *Wackerly v. Workman*, 580 F.3d 1171 (10th Cir. 2009); *Matthews v. Workman*, 577 F.3d 1175 (10th Cir. 2009).
[173] 689 F.3d 1148 (10th Cir. 2012).
[174] 803 F.3d 1129 (10th Cir. 2015).

among other things, that the trial court erred by seating two jurors who were impermissibly biased in favor of a death sentence, in contravention of binding Supreme Court precedent. One of the seated jurors indicated on her death-penalty questionnaire that "I am strongly in favor of capital punishment as an appropriate penalty," that "I firmly believe if you take a life you should lose yours," that she "would have to try hard" to endorse life without parole, and that she "would not hesitate to impose the death penalty" if guilt had been proven. Another seated juror stated that the defendant would not want him as a juror because "[i]f guilty, he will be on death row and eventually executed."

Judge Gorsuch ruled that the petitioner's juror claim was invalid for two reasons. First, in a discussion that emphasized the "double deference . . . owe[d]" to the trial court, Judge Gorsuch acknowledged that the jurors' statements did "seem to suggest a bias in favor of the death penalty" but nonetheless concluded that the decision to seat them was not unreasonable. Second, Judge Gorsuch ruled that the petitioner had forfeited his claim that the state appellate court applied the wrong legal standard as to whether a juror must be "irrevocably committed" to any one punishment.

The dissent not only rejected Judge Gorsuch's legal conclusions, it also challenged the accuracy of his opinion. Specifically, the dissent noted that Judge Gorsuch's opinion "makes several assertions that are erroneous and thus require a response." For instance, "the majority [opinion written by Judge Gorsuch] ignores key passages in [Mr.] Eizember's federal court pleadings and ultimately paints a distorted picture of [Mr. Eizember's legal challenge[;]" "[t]he majority, in its effort to avoid [Mr. Eizember's legal claim], characterizes" his earlier arguments in a manner that is "simply inaccurate[;]" and "[t]he majority also inaccurately frames [the dissent's] position."

In *Banks v. Workman*,[175] Judge Gorsuch permitted a conviction and death sentence to stand despite the prosecutor's hyperbolic and potentially biased description of the defendant during closing argument. In the closing argument, "the prosecutor characterized Mr. Banks as a 'wild animal that stalks its prey,' 'a predator who lurks in the shadows,' a 'monster' who selects the most helpless victims, and a 'Mafia style' killer." Judge Gorsuch did not defend these remarks, but, instead, noted that reversal is only appropriate if the remarks were prejudicial, and concluded that "it's hard to see how the prosecutor's statements would have, in any event, done much to inflame the jury's passions above and beyond their reaction to the gruesome crime itself." But because every capital murder involves "gruesome" facts, Judge Gorsuch's reasoning would authorize any and all arguments by a prosecutor during a capital trial, regardless of how inflammatory or prejudicial. That is clearly contrary to law.[176]

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[175] 692 F.3d 1133 (10th Cir. 2012).

[176] *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) ("while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

Grant v. Trammell, like *Hooks*, highlights Judge Gorsuch's excessive deference to state courts and reluctance to find prejudice in habeas proceedings.[177] Before the Tenth Circuit, Mr. Grant contended that he received ineffective assistance of counsel in the sentencing phase of his capital trial. Specifically, he asserted that his trial attorney had failed to investigate and present available mitigating testimony from Mr. Grant's family. Writing for the majority, Judge Gorsuch conceded that Mr. Grant's trial counsel had performed deficiently. But, after applying a deferential standard of review, Judge Gorsuch found that Mr. Grant was not prejudiced by his counsel's shortcomings.

The dissent, however, identified six different factual errors in the state court's decision that were "clearly contrary to, and rebutted by, the record developed during the trial court's evidentiary hearing." The dissent concluded that the state court's prejudice determination was "unquestionably impacted by its erroneous factual findings," and, as a result, *de novo* federal habeas review of the claim was warranted. Under this standard, the dissenting judge concluded that Mr. Grant was entitled to a new sentencing hearing because "the testimony of Grant's family members would have placed not only the murder, but Grant's entire criminal history, into a different, and more sympathetic context for the jury."

Judge Gorsuch also joined a pair of opinions that suggest a disturbing lack of concern about extreme and needless pain and suffering in the execution context. In *Estate of Clayton Lockett v. Fallin*,[178] the panel considered a lawsuit that arose from the botched execution of Clayton Lockett. Mr. Lockett was executed using a combination of drugs in which one drug—midazolam—was supposed to render Mr. Lockett unconscious before two other drugs—vecuronium bromide and potassium chloride—killed him. Vecuronium bromide asphyxiates the prisoner, and potassium chloride causes "burning and intense pain" until it induces cardiac arrest. In Mr. Lockett's case, the executioners failed to properly administer the drugs. He appeared to be unconscious, but "[u]nexpectedly" "began 'twitching and convulsing,'" before trying to raise his head from the table and saying, "Oh, man" and "something's wrong." Shortly thereafter, he "began to buck and writhe, as if he was trying to raise himself from the gurney . . .[while] clench[ing] his teeth and grimace[ing] in pain." In an attempt to intravenously administer more drugs, the executioners pushed a needle into Mr. Lockett's artery, resulting in a "bloody mess" that one witness described as

calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

[177] 727 F.3d 1006 (10th Cir. 2013).

[178] 841 F.3d 1098 (10th Cir. 2016).

a "horror movie."[179] It took 43 minutes for the state to kill Mr. Lockett, after numerous failed attempts to secure IV access.[180]

Mr. Lockett's estate sued, claiming a violation of his right to be free of cruel and unusual punishment. The panel opinion, joined by Judge Gorsuch, rejected Mr. Lockett's claim, finding that his complaint "describes exactly the sort of 'innocent misadventure' or 'isolated mishap'" that falls outside the protections of the Eighth Amendment.[181]

In *Warner v. Gross*,[182] Judge Gorsuch joined a panel that addressed the constitutionality of the same three-drug cocktail at issue in Clayton Lockett's case. The petitioners contended that midazolam—the anesthetic used in the lethal injection cocktail—was ineffective and unsuitable for executions, and posed a risk that an inmate would experience "severe pain, needless suffering, and extended death." The district court rejected the plaintiffs' request for a preliminary injunction, and the panel affirmed the district court decision, finding that it had correctly applied the law and appropriately relied on the testimony of the government's expert at the preliminary injunction hearing. The panel's opinion was affirmed by a sharply divided Supreme Court.[183] Justice Sotomayor, writing for four dissenting justices, argued that the district court had clearly erred by relying on supposed expert testimony that she described as "scientifically unsupported" and "implausible."[184] According to the dissent, the result, both at the Tenth Circuit and the Supreme Court, "leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake."[185]

D. CRIMINAL JUSTICE

In addition to federal habeas and the death penalty, Judge Gorsuch's opinions across multiple criminal justice contexts—including excessive force by law enforcement officers, qualified immunity, the Fourth Amendment, and the right to counsel—often reflect undue deference to government that favors finality over equity and favors law enforcement over the protection of individual constitutional rights.

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[179] Cary Spinwall & Ziva Branstetter, *Execution of Clayton Lockett described as 'a bloody mess,' court filing shows*, TULSA WORLD (Dec. 14, 2014), http://www.tulsaworld.com/newshomepage2/execution-of-clayton-lockett-described-as-a-bloody-mess-court/article_a4b70b76-84f7-5ebd-a5f3-044c205d474a.html.

[180] *See* Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/.

[181] *Id*. at 1110 (quoting *Baze v. Rees*, 53 U.S. 35, 50 (2008)).

[182] 776 F.3d 721 (10th Cir. 2015).

[183] *See Glossip v. Gross*, 135 S. Ct. 2726 (2015).

[184] *Id*. at 2781 (Sotomayor, J., dissenting).

[185] *Id*.

There have been some notable instances in which Judge Gorsuch ruled in favor of criminal defendants. For example, in a dissenting opinion, Judge Gorsuch stated that there is no "implied consent" for police to approach the front door of a home that is clearly marked with "no trespassing" warnings.[186] (Judge Gorsuch reported to the Senate Judiciary Committee that this case is among "the ten most significant cases over which [he] presided.)"[187] He has also expressed concern with "overcriminalization" as a general matter, noting that criminal laws have become so numerous—and some so vague—that it is hard to distinguish a crime from what is not a crime.[188] For example, Judge Gorsuch has twice resolved ambiguity in federal firearm statutes in favor of criminal defendants. In *United States v. Games-Perez*,[189] Judge Gorsuch concurred that defendants do not violate the statute that prohibits knowing possession of a firearm by a felon unless the defendant knows *both* that he possessed a gun *and* that he has been convicted of a felony. In that case, Judge Gorsuch criticized Tenth Circuit precedent that "the only knowledge required for a [criminal] conviction is knowledge that the instrument possessed is a firearm."[190] Similarly, in *United States v. Rentz*,[191] Judge Gorsuch wrote the *en banc* opinion, holding that, applying the rule of lenity, a defendant who fired a single shot that struck two people (killing one) "used" the firearm just once, not twice, for purposes of sentence enhancement under 18 U.S.C. § 924(c).

But Judge Gorsuch's views in these cases require further explanation. First, his concern about the proliferation of criminal laws primarily rests in the context of federal regulations that impose criminal penalties, and, therefore, fits within his broader critique of the modern administrative state, as detailed above in the section on Administrative Law. For example, Judge Gorsuch has questioned "[b]y what authority is the Executive permitted to criminalize conduct and impose jail terms in administrative regulations buried deep within the Code of Federal Regulations?" "Normally," he wrote, "we don't think of regulatory agencies as entitled to announce new crimes by fiat."[192] According to Judge Gorsuch, the undesirable result of this authority is that "the Code of Federal Regulations today finds itself crowded with so many 'crimes' that scholars actually debate their number."[193] His concern with overcriminalization is, therefore, motivated—at least in part—by his opposition to federal bureaucracy, and therefore does not speak to his views on issues of race and other inequities in the criminal justice system.

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[186] *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016) (Gorsuch, J., dissenting).
[187] Neil M. Gorsuch, *Questionnaire for Nomination to the Supreme Court* at 27, https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf.
[188] *See* The Hon. Neil M. Gorsuch, Barbara K. Olson Memorial Lecture, the Federalist Society (Nov. 22, 2013), http://www.fed-soc.org/multimedia/detail/13th-annual-barbara-k-olson-memorial-lecture-event-audiovideo.
[189] 667 F.3d 1136 (10th Cir. 2012) (Gorsuch, J, concurring).
[190] *United States v. Capps*, 77 F.3d 350, 352-53 (10th Cir. 1996).
[191] 777 F.3d 1105 (10th Cir. 2015) (*en banc*).
[192] *United States v. Baldwin*, 745 F.3d 1027, 1030 (10th Cir. 2014).
[193] *Id*. at 1031.

Second, as the cases discussed below reflect, Judge Gorsuch has used reasoning favorable to defendants in contexts where more privileged members of American society may cross paths with the criminal justice system. For example, he has shown markedly more sympathy for defendants subject to obscure federal regulations that prohibit business-related crimes than people subject to traffic stops and excessive force by police.[194]

i. Policing

Judge Gorsuch adheres to an exceedingly high standard for demonstrating racial discrimination in policing, and is highly deferential to the police in street stops, often needlessly invoking "officer safety" to justify police intrusion. As a result, Judge Gorsuch frequently rules in favor of the government when deciding Fourth Amendment claims, including challenges to law enforcement seizures, excessive use of force claims, and assertions of qualified immunity.

In his relatively few cases dealing with direct claims of racial discrimination—which typically arise in the policing context—Judge Gorsuch has often defended police conduct, crediting testimony that a suspect of color appeared nervous or agitated as justification for invasion of the individual's rights. While these cases are not numerous, they are concerning for their apparent lack of awareness of how implicit bias, structural racism, and entrenched racial stereotypes continue to infect policing throughout this country. Justice Sotomayor vividly raised these concerns last term when she dissented in a case involving an officer's suspicionless stop of a person on the street.[195] Although, in that case, the police arrested a white person, Justice Sotomayor explained that "it is no secret that people of color are disproportionate victims of this type of scrutiny,"[196] and as a result, "[f]or generations black and brown parents have [had to give] their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."[197] Judge Gorsuch's record and background show that he is less sensitive to the role of race in policing, and less skeptical of the purported need to use violent force.

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[194] In hypotheticals to show who might unfairly become ensnared by the ever-expanding criminal code, Judge Gorsuch has pointed to "[b]usinessmen who import lobster trails in plastic bags rather than cardboard boxes," "[m]attress sellers who remove that little tag," and federal employees who have "conversation[s] with a coworker about ski conditions in the high country[.]" *See* Gorsuch, *supra* note 188; *Baldwin*, 745 F.3d at 1031.

[195] *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

[196] *Id*. at 2070 (Sotomayor, J., dissenting).

[197] *Id*.

a. Qualified Immunity and Excessive Force

Judge Gorsuch's qualified immunity opinions demonstrate undue deference to police conduct and heightened concern for officer safety, resulting in the imposition of a high bar for claims of excessive force. Aside from his views on the merits of a particular case, Judge Gorsuch has expressed a general skepticism of § 1983 suits, particularly against police officers. For example, he has proactively argued in multiple cases that federal courts should abstain from addressing the constitutional claims raised in such suits when the plaintiff can seek remedies in state court via tort law. He has advanced this theory even when not raised by the parties. Judge Gorsuch has also referred to qualified immunity appeals as "small," and therefore not "the right place to decide large new issues of constitutional law."

This approach can have serious consequences for the enforcement of constitutional rights. Judge Holloway made that clear when he dissented in *Kerns v. Bader*.[198] There, Judge Gorsuch applied his "small" view of qualified immunity cases to avoid reaching what Judge Holloway thought a "patent" constitutional violation when officers sought medical records of a suspect without a warrant. To avoid reaching the constitutional claim, Judge Gorsuch held only that, for the purpose of qualified immunity, the constitutional right at issue was not "clearly established." In declining to reach the merits, Judge Gorsuch made "the obvious implication" that the officer's conduct might have been lawful, when in fact the violation was clear and the officer's "conduct was . . . blithely oblivious to the constitutional and statutory protections" at issue.[199]

In *Wilson v. City of Lafayette*,[200] Judge Gorsuch held that a police officer was entitled to qualified immunity after firing a Taser at a man's head, killing him. Although the man was suspected of a completely non-violent crime – growing marijuana – Judge Gorsuch reasoned that because he ran from police and reached for his pocket, the officer did not use excessive force by shooting him. However, one judge noted in concurrence that Judge Gorsuch's opinion omitted key facts that would have led to the conclusion that the officer had used excessive force. Specifically, Judge Gorsuch failed to acknowledge that the officer's Taser was equipped with a targeting function and the "training manual specifically warned officers against aiming at the head or throat unless necessary."

Similarly, in *Hawker v. Sandy City Corp.*,[201] Judge Gorsuch joined the majority, which held that an officer's use of a twist-lock "control hold" against a nine-year-old, sixty-seven-pound child—breaking the child's collarbone—did not constitute excessive force. In *Hawker*, school administrators accused the child of stealing an

[198] 663 F.3d 1173, 1187 (10th Cir. 2011).
[199] *Id*. at 1196 (Holloway, J., dissenting).
[200] 510 F. App'x 775 (10th Cir. 2013).
[201] 591 F. App'x 669 (10th Cir. 2014).

iPad from his elementary school. School officials escorted the boy to the hallway, where he sat with the school principal and psychologist until Officer Albrand arrived. The officer told the boy, "We can do this the easy way . . . or we can do this the [ ] hard way by you not talking to me." When the nine-year-old said nothing, the officer "grabbed his arm and yanked him up off the floor." The boy then grabbed the officer's arm. The officer reacted by placing the child "in a twist-lock, push[ing] him against the wall, and handcuff[ing] him." The boy cried out that the officer was hurting him. In addition to being treated for a broken collarbone, the school student "suffered anxiety and post-traumatic stress as a result of his encounter with Albrand." Granting the officer qualified immunity on an excessive force claim, the court reasoned that by grabbing the officer's arm—which the court characterized as "an act of violent resistance"—the child forfeited any excessive force claim he may have had.

In *Pauly v. White*,[202] the court denied rehearing *en banc* to determine whether an officer who shot and killed a man in his home was entitled to qualified immunity. The panel denied qualified immunity at summary judgment and allowed the case to go forward. The officer who killed Mr. Pauly testified that at the time of the incident, he could not tell whether Mr. Pauly had lowered his gun, and conceded that he never warned Mr. Pauly before firing a deadly shot. Judge Gorsuch, however, joined the dissent, which disputed the facts in the record and asserted that the court's decision has "potentially deadly ramifications for law enforcement officers." Other members of the court criticized the dissent for improperly "substituting its own facts after resolving the evidence in favor of the officers and against the plaintiffs."[203]

Cortez v. McCauley[204] further demonstrates Judge Gorsuch's deference to the judgment of law enforcement—here, the low, easily surmounted bar he sets for establishing probable cause to make an arrest. In *Cortez*, a babysitter and her husband brought a § 1983 action stemming from an unsubstantiated allegation of sexual assault of a two-year-old. The court found the babysitter—who was not the subject of the investigation—was subjected to excessive force during an unlawful detention: The police unlawfully entered her home in the middle of the night, confiscated her cell phone and home keys, and locked her in the backseat of a patrol car. Judge Gorsuch concurred in part and dissented in part, opining that the officers' actions with respect to the babysitter did not constitute excessive force. Further, Judge Gorsuch would have held that a statement from a two-year old alleged victim of sexual assault, without more, provided sufficient probable cause for arrest.

By contrast, Judge Gorsuch has at times denied qualified immunity to police officers, particularly in cases where officers violated a child's rights. In *Blackmon v. Sutton*,[205] Judge Gorsuch considered a § 1983 action involving an eleven-year-old

[202] 817 F.3d 715 (10th Cir. 2016).
[203] *Id*. at 716, 719 (Phillips, J., concurring in the denial of rehearing *en banc*).
[204] 478 F.3d 1108 (10th Cir. 2007).
[205] 734 F.3d 1237 (10th Cir. 2013).

former juvenile detainee, who on multiple occasions was forced to sit in a chair with wrist, waist, chest, and ankle restraints while adult male officers sat on top of him. Contrary to *Hawker*, no "act of violent resistance"[206] preceded the officers' actions in *Blackmon*. Judge Gorsuch found the officers were not entitled to qualified immunity because there was "no evidence suggesting why officials thought it reasonable [for] a grown man [to] sit on a 96–pound boy." However, his opinion made clear that while the court would not grant qualified immunity in this case, "briefly sitting on a detainee might be reasonably related to [a legitimate, non-punitive] purpose in certain circumstances."

In *A.M. ex. rel. F.M. v. Holmes*,[207] the Tenth Circuit ruled that police were entitled to qualified immunity after arresting a student for disrupting the class by burping in school. Judge Gorsuch dissented and found no legal authority that criminalized the student's behavior. He concluded that a reasonable officer should know "that arresting a now compliant class clown for burping was going a step too far."[208]

b. The Fourth Amendment and Selective Enforcement

Judge Gorsuch's Fourth Amendment decisions have had a decidedly pro-government bent. Even when Judge Gorsuch identifies a clear constitutional violation, he often does not exclude the evidence obtained pursuant to that violation ("the exclusionary rule"). Instead, Judge Gorsuch is willing to forgo the protections of the exclusionary rule in favor of "[o]ther remedies (from administrative to civil) [that] exist to punish and deter officer misconduct."[209] Thus, under Judge Gorsuch's view, evidence discovered following the violation of a person's constitutional rights may nonetheless be admissible against him at trial. Such a rule provides police officers with limited incentive to avoid violating individuals' civil rights.

In *Blackwell v. Strain*,[210] Judge Gorsuch considered evidence of racial discrimination at a commercial vehicle inspection center at the Lordsburg Port of Entry in New Mexico. Mr. Blackwell argued that he was stopped because of his race, citing not only "statistical evidence presented by an expert witness," but also "statements provided by other black truck drivers who said they were discriminated against by [ ] officers at the [Port] because of their race, and evidence that state and federal narcotics agents and individuals at the federal public defender's office believed racial profiling was occurring at the [Port]."[211] Despite the "curious" evidence

[206] *Hawker*, 591 F. App'x at 675.
[207] 830 F.3d 1123 (10th Cir. 2016).
[208] *Id*. at 1170 (Gorsuch, J., dissenting).
[209] *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013) (Gorsuch, J., dissenting); *United States v. Mitchell*, 653 F. App'x 651, 651–53, 654 (10th Cir. 2016).
[210] 496 F. App'x 836 (10th Cir. 2012).
[211] *Id*. at 838.

of a significant disparity between Black and non-Black truckers stopped at Lordsburg Port, Judge Gorsuch joined the majority to hold that the evidence was insufficient to demonstrate racial discrimination in vehicle stops.

In dissent, Judge Holloway argued that because the evidence presented in this case was not merely statistical, the majority applied the wrong legal principle.[212] Judge Holloway noted that the majority improperly "reject[ed] . . . evidence that [the defendant officer] subjected other African-American truck drivers to intrusive inspections,"[213] and "[w]hen faced with a claim of discriminatory enforcement practices by an individual officer," courts "have described similar evidence as seeking to prove the plaintiff's case 'not by means of statistical inference, but by direct evidence of [the officer's] behavior during the events in question, . . . and [the officer's] alleged record of racially selective stops and arrests in drug cases under similar circumstances.'"[214]

In *United States v. Montes*,[215] Judge Gorsuch again confronted claims of racial discrimination in vehicle stops. *Montes* began when the police stopped a BMW for a failure to signal. The officer conducting the car stop initially intended to issue a warning, but upon approaching the vehicle he observed that the driver, Mr. Montes, was Hispanic and noticed the "overwhelming odor of air freshener" in the car. He also saw a female in the front passenger seat who looked "extremely nervous" and children in the backseat. Without more, the officer ordered Mr. Montes out of his vehicle, allegedly for officer safety. He then began questioning Mr. Montes, who "avoided eye contact and hesitated when answering basic questions." The officer had Mr. Montes wait until K-9 alert dogs arrived. The dogs alerted to Mr. Montes's vehicle and drugs were recovered. Mr. Montes filed a motion to suppress the drugs, and claimed that his constitutional rights were violated by racial profiling and selective enforcement by the police department. He also issued a subpoena requesting information on traffic stops by the officer where he purportedly issued warnings that resulted in the use of K-9 alert dogs. Writing for the court, Judge Gorsuch quashed the subpoena, ruling that there was no evidence that Mr. Montes's race or ethnicity motivated the officer to effectuate the stop.

In *United States v. Martin*,[216] Judge Gorsuch subverted the test for seizure under the Fourth Amendment to rule against the defendant. In *Martin*, police were searching for a Black male suspect when they encountered Mr. Martin in the entryway of an apartment building. Upon seeing Mr. Martin, multiple police officers approached and ordered him to "turn around and put his hands on the wall behind him." Notwithstanding the fact that a reasonable person in Mr. Martin's position

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[212] *Id.* at 850 (Holloway, J., dissenting).
[213] *Id.*
[214] *Id.* (citing *Marshall v. Columbia Lea Regional Hospital*, 345 F.3d 1157, 1168 (10th Cir. 2003)).
[215] 280 F. App'x 784 (10th Cir. 2008).
[216] 613 F.3d 1295 (10th Cir. 2010).

would not believe they were free to leave under those circumstances, Judge Gorsuch held that the police had not "seized" Mr. Martin because—though he made no attempt to flee—he did not immediately comply with the officers' command.

In contrast to car stops and stops of individuals on the street, Judge Gorsuch appears more protective of individuals' right to privacy in their homes. In *United States v. Carloss*,[217] for example, the court held that "no trespassing" signs surrounding a person's home did not revoke the implied license to knock on the door to the home to speak to the occupants. Judge Gorsuch dissented, finding that there is no irrevocable license to enter in the face of "no trespassing" signs posted across one's property. Judge Gorsuch's concern for privacy inside one's home extends to police use of technology. As he wrote in *United States v. Denson*,[218] a case in which police used a Doppler radar device to detect "human breathing and movement" inside of a house, "[i]t's obvious . . . that the government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions. New technologies bring with them . . . new risks for abuse."

ii. Direct Criminal Appeals

In direct appeals of criminal convictions, Judge Gorsuch tends to afford significant deference to district courts, and rarely holds that an error of the court or a prosecutor is so egregious that it constitutes reversible error. In our view, Gorsuch's interest in finality is sometimes to the detriment of fairness and due process in the criminal justice system. The following cases demonstrate this point.

In *United States. v. Taylor*,[219] Judge Gorsuch upheld the conviction of a man who had been convicted of assault on the Southern Ute Indian Reservation. During opening arguments at trial, the prosecutor asked the jury to convict to "end the cycle of violence" on the reservation, inappropriately calling upon the jury to correct a societal ill rather than focus on the guilt or innocence of the defendant. Judge Gorsuch, applying the "plain error" standard of review, affirmed the conviction and held that the trial court had cured any error by instructing the jury merely to "remember that what the lawyers tell you is not evidence, and the evidence in the case is what you must decide."[220] While the remainder of the panel agreed with the result, Judge Briscoe wrote a concurrence arguing that the lower court's decision should have been reviewed *de novo*.

In *United States v. Poole*,[221] John Poole appealed his conviction for assault. After trial, despite being instructed that if it found Mr. Poole guilty of assault it

[217] 818 F.3d 988 (10th Cir. 2016).
[218] 775 F.3d 1214 (10th Cir. 2014).
[219] 514 F.3d 1092 (10th Cir. 2008).
[220] *Id*. at 1095.
[221] 545 F.3d 916 (10th Cir. 2008).

should stop its deliberations and not consider any lesser charges, the jury found Mr. Poole guilty of both assault and the lesser-included offense of simple assault. The district court threw out the conviction for the lesser charge (simple assault) and determined that Mr. Poole had been convicted of the higher charge (assault) and polled the jury to see if the verdict was correct. After the jury was discharged, Mr. Poole moved for a mistrial, but his motion was denied by the lower court. On appeal, Mr. Poole argued that it was unclear whether the jury had convicted him on the higher or lower count of assault, and that it was improper for the trial court to assume that the conviction was on the higher charge. Judge Gorsuch denied the appeal, and deferred to the trial court's decision, holding that it had taken necessary steps to ensure that the verdict was fair. Judge Gorsuch also concluded that Mr. Poole should have raised his arguments before the jury was discharged.

In *United States v. Sturm*,[222] Judge Gorsuch joined the majority in affirming the conviction of the defendant for distributing child pornography. This case rested on the court's interpretation of the term "visual depiction" in the relevant criminal statute. Overruling an earlier Tenth Circuit case, the majority held that the government does not have to prove that the specific digital image in the defendant's possession had traveled in interstate commerce. Instead, it is sufficient to show that the substantive content of the images had at some point traveled in interstate or foreign commerce. Although the government had not shown that the actual digital images in the defendant's possession had ever left Oklahoma, the conviction was affirmed because the content of the images originated in Paraguay.

The dissent called this a "strained interpretation" of the statute and offered the following example:

> Imagine two identical photographs of the Eiffel Tower, one an original and the other a copy. . . . Each of the photos is a separate and distinct "visual depiction" *of* the same substantive content. And of course, if I were to say that I had "mailed" or "transported" one of these visual depictions in interstate commerce, everyone (except perhaps the majority) would understand that to mean that I had mailed or transported a particular *photo*. No one would say, for example, that I had mailed "the Eiffel Tower."[223]

Despite the apparent absurdity of their interpretation, Judge Gorsuch and the majority held that, since the people pictured in the image were in Paraguay and the defendant was in Oklahoma, the image had traveled in interstate commerce and the conviction was appropriate—no matter that there was no evidence that the digital image in the defendant's possession had ever left Oklahoma.

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[222] 672 F.3d 891 (10th Cir. 2012).
[223] *Id*. at 903 (Holmes, J., dissenting).

iii. Sentencing

Unlike his jurisprudence in the habeas and death penalty realms, Judge Gorsuch's sentencing decisions do not reveal a starkly ideological bent. Although he generally sides with the government on sentencing issues,[224] Judge Gorsuch occasionally reversed sentencing decisions in favor of criminal defendants, and there is no clear trend of disproportionately ruling in favor of prosecutors or any other general approach to sentencing that is discernible from his many decisions in this area.

For instance, in *United States v. Smith*,[225] Judge Gorsuch reversed a sentence which was challenged on the basis of statutory interpretation: Mr. Smith was convicted of two counts of robbery and two counts of using a firearm during the robbery. It was clear that the two firearm counts required the imposition of a 35-year sentence, and that the robbery sentences had to run consecutive to the firearms sentences. What was less clear was whether the district court could take its knowledge of the very lengthy firearm sentences into account when fashioning its sentence for the underlying offenses. The government convinced the district court that the answer was "no." After closely analyzing the text and structure of four different statutes and examining related pronouncements from the sentencing commission and case law, Judge Gorsuch reversed.

Judge Gorsuch also reversed a district court's sentencing decision in *United States v. Sabillon-Umana*.[226] Mr. Sabillon-Umana argued that the district court erred in two respects: First, by selecting a sentence length for drug trafficking and then using the sentence length to determine the quantity of drugs at issue, rather than using the drug weight to determine the sentence; and second, by siding with the trial prosecutor's assertion that the prosecutor—not the trial court—determined the magnitude of the downward departure that the defendant could receive at sentencing in return for assistance to the government (aka snitching). Judge Gorsuch reversed Mr. Sabillon-Umana's sentence on both counts even though the latter issue had not been preserved at trial and could be reviewed only for plain error.

By contrast, *United States v. Hinckley*, [227] which involved the retroactive application of registration requirements to sex offenders, raises multiple concerns. Judge Gorsuch joined a panel opinion and wrote a concurrence in the case, holding

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[224] *See, e.g., United States v. Duran*, 219 F. App'x 762 (10th Cir. 2007); *Calvert v. Denham,* 594 F. App'x 545 (10th Cir. 2015); *Litteral v. Marshall*, 437 F. App'x 749 (10th Cir. 2011); *Perez-Carrera v. Stancil*, 616 F. App'x 371 (10th Cir. 2015); *United States v. Burgdorf,* 466 F. App'x 761 (10th Cir. 2012); *United States v. Chapman,* 521 F. App'x 710 (10th Cir. 2013); *United States v. Collins,* 461 F. App'x 807 (10th Cir. 2012); *United States v. Dolan,* 571 F.3d 1022 (10th Cir. 2009); *United States v. Hernandez*, 655 F.3d 1193 (10th Cir. 2011); *United States v. Jackson*, 493 F.3d 1179 (10th Cir. 2007).
[225] 756 F.3d 1179 (10th Cir. 2014).
[226] 772 F.3d 1328 (10th Cir 2014).
[227] 550 F.3d 926 (10th Cir. 2008).

that the Sex Offender Registration and Notification Act (SORNA) registration requirements apply to sex offenders convicted before the Act became law. In *Hinckley*, Judge Gorsuch conceded that SORNA is ambiguous, but that "after utilizing our traditional tools for resolving ambiguity, it is beyond question that Congress manifested an intent that SORNA should apply" to the defendant in that case. The dissent—later validated by the Supreme Court—argued there was no ambiguity and "because the Attorney General had not promulgated any rules about the retroactivity of SORNA prior to [the defendant's] conviction, [the defendant] did not violate its registration requirements."[228]

This case is significant for two reasons. First, Judge Gorsuch's position was rejected by the Supreme Court but echoed by Justice Scalia in a dissent joined by Justice Ginsburg. In *Reynolds v. United States*,[229] the Supreme Court abrogated that portion of *Hinckley* in a 7-2 ruling, holding that SORNA's registration requirements do not apply to pre-Act offenders unless and until the Attorney General specifies that they do.

Second, Judge Gorsuch used this case to raise what has been a pet issue of his—the extent of Congress's power to delegate authority to executive agencies. As explained further in the section on Administrative Law, Judge Gorsuch has argued that the Supreme Court should revive the "nondelegation doctrine," a rule that has sat in desuetude for decades, to impose strict limits on congressional authority to delegate rulemaking authority. In this case, Judge Gorsuch observed that the defendant's argument—that Congress had left it entirely to the Attorney General to decide whether SORNA applies to pre-Act defenders—raises a "potential constitutional difficulty" under the nondelegation doctrine.[230] Were this doctrine given the renewed strength that Judge Gorsuch has called for, it would have sweeping implications well outside the criminal context—including, for example, limiting agencies' ability to issue regulations that protect the environment, ensure workplace safety, and prevent corporations from defrauding consumers, among other important agency functions.

In sum, Judge Gorsuch's criminal justice record is most concerning in cases involving capital punishment, federal habeas, and issues related to policing, including roadside stops and excessive force. Further, in line with his restrictive views on access to courts, Judge Gorsuch holds a robust view of qualified immunity, and generally defers to law enforcement concerns over plaintiffs in civil suits against police officers.

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[228] *Id*. at 952 (McConnell, J., dissenting).
[229] 565 U.S. 432 (2012).
[230] *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring).

E. EMPLOYMENT DISCRIMINATION

Most of Judge Gorsuch's economic justice-related decisions involve employment discrimination. The issue accounts for the largest share of civil rights cases before the Supreme Court, through both U.S. Equal Opportunity Employment Commission ("EEOC") enforcement and suits between private parties.[231] Employment discrimination suits have played an essential role in integrating the country and cutting back on workplace discrimination based on race, gender, national origin, and other protected characteristics.[232] As a justice on the Supreme Court, Judge Gorsuch would play a significant role in determining the extent of workplace protections for employees.

Overall, in his ten years on the bench, Judge Gorsuch has demonstrated a general skepticism of employee claims in discrimination cases, and, accordingly, has frequently ruled in favor of employers. Judge Gorsuch has frequently parsed the facts of employment discrimination cases very closely, focusing on facts harmful to employees. Additionally, he has applied procedural barriers to relief for employees strictly. Below, we analyze Judge Gorsuch's notable decisions, primarily involving Title VII of the Civil Rights Act of 1964 (Title VII) discrimination and retaliation claims, including key exceptions to our general analysis in which he ruled in favor of employees. As revealed by Judge Gorsuch's general approach to access to justice, several of these adverse rulings for employees turn upon procedural issues.

Judge Gorsuch's decision in *Gaff v. St. Mary's Regional Medical Center*[233] illustrates his tendency to affirm summary judgment for employers despite genuine issues of material fact. Judge Gorsuch wrote for a three-judge panel and ruled against a nurse who brought sexual harassment and retaliation claims against her hospital employer. The plaintiff alleged that she was sexually harassed by a male co-worker.[234] She alleged that her co-worker stared at her with a sexually provocative expression,[235] which she interpreted as him "undressing her with his eyes."[236] The plaintiff also alleged that her co-worker touched her on a regular basis,[237] and once told her, "All you need is a good f*%k."[238] The plaintiff reported these incidents to her

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[231] In fiscal year 2016 alone, the EEOC received more than 91,000 charges of discrimination; of those charges, 32,309 (or 35.3%) involved allegations of racial discrimination. *See* U.S. Equal Emp't Opportunity Comm'n, Charge Statistics FY 1997 through FY 2016 (2016), http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[232] *See*, *e.g.*, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[233] 506 F. App'x 726 (10th Cir. 2012).

[234] Brief of Appellant, Doc. 01018853238, Case No. 12-6064, United States Court of Appeals for the Tenth Circuit ("Brief of Appellant") at 3.

[235] *Id.* at 4.

[236] *Id.*

[237] *Id.* at 5.

[238] *Id.*

supervisor, to no avail.[239] This conflict culminated when the hospital fired the plaintiff for allegedly threatening her co-worker,[240] although she denied having threatened him.[241]

Gaff demonstrates that Judge Gorsuch does not fully appreciate the very real gender dynamics that may shape the hostile work environment claim. Instead, Judge Gorsuch dismissed the significant of the offending co-worker's conduct, euphemizing it as "boorish"[242] and immature.[243] Judge Gorsuch also chose to focus on the one sexually explicit comment, characterizing it as an isolated instance. But his focus on the co-worker's sexually explicit statement was to the exclusion of the plaintiff's other allegations, including allegations of sexually charged staring and evidence that the co-worker admitted to flirting with her.[244] And given the nature of the comment, Judge's Gorsuch's characterization of it as "isolated" in concert with the co-worker's other actions, demonstrated his lack of understanding of workplace harassment. Judge Gorsuch also focused on the fact that plaintiff was not subordinate to her co-worker.[245] However, viewing the facts in the light most favorable to the plaintiff, as required, it is clear that the co-worker's position as a peer did not deter his chauvinism and that the plaintiff may have been powerless to change her co-worker's behavior or her work environment, try as she might.

Judge Gorsuch's reasons for affirming the dismissal of the plaintiff's retaliation claim were even more troubling. The law is clear that even an employee's mistaken understanding of Title VII should not doom her retaliation claim, so long as it was reasonable for her to believe that she was sexually harassed.[246] Were it otherwise, employees would further hesitate to report perceived discrimination, to the detriment of Title VII's goals. As one commentator has noted, "[b]y ensuring that individuals report possible discrimination, [Title VII] can facilitate open communication about what conduct violates that norm, and it can help victims cope with, and recover from, the psychological and dignitary harms that such discrimination often causes. But if the anti-retaliation provision is interpreted too

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[239] *Id.* at 5-8.
[240] *Id.* at 12.
[241] *Id.* at 11.
[242] 506 F. App'x at 727.
[243] *Id.* at 728.
[244] Brief of Appellant at 4.
[245] 506 F. App'x at 728.
[246] *See Wyatt v. City of Boston,* 35 F.3d 13, 15 (1st Cir. 1994); *Wimmer v. Suffolk Cty. Police Dep't,* 176 F.3d 125, 134 (2d Cir. 1999); *Moore v. City of Phila.,* 461 F.3d 331, 341 (3d Cir. 2006); *Jordan v. Alt. Resources Corp.,* 458 F.3d 332, 337-38 (4th Cir. 2006); *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1137 (5th Cir. 1981); *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 579 (6th Cir. 2000); *Tate v. Exec. Mgmt. Servs. Inc.,* 546 F.3d 528, 532 (7th Cir. 2008); *Barker v. Mo. Dep't of Corr.,* 513 F.3d 831, 834 (8th Cir. 2008); *Sias v. City Demonstration Agency,* 588 F.2d 692, 695 (9th Cir. 1978); *Crumpacker v. Kan. Dep't of Human Res.,* 338 F.3d 1163, 1172 (10th Cir. 2003); *Weeks v. Harden Mfg. Corp.,* 291 F.3d 1307, 1311-12 (11th Cir. 2002); *Parker v. Balt. & Ohio R.R. Co.,* 652 F.2d 1012, 1020 (D.C. Cir. 1981).

narrowly, such that it often fails to protect individuals who report conduct that they believe violates Title VII, it will be unable to serve any of these purposes."[247]

Judge Gorsuch found it was unreasonable for the plaintiff to believe that she was subjected to a hostile work environment. Because Judge Gorsuch acknowledged that the standard for a retaliation claim is a good faith belief, he seems to have substituted his own perspective for the layperson's reasonable understanding of what it means to be sexually harassed. Unfortunately, Judge Gorsuch's narrow view of Title VII's retaliation standard vindicates the fears of many victims of harassment, who are reluctant to complain for fear of reprisal.

Similarly, in *Pinkerton v. Colorado Department of Transportation*,[248] the plaintiff claimed that her former employer, the Colorado Department of Transportation, subjected her to sexual harassment.[249] Judge Gorsuch joined a majority opinion that criticized the plaintiff for not complaining as soon as her supervisor initially made sexually demeaning comments towards her.[250] As the dissent rightfully recognized, the plaintiff could have waited to complain because she reasonably hoped that the harassment would have stopped; when it became clear that this was unlikely to occur, she complained.[251]

The majority opinion is troubling in two respects. First, the case involved disputed facts that should have been left for the jury to decide at trial—instead of on summary judgment, where the only relevant question is whether a factual dispute exists. Specifically, as the dissent points out, there was a factual dispute over whether the plaintiff filed complaints in a timely fashion, and evidence that she filed a complaint once the harassment escalated to "unambiguously create a hostile work environment."[252] Second, the decision reflects a failure to understand how a reasonable person acts when subjected to sexual harassment. An actual victim may not be eager to complain, but rather may hope that if she waits, any harassing behavior will either dissipate or be corrected. To assume otherwise ignores the fear and trepidation an actual victim may experience.[253]

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[247] Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1470 (2007).
[248] 563 F.3d 1052 (10th Cir. 2009).
[249] *Id*. at 1055.
[250] *Id*. at 1066-67.
[251] *Id*. at 1067.
[252] *Id*. at 1068 (Ebel, J., dissenting).
[253] *See id.* (pointing out that an employee's response to harassment must be assessed "by reference to many factors" including "the accessibility and efficacy of a mechanism for reporting and resolving complaints of sexual harassment, and the plaintiff's own efforts to stop or avoid escalation of the harassment short of filing a complaint").

The majority also criticized the plaintiff for presenting insufficient evidence that her employer acted against her because of her complaint.[254] The plaintiff produced evidence regarding the temporal proximity between her complaint and her termination.[255] Relying on previous Tenth Circuit precedent, the majority said this alone was insufficient.[256] However, as the dissent correctly pointed out, the case on which the majority relied did not involve retaliation, but the failure to hire.[257] The failure to hire context is materially different because there an employer has failed to act (i.e., to hire or promote), and thus involves unique problems of proof. Reasoning from such cases should not be applied to retaliation claims that involve allegations of the employer taking a specific action.[258]

In *Zamora v. Elite Logistics, Inc.*,[259] the plaintiff, a Mexican national and lawful permanent resident, alleged that his former employer suspended and then terminated him on the basis of his race and national origin.[260] The district court entered summary judgment for the defendant, finding that even if the plaintiff established a prima facie case of discrimination, the employer had presented a legitimate reason for both decisions, and the plaintiff had failed to establish a triable issue of fact as to whether the reason was pre-textual.[261] A three-judge panel of the Tenth Circuit—which did not include Judge Gorsuch—reversed regarding both the suspension and termination.[262]

In an *en banc* decision, the Tenth Circuit overturned the panel regarding both the suspension and termination; in both cases, finding in favor of the employer.[263] Judge Gorsuch agreed with both decisions.[264] As set out below, both decisions further evidence Judge Gorsuch's propensity to weigh disputable facts in a manner detrimental to plaintiffs' claims.

With regard to the plaintiff's suspension, the *en banc* court was equally divided as to whether he had presented sufficient evidence that the employer's explanation for suspending him—an employer-initiated investigation that raised questions as to whether the plaintiff was authorized to work in the United States—was merely an excuse for discrimination.[265] As the dissent rightly emphasized, on the same day that the defendant informed the plaintiff of the results of the investigation, the plaintiff

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[254] *Id*. at 1066.
[255] *Id*.
[256] *Id*.
[257] *Id*. at 1069 (Ebel, J., dissenting).
[258] *See id*.
[259] 478 F.3d 1160 (10th Cir. 2007).
[260] *Id*. at 1162.
[261] *Id*. at 1165.
[262] *Id*. at 1162.
[263] *Id*.
[264] *Id*. at 1167 (McConnell, J., concurring).
[265] *Id*. at 1165.

produced "a report of his earnings from the Social Security Administration ('SSA'), his social security card, and an immigration document showing that he had applied to become a naturalized citizen in 2001."[266] Nonetheless, his employer suspended his employment.[267] Judge Gorsuch joined a concurrence concluding that the employer had sufficiently justified his decision on account of other evidence in the record that raised questions as to the plaintiff's identity.[268] Ultimately, it is not the plaintiff's responsibility at the summary judgment stage to conclusively rebut each of the employer's factual allegations. Rather, if there were competing facts in evidence, the proper conclusion would have been for the court to let the case proceed to trial where such questions could have been resolved. Resolution at summary judgment is reserved for cases where there is no genuine issue as to any material fact.[269]

The court's ruling regarding the plaintiff's termination involved a similarly questionable and concerning weighing of the facts. Even though the plaintiff's suspension and termination were part of the same episode and occurred one right after the other, the majority opinion, which Judge Gorsuch joined, analyzed the episodes separately.[270] This splicing of the events allowed the majority to ignore evidence raising questions as to whether the plaintiff had been fired because of his race and to conclude that there was insufficient evidence of discriminatory intent. As the dissent in the case noted, it was not that such evidence did not exist, but rather the majority purposefully employed a method of analysis which allowed the court, including Judge Gorsuch, to ignore it.[271]

Hwang v. Kansas State University also involved a questionable approach to the facts that suggests a troubling pattern.[272] Judge Gorsuch wrote for a three-judge panel to affirm the district court's grant of a motion to dismiss. The plaintiff did not even get a chance to conduct discovery into her claims.

The plaintiff, who taught at Kansas State University for fifteen years,[273] was diagnosed with breast cancer in 2005,[274] and became critically ill with leukemia in 2009.[275] Her physicians concluded that her survival depended on an aggressive course of chemotherapy and a bone marrow transplant.[276] The plaintiff was initially absent from work for six months.[277] For two months she availed herself of her accumulated

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[266] *Id*. at 1186 (Lucero, J., dissenting).
[267] *Id*.
[268] *Id*. at 1176-77.
[269] Fed. R. Civ. P. 56(c).
[270] *See Zamora*, 478 F.3d at 1187-88 (analyzing majority opinion).
[271] *Id*.
[272] 753 F.3d 1159 (10th Cir. 2014).
[273] First Amended Complaint, *Hwang v. Kan. State Univ.*, No. 5:11-cv-04185-EFH-KMH (D. Kan. Apr. 5, 2012), ECF. No. 20 ("FAC") ¶¶ 12-13.
[274] *Id.* ¶ 17.
[275] *Id.* ¶ 20.
[276] *Id.* ¶ 21.
[277] *Id.* ¶ 23.

paid leave time[278] and for four months she availed herself of paid leave that her co-workers donated, pursuant to a University program set up for that purpose.[279] As her leave period drew to a close, the plaintiff asked the University for an extension through the end of the spring semester, promising to return in time for the summer term, but the University refused.[280] The University advised the plaintiff to apply for long term disability benefits, which would require her to pay her health insurance premium of $1,340 per month and would require her to resign her position at the University.[281] The plaintiff alleged that by denying her more than six month's sick leave the University failed to afford her a reasonable accommodation, in violation of the Rehabilitation Act.[282]

Although it was incumbent upon him to do so, Judge Gorsuch did not view the facts in the light most favorable to the plaintiff before affirming dismissal of the case without the benefit of discovery.[283] For instance, Judge Gorsuch did not address plaintiff's claims that a manager in her department informed her that she had one year of shared leave at her disposal.[284] And although the plaintiff was in nearly all respects similarly situated to other teachers, Judge Gorsuch insisted on referring to her as an "'annual contract teacher"[285] even though she had taught at the university for years and her yearly contracts were renewed as a matter of course before she became ill.[286] Characterizing the plaintiff as an annual contract teacher enabled Judge Gorsuch to summarily dismiss her allegations that similarly situated employees received more favorable treatment, because it skewed the point of comparison to other teachers with a comparable history.[287]

Judge Gorsuch also construed the Rehabilitation Act in a manner that prioritizes employers' needs. "After all," he wrote, "reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work."[288] Elsewhere he writes that plaintiff's illness is "a problem other forms of social security aim to address. The Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work."[289]

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[278] *Id.* ¶ 24.
[279] *Id.* ¶ 27.
[280] *Hwang*, 753 F.3d at 1161.
[281] FAC ¶¶ 40-41.
[282] *Hwang*, 753 F.3d at 1161.
[283] *Jordan-Arapahoe v. Bd. of Cty. Comm'rs of Cty. of Arapahoe, Colo.*, 633 F.3d 1022, 1025 (10th Cir. 2011).
[284] FAC ¶ 37.
[285] *Hwang*, 753 F.3d at 1164.
[286] FAC ¶¶ 12-14
[287] *Hwang*, 753 F.3d at 1164.
[288] *Id.* at 1161-62.
[289] *Id.* at 1162.

As noted above, on occasion, Judge Gorsuch has ruled in favor of plaintiffs in employment discrimination cases, particularly when the claim does not concern race, ethnicity, or sex discrimination. For example, in *Walton v. Powell*,[290] a former employee of the New Mexico Land Office and self-described Republican, filed suit alleging that her recently elected Democratic supervisor fired her because of her political affiliation in violation of the First Amendment.[291] The defendant alleged that the plaintiff's claims were barred by qualified immunity.[292] The district court rejected this argument, and the plaintiff appealed.[293]

On appeal, with Judge Gorsuch writing for the majority, a three-judge panel affirmed.[294]

Unlike the decisions above, Judge Gorsuch found that the plaintiff had presented sufficient facts to survive the defendant's motion for summary judgment.[295] While the decision seems correct, it is not clear that the evidence of unlawful intent is more significant than in the contradictory cases discussed above. Judge Gorsuch cited evidence that the defendant was "aware" of news reports critical of the plaintiff; that other employees in the office accused the plaintiff of illegal activity; and that the defendant had publicly criticized the qualifications of "certain employees" in the office.[296]

i. Dissents

In dissent, Judge Gorsuch has narrowly interpreted civil rights statutes, thereby limiting the rights of persons who may seek protection or relief under them. For example, in *TransAm Trucking, Inc. v. Administrative Review Board*,[297] the plaintiff, a former employee of TransAm Trucking, challenged his employer's decision to terminate him.[298] The plaintiff in the case was transporting cargo when the brakes on his trailer froze due to subzero temperatures.[299] "After reporting the problem to TransAm and waiting several hours for a repair truck to arrive, [the plaintiff] unhitched his truck from the trailer and drove away," ignoring his employer's request that he either remain with the vehicle or drag the trailer behind with him.[300] He was terminated for abandoning the trailer.[301] The Administrative Review Board found in

[290] 821 F.3d 1204 (10th Cir. 2016).
[291] *Id*. at 1206-07.
[292] *Id*. at 1206.
[293] *Id*. at 1207.
[294] *Id*. at 1214.
[295] *Id*.
[296] *Id*.
[297] 833 F.3d 1206 (10th Cir. 2016).
[298] *Id*. at 1208.
[299] *Id*.
[300] *Id*.
[301] *Id*.

favor of the plaintiff, concluding that the employer violated the Surface Transportation Assistance Act (STAA).[302]

On appeal, a majority opinion from the three-judge panel denied the defendant's petition for review.[303] The court found that the termination violated a provision of the STAA making it unlawful for an employer to discharge 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."[304] In dissent, Judge Gorsuch argued that the plaintiff was not fired for refusing to operate his vehicle—as the statute requires—but rather because he abandoned the trailer.[305] His hyper-technical interpretation not only undermines the intent of the statute—to protect drivers from being fired for refusing to undertake dangerous activities while driving[306]—but was at odds with the facts of the case and the plain meaning of the statute. The statute could have been reasonably interpreted to apply to the situation as the majority did, because the employer ordered the plaintiff to drag the trailer along with him, but the driver refused to do so. Judge Gorsuch's decision may have been motivated, in part, by his apparent distrust of agency decision-making, as described above in the section on Administrative Law.[307]

ii. Mixed Rulings

In a handful of cases, Judge Gorsuch has ruled in favor of the plaintiff regarding one aspect of a case, while ruling against the plaintiff in another. For example, in *Strickland v. United Parcel Service, Inc.*,[308] the plaintiff brought various state and federal claims against the United Parcel Service, Inc. ("UPS") after she stopped working for UPS.[309] At issue were claims of retaliation for utilizing the Family and Medical Leave Act ("FMLA") and sex discrimination.[310] The district court found in favor of the defendant on both claims; however, a three-judge panel of the Tenth Circuit reversed the decision regarding both claims.[311] Judge Gorsuch joined the majority with regard to the FMLA claim, agreeing that whether the plaintiff was "constructively discharged" was a question for the jury to decide.[312]

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[302] *Id*. at 1210.
[303] *Id*. at 1208.
[304] *Id*. at 1211.
[305] *Id*. at 1215.
[306] *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987).
[307] *See id*. at 1216 (criticizing the majority's invocation of *Chevron* deference) (Gorsuch, J., dissenting). The Administrative Law section (Part F), *infra*, further explains Judge Gorsuch's extreme opposition to agency deference.
[308] 555 F.3d 1224 (10th Cir. 2009).
[309] *Id*. at 1225.
[310] *Id*.
[311] *Id*. at 1225-26.
[312] *Id*. at 1231 (Gorsuch, J., concurring in part and dissenting in part).

But Judge Gorsuch wrote a separate opinion addressing the majority's ruling on the plaintiff's sex discrimination claim.[313] The specific issue was whether the existence of a co-worker of the plaintiff, who performed worse than the plaintiff, but was not subjected to mistreatment, created a triable issue of fact.[314] The majority concluded that it did.[315] But Judge Gorsuch construed the facts narrowly and unfairly against the plaintiff, distinguishing the comparator employee on the grounds that he worked in another office (but was still supervised by the same supervisor as the plaintiff), and highlighting facts indicating that he was also subjected to harsh treatment.[316] In light of the conflicting facts, the majority correctly held that the plaintiff's sex discrimination claims could not be disposed of before a trial.[317]

Similarly, Judge Gorsuch has found that a plaintiff may have a valid claim, but has ruled against the plaintiff because of a procedural hurdle that the plaintiff failed to overcome. For example, in *Somerlott v. Cherokee Nation Distributors, Inc.*,[318] an employee of CND, LLC, a private corporation in Oklahoma that provided chiropractic care, alleged that her employer violated Title VII and the ADEA.[319] The district court concluded that CND was entitled to qualified immunity as a subsidiary of a tribal corporation wholly owned by the Cherokee Nation.[320] Judge Gorsuch joined a majority opinion holding that CND was not entitled to sovereign immunity, but also that the plaintiff had failed to preserve the relevant argument in the court below.[321] The plaintiff had raised the issue of sovereign immunity below, but the panel faulted her for not raising the precise legal argument that she later presented to the Tenth Circuit. Accordingly, the Court affirmed in favor of the defendant corporation.[322] Although Judge Gorsuch agreed that the defendant was not entitled to sovereign immunity, his strict approach to preserving arguments resulted in him ruling for the defendant.

iii. Employment Discrimination and Religious Exemptions

Judge Gorsuch's empathy for employers is starkly illustrated in *Hobby Lobby Stores, Inc. v. Sebelius,*[323] a case about whether for-profit companies can withhold

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313 *Id.*
314 *See id.* at 1230-31 ("Paul Deaton was similarly situated to Strickland and had worse sales numbers, yet he was not subject to the same requirements and oversight as Strickland. From this evidence the jury could have found that Strickland was subjected to sex discrimination[.]")
315 *Id.*
316 *Id.* at 1232-33.
317 *Id.* at 1231.
318 686 F.3d 1144 (10th Cir. 2012).
319 *Id.* at 1146.
320 *Id.* at 1147.
321 *Id.* at 1150.
322 *Id.* at 1154.
323 723 F.3d 1114 (10th Cir. 2013).

certain federally-guaranteed benefits from women employees based on the companies' religious beliefs. Two companies and their owners took issue with the 2010 Patient Protection and Affordable Care Act's ("ACA") requirement that they provide, as part of their employer-sponsored health care plan, certain contraceptives that they deem abortifacients. The district court denied their motion for a preliminary injunction. The *en banc* court reversed and remanded, and Judge Gorsuch wrote a concurrence. The Tenth Circuit's decision was later affirmed by the Supreme Court in a 5-4 opinion.

The ACA requires health insurance plans to cover certain preventative services without cost-sharing.[324] The coverage requirement did not initially include many preventative services unique to women, prompting the passage of the Women's Health Amendment ("WHA").[325] The WHA codifies Congress's intention to address gender disparities in out-of-pocket health care costs, which stem in large part from reproductive health care.[326] To implement the WHA, the federal government adopted the recommendations of the Institute of Medicine and enacted regulations that require non-grandfathered plans covered by the ACA to provide health care coverage without cost-sharing for all FDA approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.[327] As the government noted, their inability to access contraception:

> places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventative services, including contraceptive services.[328]

The employers in *Hobby Lobby* argued that the ACA's mandate violated their religious faith because it forced them to be complicit in conduct that their religion teaches to be gravely wrong.[329] Judge Gorsuch agreed with the employer's religious conceptualization of the issue. "All of us face the problem of complicity," Judge Gorsuch wrote, and "[a]ll of us must answer for ourselves whether and to what degree

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[324] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131-32 (2010) (codified at 42 U.S.C. § 300gg-13).
[325] *Id.* § 2713(a)(4), 124 Stat. at 131.
[326] *See* 155 Cong. Rec. S12,019, S12,027 (statement of Sen. Gillibrand).
[327] *See* 45 C.F.R. §§ 147.130(b)(1), 147.130(a)(1)(iv); Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Women's Preventative Services Guidelines,* http://www.hrsa.gov/womensguidelines.
[328] 77 Fed. Reg. 8725, 8728.
[329] 723 F.3d at 1152.

we are willing to be involved in the wrongdoing of others."[330] By framing the debate in terms of "complicity" and "the wrongdoing of others," Judge Gorsuch's reasoning tellingly exposes his sympathies and antipathies. Judge Gorsuch concluded that the ACA infringed on the employers' religious liberty by "requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong."[331] In so doing, Judge Gorsuch abetted the employers' efforts to resurrect the long-discredited notion that personal religious beliefs can justify discrimination against others.[332]

Resort to religion to justify discrimination has a shameful history in America. Religion was used to justify slavery,[333] anti-miscegenation laws,[334] and segregation.[335] Religious objections were also levied against the Civil Rights Act of 1964. For example, during the Act's passage, Senator Robert Byrd recited Leviticus 19:19, which discusses the need to keep cattle separate from other animals, to argue that "God's statutes . . . recognize the natural order of the separateness of things."[336] The House sought a broad exemption to exclude religiously affiliated employers entirely from the proscriptions of the Act.[337]

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[330] *Id.*

[331] *Id.* at 1154.

[332] Judge Gorsuch also argued that the ACA's accommodation for religiously-affiliated nonprofits is inadequate. The accommodation permits organizations to opt out of providing contraceptive coverage by signing a form, at which point the federal government steps in to cover the costs of such coverage for the organization's women employees. A Tenth Circuit panel upheld this accommodation, but Judge Gorsuch joined a dissent from denial of rehearing *en banc* which said that the "opinion of the panel majority is clearly and gravely wrong—on an issue that has little to do with contraception and a great deal to do with religious liberty." *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting from denial of rehearing *en banc*).

[333] For instance, the Missouri Supreme Court, in rejecting Dred Scott's claim for freedom, noted that the introduction of slavery was perhaps "the providence of God" to rescue an "unhappy race" from Africa and place them in "civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852).

[334] For example, in upholding the criminal conviction of an African-American woman for cohabitating with a white man, the Georgia Supreme Court held that no law of the State could

> Attempt to enforce moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it.

Scott v. State, 39 Ga. 321, 326 (1869); *see also Kinney v. Commonwealth*, 71 Va. 858, 869 (1878) (Reasoning that, based on "the Almighty," the two races should be kept "distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion.").

[335] *See The West Chester & Phila. R.R. v. Miles,* 55 Pa. 209, 213 (1867) (reasoning that "the Creator" made two distinct races, which "God has made . . . dissimilar," and "the order of Divine Providence" dictates that the races should not mix.).

[336] 110 Cong. Rec. 13,207 (1964). Senator Byrd also noted that "[t]he American Council of Christian Churches, representing 15 denominational groups with a total of more than 20 million members wired President Johnson" in protest of the civil rights bill. *Id.* at 13,209.

[337] *See EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964).

Resistance to the 1964 Civil Rights Acts based on religion persisted even after it passed. For instance, in a landmark case litigated by LDF on behalf of African-American plaintiffs, the owner of a barbeque chain who refused to serve African Americans in South Carolina defended the lawsuit by claiming that serving Blacks violated his religious beliefs. The court rejected the restaurant owner's defense, holding that the owner:

> Has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.[338]

Religion has also been used to subvert efforts to achieve gender equality.[339] Religious schools, for example, resisted notions that women must receive compensation equal to men, invoking their belief that the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family."[340] And policies like the one at issue in *Hobby Lobby*—which are designed to guard against invidious gender discrimination—continue to be tested by similar arguments. In recent cases, religious employers have essentially claimed that their religious beliefs entitle them to violate Title VII's prohibition on sex discrimination.[341] Likewise, appeals to religious liberty have been used to defy the Supreme Court's 2015 decision

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[338] *Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

[339] The Court in *Frontiero v. Richardson* chronicled the long history of sex discrimination in the United States. 411 U.S. 677, 684-88 (1973). The Court noted that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes," and emphasized that women, like slaves, could not "hold office, serve on juries, or bring suit in their own names," and that married women traditionally could not own property or even be legal guardians of their children. *Id.* at 685.

[340] *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

[341] *See, e.g., Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of marriage); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, as "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (rejecting free exercise challenge to Title VII by religious school that fired librarian for becoming pregnant outside of marriage, and noting that the school may have discriminated based on sex because "*only* women can *ever* be fired for being pregnant without the benefit of marriage").

upholding a right to marriage equality,[342] as officials in multiple states refused to issue marriage licenses to same-sex couples.[343]

In *Hobby Lobby*, Judge Gorsuch appeared indifferent to the way in which appeals to religious liberty have been used to justify discrimination. The contraception rule is of a piece with Title VII and other efforts to purge the workplace of gender discrimination. Notwithstanding the Supreme Court's affirmance in *Hobby Lobby*, LDF remains opposed to any expansion of the religious exemption doctrine that invites or condones the kind of discrimination that LDF fought successfully in the *Piggie Park* barbecue restaurant litigation and other cases.

iv. Reversals in Favor of Plaintiffs

On occasion, Judge Gorsuch has reversed lower court and agency rulings for defendants (employers), thereby allowing plaintiffs' (employees) cases to proceed. Judge Gorsuch is particularly critical of agencies that he sees as failing to adequately support their decisions. For example, in *Craine v. National Science Foundation*,[344] Judge Gorsuch reversed the National Science Foundation's dismissal of a complaint from a professor alleging that the university that employed him illegally retaliated against him.[345] Judge Gorsuch correctly explained that the agency order included virtually no "analysis of reasoning."[346] However, as discussed above in the section on Administrative Law, this analysis is consistent with Judge Gorsuch's general skepticism of agency action.

Despite some exceptions, Judge Gorsuch's overall record on employment discrimination cases gives rise to serious concerns, and in many respects overlaps with the concerns raised in our discussion of his Access to Justice record.

F. LGBTQ EQUALITY

LDF has also participated as *amicus curiae* in cases across the nation about the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals, including on the constitutional right to marriage and the provision of public accommodations and services.[347]

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[342] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[343] *See* Andrew Wolfson & Mike Wynn, *Kim Davis isn't the only one refusing same-sex marriages*, USA TODAY (Sept. 5, 2015), http://www.usatoday.com/story/news/nation-now/2015/09/05/kentucky-clerk-same-sex-marriage-license-religious-freedom/71770124/.
[344] 647 F. App'x. 871 (10th Cir. 2016).
[345] *Id*. at 871-72.
[346] *Id*. at 872.
[347] *See, e.g.*, *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, No. 16-273, __ S. Ct. __, 2017 WL 855755, vacated and remanded (Mar. 6, 2017); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United*

Judge Gorsuch has had only a few opportunities to directly rule on legal issues affecting the rights of LGBTQ individuals. But when he has, his decisions or statements suggest that he would generally oppose LGBTQ equality and would depart from the Supreme Court's precedents on same-sex marriage. Perhaps most obviously, there is Judge Gorsuch's 2005 *National Review* op-ed criticizing the achievement of marriage equality through the courts, writing "American liberals have become addicted to the courtroom . . . as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide[.]"[348]

His high-profile opinion in *Hobby Lobby* indicates that he would greatly expand religious exemptions to the law and correspondingly pare back on anti-discrimination protections for LGBTQ individuals in the name of religious freedom. This is part of a broader, problematic trend, under the auspices of religious freedom, of cutting holes into federal civil rights statutes.

In 2015, Judge Gorsuch joined a ruling against an incarcerated transgender woman who sought to continue regular access to hormone therapy during confinement. The woman brought a § 1983 complaint alleging that prison officials violated the Eighth Amendment's prohibition on cruel and unusual punishment by stopping and starting her prescribed hormone medications and giving her inadequately low dosages of her hormone medication.[349] She also asked that the prison allow her to wear "ladies' undergarments" and make other medical-related accommodations. The panel found that the prison's decision was well within the "flexible guidelines" for the relevant standard of medical care. Moreover, the panel found that "this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." The panel reasoned that "Ms. Druley did not allege any facts suggesting the [] defendants' decisions concerning her clothing or housing do not bear a rational relation to a legitimate state purpose. Thus, she has not demonstrated a likelihood of success on her Equal Protection claims."

Additionally, in *Kastl v. Maricopa County Community College District*,[350] Judge Gorsuch, sitting by designation on the Ninth Circuit, joined a panel opinion against a transgender woman who sought to use the restroom in her workplace in accordance with her gender identity. The panel affirmed summary

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States v. Windsor, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Jackson v. Abercrombie*, 585 F. App'x 413 (9th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Ingersoll v. Arlene's Flowers*, No. 91615-2 (Wash. Feb. 16, 2017); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. App. Apr. 25, 2016); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016).

[348] Gorsuch, *supra* note 11.

[349] *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015).

[350] 325 F. App'x 492 (9th Cir. 2009).

judgment in favor of the employer, which had refused her access to the women's restroom until she proved she had sex reassignment surgery, and also refused to renew her employment contract. The panel reasoned that the employer's invocation of "safety reasons" was a legitimate, non-discriminatory basis for banning the women from the bathroom.[351] This generalized fear of danger from transgender persons echoes the sorts of factually baseless arguments made against transgender equality in recent filings before the Supreme Court.[352] This small but revealing set of cases present grave concerns for the future protection of LGBTQ rights if Judge Gorsuch is confirmed.

G. EDUCATION

Judge Gorsuch has decided only a handful of education cases. Most of these cases have addressed the Individuals with Disabilities Education Act (IDEA), the statute designed to ensure that students with disabilities have access to a quality public education. His positions in these cases evince a limited view of both the civil rights protections for students with disabilities, and the capacity of the public education system. Judge Gorsuch has also addressed school discipline in the context of excessive force claims against school police officers, revealing a small but mixed record.

On other important education issues, including school desegregation, Judge Gorsuch has had little or no opportunity to weigh in, making these important areas for further investigation during his confirmation hearing.

i. Individuals with Disabilities Education Act

The IDEA ensures that students with disabilities are provided with a "free appropriate public education" (FAPE) and provides broad protections for those students. Judge Gorsuch, however, has applied the IDEA extremely narrowly, and in almost all cases involving students with disabilities, he sides with school districts, denying students with disabilities educational opportunities guaranteed by the law. Judge Gorsuch's preoccupation with technical procedure and his consistently narrow interpretation of these civil rights protections are contrary to congressional intent and the explicit purpose of the IDEA.

In *A.F. ex rel Christine B. v. Española Public Schools*,[353] Judge Gorsuch, writing for a sharply divided panel, denied relief to a student based on a procedural rule that undermines the statute's very purpose. A.F. was a child with a learning

[351] *Id*. at 494.
[352] *See generally* Br. of NAACP LDF and AALDEF as Amici Curiae, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm* (Mar. 2, 2017).
[353] 801 F.3d 1245 (10th Cir. 2015).

disability that her mother felt was not being adequately addressed by her school. A.F.'s mother followed the redress procedures required by IDEA, first filing an administrative complaint before reaching a settlement with the school district during mediation. She then went to federal court seeking remedies that were available only under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Congress has expressly guaranteed that students are free to pursue remedies under these other statutes in addition to IDEA.[354]

Yet Judge Gorsuch held that the student's mother could not bring these additional claims because she had settled her IDEA claim during mediation, before she completed, even if needlessly, every potential administrative path to relief that IDEA provides. The dissent explains the absurdity of Judge Gorsuch's reasoning:

> a claimant under the IDEA must now, in order to later be able to file suit in federal court under other related statutes, refuse to settle her IDEA claim during the preliminary meeting . . . or the mediation process . . . and must also lose in both the due process hearing . . . and the subsequent administrative appeal.[355]

The dissent concluded: "This was clearly not the intent of Congress and, ironically enough, harms the interests of the children that IDEA was intended to protect."[356]

Judge Gorsuch's interpretation of the "free and appropriate education" that IDEA guarantees reflects the lowest expectations for students' capacity to learn and a significant watering down of IDEA's protections. In *Thompson R2-J School District v. Luke P.*,[357] Judge Gorsuch held that IDEA only requires "the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program."[358] Judge Gorsuch rejected the conclusion of the hearing officer, administrative law judge, and district court that the school district had not provided the autistic student with FAPE because he was unable to transfer the skills he learned at school to other settings. Despite acknowledging the student's lack of progress outside of school—the second-grade student was toilet trained only at school, intentionally spread his feces around his bedroom at night, and was violent at home and public places—Judge Gorsuch narrowly found that a student need only make "some" progress. He further held that FAPE was "not an onerous" standard, weakening school districts' statutory

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[354] *See* 20 U.S.C. § 1415(l).
[355] *Española Public Schools*, 801 F.3d at 1251 (Briscoe, J., dissenting).
[356] *Id.*
[357] 540 F.3d 1143 (10th Cir. 2008).
[358] *Id.* at 1155.

responsibilities under IDEA to provide an appropriate education that, as Congress intended, moves that student toward the goal of independence.[359]

In *Garcia v. Board of Education of Albuquerque Public Schools*,[360] Judge Gorsuch denied relief to a high school student with a learning disability, finding that even if the school district had failed to provide a FAPE, compensatory educational services were not warranted. This opinion is striking because it holds that, even if a student's rights under IDEA are violated, he or she may be left with no remedy if the student leaves the school out of frustration with the school's failure to comply with IDEA.

Judge Gorsuch dismissed the school district's procedural deficiencies—which left the student without consistent or appropriate services for many years—because the student had not attended school regularly and had disciplinary problems. Judge Gorsuch did note that behavior and attendance issues can be related to a student's disability, but failed to acknowledge how such problems can be exacerbated by the school district's failure to provide the accommodations and programs necessary for students to receive educational benefits. Instead, in this case Judge Gorsuch blamed the student for her lack of education, finding that that there was "strong evidence indicating that, regardless of what actions the school district did or did not take . . . [the student's] poor attitude and bad habits would have prevented her from receiving any educational benefit."[361] No such requirement of merit or willingness to learn is contained within IDEA.

ii. School Discipline

Finally, a pair of school discipline cases, discussed above in the Criminal Law section, show mixed results. In *A.M. ex. rel. F.M. v. Holmes*,[362] the Court ruled that police were entitled to qualified immunity after arresting a student for disrupting the class by burping in school. Judge Gorsuch dissented and found no legal authority criminalizing the student's behavior. He concluded that a reasonable officer should know "that arresting a now compliant class clown for burping was going a step too far."[363]

Conversely, in *Hawker v. Sandy City Corp.*,[364] Judge Gorsuch joined the majority, which held that an officer's use of a twist-lock "control hold" against a nine-year-old, sixty-seven-pound child—breaking the child's collarbone—did not constitute excessive force. This case, discussed in detail above in the Criminal Justice section,

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[359] *Id.* at 1149.
[360] 520 F.3d 1116 (10th Cir. 2008).
[361] *Id.* at 1127.
[362] 830 F.3d 1123 (10th Cir. 2016).
[363] *Id.* at 1170 (Gorsuch, J., dissenting).
[364] 591 F. App'x 669 (10th Cir. 2014).

can be explained by the application of factually analogous precedent—precedent that Judge Lucero criticized in a published concurrence that Judge Gorsuch did not join. Judge Lucero wrote that Tenth Circuit case law "stems from . . . an improperly and inadequately developed state of the law for treating childhood criminal behavior. It is time for a change in our jurisprudence," he continued, "that would deal with petty crimes by minors in a more enlightened fashion[.][365]

In sum, Judge Gorsuch's limited but revealing record on education forebodes concerning outcomes for students with disabilities, students facing abuse of authority, and students pressing other civil rights violations if he were to become the new associate justice.

H. POLITICAL PARTICIPATION

LDF's work to ensure that African Americans have the opportunity to participate equally in the political process long predates the Voting Rights Act (VRA). In 1944, LDF won the landmark case *Smith v. Allwright*,[366] in which the Supreme Court struck down the all-white primary in Texas as unconstitutional. Since passage of the VRA in 1965, LDF has been involved in nearly all the precedent-setting cases regarding minority political representation and voting rights before federal and state courts.[367] LDF was counsel of record and argued for Black voters in *Shelby County, Ala. v. Holder*,[368] the 2013 case in which the Supreme Court struck down a core provision of the Voting Rights Act. Since that decision, LDF has documented the proliferation of voter suppression efforts aimed at Black and Latino voters around the country.[369] Currently, LDF is counsel of record in the challenge to Texas' voter identification law, which was struck down by the Fifth Circuit Court of Appeals in 2016,[370] and in a challenge to Alabama's voter ID law.[371]

The Supreme Court continues to play a critical role in protecting voting rights for people of color and in all forms of political participation. Yet, in *Shelby County*,[372]

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[365] 774 F.3d 1243 (10th Cir. 2014) (Lucero, J. concurring).
[366] 321 U.S. 649 (1994).
[367] *See Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); and *White v. Regester*, 422 U.S. 935 (1975) (per curiam).
[368] *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013).
[369] LDF, *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, http://www.naacpldf.org/press-release/democracy-diminished-ldf-releases-report-state-and-local-threats-voting-rights.
[370] *Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc).
[371] LDF, *Democracy Diminished*, *supra* note 369 at 6.
[372] 133 S. Ct. 2612 (2013).

the Court effectively gutted Section 5 of the VRA in a 5-4 decision. Under Section 5, in a process called "preclearance," states with a history of racial discrimination in voting were required to seek permission from DOJ or a three-judge federal court in Washington, D.C. before implementing any new election laws. In 2016, as a result of the Court's decision in *Shelby County*, the United States held its first presidential election in over 50 years without the protections of Section 5 of the VRA, which had blocked countless voter suppression efforts.

Since *Shelby County*, numerous states, counties, and cities have passed discriminatory voting measures that have been challenged by LDF, other civil rights groups, and DOJ. The Supreme Court has heard several voting cases this term,[373] and it is likely to continue to address and decide important voting rights issues—including racial gerrymandering claims, challenges to discriminatory voter photo ID laws, and redistricting litigation—that will dictate the scope and the extent to which communities of color have access to the political process.

Judge Gorsuch has a very limited record in voting rights cases. For example, he has never been called upon to decide any cases brought under the VRA or Fifteenth Amendment. But he has decided a handful of cases addressing representational equality and campaign finance issues and engaged on voting rights matters while at DOJ, all of which provide cause for concern.

i. Voting Rights

LDF has found no cases in which Judge Gorsuch has interpreted the VRA and found only one case where he addressed the National Voter Registration Act of 1993 (NVRA). The NVRA is a civil rights statute that, among other things, requires states to actively register people to vote at motor vehicle and public assistance offices.

In *Valdez v. Squier*,[374] Judge Gorsuch joined a panel opinion, written by Judge Briscoe, which correctly held that Section 7 of the NVRA requires that public assistance agencies offer voter registration forms to everyone who applies for assistance, unless an individual applicant affirmatively declines the form in writing. Encouragingly, the panel opinion found that the public assistance agency's policy of not providing voter registration forms to applicants who left blank the application question that asked whether they would like a form violated the agency's obligations under NVRA. The panel opinion also correctly held that the plaintiffs in that case were entitled to attorneys' fees.

More troubling, however, are the questions posed by Judge Gorsuch's time as the Principal Deputy to the Associate U.S. Attorney General, where he managed

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[373] *See, e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, No. 15-680 __ S. Ct. ___, 2017 WL 774194 (Mar. 1, 2017).
[374] 676 F.3d 935 (10th Cir. 2012).

several groups within DOJ, including the Civil Rights Division. His role at DOJ may offer the best available insight into his views on the scope of the VRA and voting rights in general.

In 2005, during Judge Gorsuch's tenure at DOJ, Georgia passed a restrictive photo voter ID law. At the time, Georgia was still subject to the preclearance requirements of Section 5 of the VRA. Accordingly, Georgia had to submit its 2005 photo ID law to DOJ for approval before the law could be implemented. DOJ was charged with deciding whether the photo ID law would have a "retrogressive effect" on Black voters—that is, whether the photo ID law would discriminate against Black voters by making them "worse-off" than under the prior law. A group of career attorneys at DOJ vigorously argued in a 51-page memo that the Georgia law should be blocked under the VRA. DOJ's career attorneys urged the political appointees under Judge Gorsuch to object to the law, in part because Georgia sought to require voters without a photo ID to pay $20 to obtain a five-year voter ID card or $35 to obtain a ten-year voter ID card. However, the political appointees under Judge Gorsuch overruled the career attorneys' analysis, and overturned their recommendation. Shortly thereafter, LDF and other groups sued Georgia and a federal court issued an order blocking the photo ID law after determining that the law's fee requirement amounted to a Jim Crow-era poll tax.[375] Georgia later amended the law in response to the federal court's decision.

LDF is deeply troubled by the role that Judge Gorsuch may have played in the decision to override the valid arguments of career attorneys at DOJ—especially because a federal court later vindicated the career attorneys' position. It also remains unclear whether DOJ has documents that would further clarify the extent of Judge Gorsuch's involvement. Accordingly, Judge Gorsuch should be extensively questioned about his role in supervising the Civil Rights Division and the extent to which he was involved in overturning the recommendation to object to Georgia's discriminatory photo ID law.

Given this limited record, Judge Gorsuch must be asked his views of the VRA. He must be questioned on whether he would vigorously enforce the Constitution and VRA's prohibitions against racial discrimination in voting or act to weaken the protections of the right to vote for people of color. Moreover, adequate time must be allowed before his hearing to digest relevant documents produced related to his tenure at DOJ, and to determine whether additional documents must be provided.

ii. Representational Equality

LDF was able to identify just one case that may offer some limited, but important, insight into Judge Gorsuch's views on representational equality. In *Kerr*

[375] *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005).

v. Hickenlooper,[376] Judge Gorsuch dissented from the denial of rehearing *en banc*. The case involved Colorado state legislators' lawsuit against the Governor to challenge the constitutionality of Colorado's "Taxpayer's Bill of Rights." The Taxpayer Bill of Rights was adopted by voter initiative and amended the state constitution to prohibit the state legislature from increasing taxes or imposing new taxes without voter approval. The panel opinion held that the legislators could move forward with their lawsuit.

Judge Gorsuch voted to rehear the case and, in his dissent, challenged the legal reasoning of the panel opinion. Notably, his dissent compared the case to the Supreme Court's decision in *Vieth v. Jubilerer*,[377] and stated that *Vieth* "put to bed" the issue of partisan gerrymandering due to a lack of judicially manageable standards.[378]

But that characterization of the opinion is not accurate. While a plurality of four Justices in *Vieth* held that "partisan gerrymandering" claims are simply not viable, another four dissenting Justices rejected that view. Significantly, the ninth Justice—Justice Kennedy—held that partisan gerrymandering claims might be viable, but only if a judicially manageable standard could be developed.

Judge Gorsuch's reference to *Vieth* in his dissent from rehearing *en banc* in *Kerr* could suggest that he agrees with the plurality in *Vieth*, which held that partisan gerrymandering claims are not viable. This raises concerns that Judge Gorsuch would be unwilling to rein in state legislators' recent and excessive abuses of partisan and racial gerrymanders designed to cement their own political power at the expense of the actual votes of the electorate. Accordingly, he should be questioned on his views on the decision in *Vieth* and racial and partisan gerrymandering claims more broadly.

iii. Campaign Finance

Finally, in *Riddle v. Hickenlooper*,[379] Judge Gorsuch joined a panel opinion, written by Judge Bacharach, that struck down a Colorado statute that imposed a $200 limit on individual campaign contributions to third or minor party candidates, but, essentially, let the individual contributors to candidates from the two major parties donate $400 in all. The panel held that Colorado's law had "discriminated" against minor party candidates.

For our purpose, the outcome in *Riddle* is less important than Judge Gorsuch's concurring opinion, which may provide some insight into his judicial philosophy on campaign finance issues. There, he questioned the proper standard of review for this case, and seemed to suggest that laws which may curb the "right" to contribute to

[376] 759 F.3d 1186 (10th Cir. 2014).
[377] 541 U.S. 267 (2004) (plurality opinion).
[378] *Kerr*, 759 F.3d at 1196.
[379] 742 F.3d 922 (10th Cir. 2014).

campaigns should be subjected to "strict scrutiny"—the most stringent form of constitutional review. But as Judge Gorsuch's own opinion notes, the Supreme Court has never applied strict scrutiny to the "right" to contribute to political campaigns. Rather, strict scrutiny is generally only applied to prevent racial discrimination by state or federal governments. Indeed, even restrictions on the right to vote itself or sex-based discrimination are not subject to strict scrutiny.

In sum, while Judge Gorsuch's judicial record on voting rights and political participation questions is not well developed, overall his few contributions to opinions in these areas, as well as the undertakings of the Department of Justice during his tenure there, provide cause for concern and a need for thorough questioning to discern his commitment to protecting the right to vote and to principles of equality in democratic processes.

I. WRITINGS ON PHYSICIAN-ASSISTED SUICIDE

Judge Gorsuch has also written at great length and detail about physician-assisted suicide and euthanasia, including multiple law review articles and a dissertation that he turned into a full-length book.[380] It is beyond the scope of this report to explore all the philosophical dimensions of that work—which include arguments about natural law, medical ethics, and moral good—but feature scarce direct references to civil rights or racial justice.[381]

However, it is worth noting Judge Gorsuch's essential premise that "human life is fundamentally and inherently valuable, and that the intentional taking of human life by private persons is always wrong."[382] Though he claims not to address "[p]ublicly authorized forms of killing" like capital punishment and war,[383] his judicial decisions make clear that Judge Gorsuch places great weight on that public/private distinction. While he's been a fierce critic of the right to die because of life's "inherent value," Judge Gorsuch has consistently ruled against the rights of capital defendants, even those who face a lethal drug protocol involved in a prior botched execution.[384]

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[380] *See generally* Neil M. Gorsuch, THE FUTURE OF ASSISTED SUICIDE AND EUTHENASIA, 80 (Princeton Univ. Press 2006).

[381] *But see* Neil M. Gorsuch, *The Legalization of Assisted Suicide and the law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WIS. L. REV. 1347, 1384-85 (2004) (exploring why racial minorities are concerned with the prospect of legalized euthanasia, receive medical treatment at lower rates, and face higher mortality rates than similarly situated non-minorities).

[382] *Id.* at 4-5.

[383] Gorsuch, *supra* note 380, at 157.

[384] *See*, *e.g.*, *Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015).

Judge Gorsuch also claims that his views in this area do not "seek . . . to engage the abortion debate."[385] But at various other points, Judge Gorsuch intimates that abortion would also violate what he describes as the "inviolability-of-life principle," were it not for the fact that the "Supreme Court in *Roe*, however, unequivocally held that a fetus is not a 'person' for purposes of constitutional law."[386]

Likewise, in an amicus brief filed when he was in private practice, now-Judge Gorsuch took a narrow view of the Supreme Court's decision in *Casey*, which forged a carefully crafted compromise that essentially sustained the *Roe v. Wade* doctrinal regime.[387] As part of that decision, Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter wrote that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[388] But Judge Gorsuch argued that "*Casey* was never intended to be read so broadly," and that "[e]ven if *Casey* is read as a re-approving (and not just declining to overrule) a due process right to abortion," physician assisted suicide is different.[389] Judge Gorsuch echoed these views in his book, observing that "*Casey*'s reliance on *stare decisis* was the narrower . . . ground[] for decision . . . and it was, standing alone, sufficient to decide the controversy before the Court."[390]

Altogether, these views suggest that Justice Gorsuch should be questioned closely and carefully about his views on *Roe v. Wade*.

CONCLUSION

There is no question that Judge Gorsuch has an impeccable resume, replete with sterling academic credentials and impressive professional accomplishments. On the bench, he has demonstrated a mastery of the law and an ability to write about even the most complicated legal issues with remarkable clarity. But these factors mark only the beginning of our inquiry into whether he is qualified to serve on the Supreme Court. In addition, we must ask whether he would further the ideal of equal justice and give full meaning to our nation's civil rights laws. And we must ask whether he would uphold these principles in the face of an aggressive anti-civil and human rights agenda outside the courts.

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[385] Gorsuch, *supra* note 380, at 157.
[386] *Id.* at 157 n.2; *see also* Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J. L. & PUB. POL'Y 599, 659 n.287 (1999-2000) (contrasting *Roe* with a dissent by Justice White in another case "arguing that the right to terminate a pregnancy differs from the right to use contraceptives because the former involves the death of a human being while the latter does not").
[387] Brief for Am. Hosp. Ass'n, *State v. Glucksberg*, Nos. 96-110, 96-1858, 1996 WL 656278 at *6 (1996).
[388] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).
[389] Brief for Am. Hosp. Ass'n, *supra* note 387, at *7.
[390] Neil M. Gorsuch, *supra* note 380.

After thorough review of Judge Gorsuch's record, focusing in particular on his judicial opinions, we can only conclude that he does not meet these criteria. Rather than protect equal rights as enshrined in our Constitution and civil rights laws, Judge Gorsuch's jurisprudence presents a troubling consistency in key areas of significance to civil rights claimants which, in our view, will adversely affect the ability of racial minorities and others to fully vindicate their rights under our nation's antidiscrimination laws. For this reason, we oppose the confirmation of Judge Neil M. Gorsuch to the Supreme Court.