Report of the American Civil Liberties Union On the Nomination of Judge Neil M. Gorsuch To be Associate Justice of the United States Supreme Court

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INTRODUCTION

By policy, the ACLU does not endorse or oppose nominees for judicial or executive appointments except in extraordinary circumstances. The ACLU accordingly neither endorses nor opposes the nomination of Judge Neil M. Gorsuch to replace Justice Antonin Scalia as an Associate Justice of the United States Supreme Court. ACLU policy also provides that the ACLU will prepare a report on Supreme Court nominees, examining the nominee's record with regard to civil liberties, and the role of the courts in protecting civil liberties.

Judge Gorsuch has been a judge on the United States Court of Appeals for the Tenth Circuit since 2006. After graduating from Columbia University and Harvard Law School, Judge Gorsuch received a doctorate in philosophy from Oxford University, where he was a Marshall scholar. He clerked for Judge David Sentelle on the United States Court of Appeals for the D.C. Circuit, and then for Justices Byron White and Anthony Kennedy on the Supreme Court. Judge Gorsuch then worked from 1995-2005 at the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. He left the firm in 2005 to become Principal Deputy to the Associate Attorney General at the U.S. Department of Justice, and was appointed to the bench one year later by President George W. Bush.

As the case summaries that follow demonstrate, Judge Gorsuch has a mixed record with respect to civil rights and civil liberties. On speech, he has defended the right to petition the government, but proved deferential to the regulation of public protests. He has ruled both in favor of and against the free speech rights of public employees. He has sometimes ruled in favor of the rights of criminal defendants, and has shown an understanding of the privacy implications of digital technology. But he has more often rejected criminal defendants' constitutional claims: he has consistently rejected appeals based on prosecutorial misconduct; has generally voted to affirm death sentences; has downplayed the significance of a lawyer's failure to present mitigating evidence in a death penalty case; and has interpreted stringently statutory restrictions on federal court review of state criminal convictions via habeas corpus. On voting rights, he has recognized statutory claims, but expressed skepticism about constitutional challenges to partisan gerrymandering, an issue very much in contention on the Supreme Court today. Judge Gorsuch has sometimes rejected and sometimes recognized constitutional rights claims based on mistreatment of prisoners. He has generally ruled against noncitizens on immigration appeals, but not always. And he has often read laws protecting the rights of people with disabilities in a restrictive fashion.

Judge Gorsuch has a relatively limited record on reproductive rights, but what is available raises cause for concern. In two religious freedom challenges to the Affordable Care Act, he gave relatively little consideration to the burdens the claimed religious accommodations would impose on employees' access to contraception. And he dissented from a decision that declared unconstitutional a state governor's decision to defund Planned Parenthood for impermissible reasons. In addition, his writings outside the courtroom suggest skepticism about whether the Constitution protects the right to abortion, and whether he would adhere to the more than four decades of Supreme Court precedent holding that it does.

With respect to religion, Judge Gorsuch has been overly tolerant of official government religious displays. He has expressed doubts about the "endorsement" test for identifying violations of the Establishment Clause, a test first advanced by Justice Sandra Day O'Connor.

And he has been very sympathetic to religious free exercise claims, even where one person's free exercise might impose substantial burdens on others.

Judge Gorsuch has had almost no occasion to address national security issues as a judge on the Tenth Circuit, but while serving in the Justice Department, he participated in defending and advancing some of President Bush's most aggressive counter-terrorism policies, including limitations on judicial review of the military commissions at Guantanamo, and the president's warrantless wiretapping program. While his role in this regard was the representation of a client, his participation warrants careful questioning by the Senate Judiciary Committee.

Finally, two overarching issues deserve the Senate's particular consideration. The first is Judge Gorsuch's method of constitutional interpretation. He has aligned himself with Justice Scalia's "originalist" approach to interpreting the Constitution, an outlier theory that only a handful of Supreme Court justices have ever adopted. It holds that the answer to constitutional questions must be determined by the original meaning of the Constitution's terms, as understood when the terms were adopted. It rejects the approach taken by the vast majority of Supreme Court justices, namely one that starts with the Constitution's text and history, but that recognizes that the Constitution's meaning develops over time as society develops and as the Court's constitutional doctrine is elaborated.

A strict originalist approach would uphold segregation, because there is little evidence that those who adopted the Fourteenth Amendment's Equal Protection Clause meant to end segregation, a practice common at the time (and extending even to the spectator section in Congress). It would find no constitutional impediment to discrimination on the basis of sex, as the Equal Protection Clause was not understood at the time to call into question laws denying women the right to pursue certain professions and drawing sex-based distinctions. It would not recognize the right to use contraception, to terminate her pregnancy, or of a same-sex couple to be married. It should be said that Judge Gorsuch's opinions on the Tenth Circuit do not reflect a consistent originalist approach, but that may be a result of his being bound, as a lower court judge, to apply and follow Supreme Court precedent, virtually none of which is originalist. But as a Supreme Court Justice, he would be free to employ originalism as he chooses. He should be questioned about his adherence to originalism, and how he squares that commitment with decisions declaring unconstitutional segregation, sex discrimination, restrictions on abortion, and laws limiting the right of same-sex couples to marry.

Second, Judge Gorsuch has criticized liberals' use of courts, but not conservatives' parallel use. In 2005, Judge Gorsuch wrote an opinion piece in the *National Review* entitled "Liberals and Lawsuits," setting forth his general skepticism regarding constitutional lawsuits on the "social agenda:"

> There's no doubt that constitutional lawsuits have secured critical civil-rights victories, with the desegregation cases culminating in *Brown v. Board of Education* topping the list. But rather than use the judiciary for extraordinary cases . . . American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education. This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary.

> Litigation addiction also invites permanent-minority status for the Democratic Party — Democrats have already failed to win a majority of the popular vote in nine out of the last ten presidential elections and pandering to judges rather than voters won't help change that. Finally, in the greatest of ironies, as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold.

The criticism seems both biased and unwarranted. Litigation and political advocacy are not mutually exclusive. Liberals and conservatives alike have used the political process to seek to advance their goals, and liberals and conservatives alike have also brought lawsuits asserting constitutional claims where they have failed to prevail in the political branches. Think, for example, of the many court challenges to the Affordable Care Act, brought by conservatives when they failed to block the Act or repeal it. Why, Judge Gorsuch should be asked, does he only criticize liberals for using the courts? And why aren't courts a proper forum for constitutional rights, which by definition are designed to be protected even when the political process chooses not to?

Moreover, courts, and the Supreme Court, in particular, have a unique and special role under the Constitution in protecting civil liberties. The Bill of Rights was designed to identify certain values that ought not be left to the political process, but are safeguarded even when political appeals do not succeed. Judge Gorsuch's article could be read to suggest that he does not sufficiently respect the responsibility courts have to protect individual liberties when the political process doesn't—even if those liberties, like equality for women and bars on segregation, were not recognized at the time the constitutional provisions were adopted.

The Senate has a constitutional obligation to undertake a thorough examination of Judge Gorsuch's views on civil liberties and on the judiciary's role in protecting constitutional rights. We hope that this report will assist in that effort.

FREEDOM OF SPEECH AND PRESS

Judge Gorsuch's First Amendment decisions are largely noncontroversial. He has shown respect for the free speech rights of protesters and federal employees, but has also recognized the government's legitimate interests in regulating public property and maintaining order and discipline in the employment context. The decisions suggest that he is neither a particularly strong proponent of First Amendment freedoms, nor that he is particularly skeptical of or hostile to, First Amendment rights.

1. The Rights to Protest and Petition

Van Deelen v. Johnson, 497 F.3d 1151 (10th Cir. 2007). A homeowner had a long-running argument with his local tax appraiser's office that involved multiple tax appeals and court filings by the homeowner, culminating in a heated meeting where the homeowner was threatened by a local law enforcement officer and told by the tax agents they were getting payback for his repeat filings. Judge Gorsuch overturned the district court's grant of summary judgment to the government officials, holding that the homeowner's filings constituted protected activity, and that, if true, intimidation by a law enforcement officer would "surely suffice" under case law to deter a person of ordinary firmness from exercising that right. *Id*. at 1157. Judge

Gorsuch's opinion included a powerful defense of the right to petition the government free from retaliation: "When public officials feel free to wield the powers of their office as weapons against those who question their decisions, they do damage not merely to the citizen in their sights but also to the First Amendment liberties and the promise of equal treatment essential to the continuity of our democratic enterprise." *Id* at 1155.

Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007). A citizen group alleged that it was unconstitutionally prohibited from protesting in the traditional public forum surrounding the hotel where NATO defense ministers were meeting. The city denied their request to protest within the security area for the meeting because it was concerned that other groups would also seek to protest there and the city would need to increase the officer presence. The court held that the group's rights were not violated because the city only had to satisfy a narrowly tailored time, place, and manner analysis, not strict scrutiny. The court noted that "the significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis." *Id*. at 1221. And the court acknowledged that, while the city could have considered allowing protests, its failure to do so was only one factor in the overall analysis. *Id*. at 1225. The court also found that the location that the city assigned to the protest was an adequate alternative in part because local media engaged with them there.

2. Rights to Access to Government Proceedings

Alvarez v. Grosso, 662 F. App'x 622 (10th Cir. Oct. 18, 2016). This opinion, concerning civilians who were barred from a military base, touched briefly on a First Amendment right of access claim to observe court martial proceedings. Judge Gorsuch dismissed the claim based on the Tenth Circuit opinion in *United States v. McVeigh*, 153 F.3d 1116 (10th Cir. 1998) which held that the right to a public criminal trial does not mean any particular individual has the right to observe proceedings. He further noted that the plaintiffs had not alleged that they had requested and were denied access to any specific court martial proceeding.

3. Employee Speech

Walton v. Powell, 821 F.3d 1204 (10th Cir. 2016). A Republican employee brought an unlawful retaliation claim against her new boss, a Democratic commissioner, after he fired her. Judge Gorsuch held that the claim should go to trial because there was sufficient evidence to show that the termination violated clearly established law. Relying on *Gann v. Cline*, 519 F.3d 1090, 1093 (10th Cir. 2008), Judge Gorsuch held that "firing a civil service employee for refusing to show allegiance to a particular political cause was already a 'clearly established' violation of the First Amendment" at the time of the commissioner's actions. *Walton*, 821 F. 3d at 1214. Although he ruled for the employee, Judge Gorsuch's opinion also included some dicta indicating that any claim based on political association must also be proven to involve a matter of public concern.

Hogan v. Utah Telecomm. Open Infrastructure Agency, 566 F. App'x 636 (10th Cir. 2014). The former director of operations for a state agency alleged that he was fired in retaliation for reporting his supervisor's potential conflicts of interest to the executive board. He asserted that his termination violated the First Amendment and gave rise to a whistleblower claim. Judge Gorsuch affirmed the district court's dismissal of the First Amendment retaliation claim because the speech at issue was "clearly made within the scope of [the plaintiff's] official duties," as it was made at work during work hours, was not about the employer curtailing its employees' First Amendment rights, and directly affected the plaintiff's job as Director of Operations. *Id* at 638–

39. Judge Gorsuch remanded the wrongful discharge claim, finding that both parties had made compelling arguments about whether or not the complaint alleged that the plaintiff's termination violated the employer's "duty not to terminate any employee . . . in violation of clear and substantial public policy"—that is, whether his firing offended public policy. Finally, Judge Gorsuch affirmed the dismissal of the state whistleblower claim because the plaintiff failed to argue that he was an employee, rather than an independent contractor, and therefore protected by the statute. As a result, he did not reach the merits of the whistleblower claim.

Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007). In *Casey*, Judge Gorsuch addressed the First Amendment claims of a school board employee who was fired for a series of complaints she made about alleged misconduct occurring at her office. While finding that *Garcetti v. Ceballos,* 547 U.S. 410 (2006), precluded most of the claims, which were based on speech pursuant to the employee's official duties, he allowed one claim to go forward based on statements she made to the New Mexico Attorney General. He held that qualified immunity did not preclude that claim because it was well established that "when a public employee speaks as a citizen on matters of public concern to outside entities despite the absence of any job-related reason to do so, the employer may not take retaliatory action." *Id*. at 1333-34.

Poindexter v. Bd. of Cty. Comm'rs of Cty. of Sequoyah, 548 F.3d 916 (10th Cir. 2008). A public employee who had served the previous land commissioner alleged that he was demoted in retaliation for his lack of political support for the new commissioner. The court found that summary judgment against him on his First Amendment claim was appropriate because, given that he effectively had to act as the assistant commissioner and therefore exercised significant political and discretionary authority, political loyalty was an appropriate requirement for his position. In addition, the court determined that there was no evidence to suggest that political allegiance was, in fact, a motivating factor in the demotion.

TransAm Trucking, Inc. v. Admin. Review Bd., United States Dep't of Labor, 833 F.3d 1206 (10th Cir. 2016). After a truck driver's brakes failed, his employer gave him two options: either stay in the truck for hours in the freezing cold, or drive the truck illegally without brakes. After waiting for hours, the driver opted to unhitch the cab in order to drive it off the highway out of the cold, leaving the trailer on the highway, and was fired. The driver asserted that his employer had violated the whistle-blower provisions of the Surface Transportation Assistance Act ("STAA"), which protects drivers who refuse to operate their vehicles out of safety concerns. The Tenth Circuit agreed with this interpretation of the STAA, but Judge Gorsuch dissented, arguing that the driver had in fact affirmatively chosen to operate his vehicle, rather than sit and wait for help, and was therefore outside the protection of the statute.

4. <u>Election Regulation</u>

Riddle v. Hickenlooper, 742 F.3d 922(10th Cir. 2014). Donors to a write-in candidate challenged Colorado's statutory scheme imposing different contribution limits for write-in candidates and major party candidates (whose donors were permitted to give twice as much). Judge Gorsuch joined the majority opinion in this case upholding the donors' Equal Protection claim, while declining to weigh in on the First Amendment claim given the strength of the equal protection argument. Judge Gorsuch wrote separately to note that while the level of scrutiny for the First Amendment claim was in some doubt under Supreme Court law, there was no question that "there is something distinct, different, and more problematic afoot when the government selectively infringes on a fundamental right." *Id* at 932 (Gorsuch, J., dissenting). He also

provided a brief roadmap to the state explaining how it could achieve a similar result without offending the Constitution.

5. Privacy v. Speech

Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210 (10th Cir. 2007). Two undercover officers and their wives brought invasion of privacy and emotional distress claims against a TV station for reporting that the officers had been investigated for sexual assault and were undercover agents. While expressing sympathy for the plaintiffs, the court dismissed both claims for failure to state a claim. With regard to the privacy claim, the court held that "allegations of police misconduct are in the public interest, and because there is no exception in the law for undercover officers, Alvarado's and Flores's claim cannot survive a Rule 12(b)(6) motion to dismiss." The court declined to create an exception for undercover officers' identities because that information, too, holds public interest value, notwithstanding the danger that might be involved. With regard to the claim for intentional infliction of emotional distress, the court explained that "accurate news reporting—even when it is likely to have an adverse impact on the subjects of the report—usually does not give rise to an action for intentional infliction of emotional distress." *Id*. at 1224.

REPRODUCTIVE RIGHTS

Judge Gorsuch's decisions touching on reproductive rights are limited, but nonetheless raise concerns about his appreciation for the rights at stake. In two cases, he voted, on statutory grounds, to recognize religious free exercise rights over access to contraception. And he dissented from a decision declaring unconstitutional a state governor's decision to defund Planned Parenthood. He has also voiced doubts, outside of his decisions, about the Supreme Court's reasoning in upholding a woman's right to terminate her pregnancy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

1. Challenges to the Affordable Care Act's Contraception Coverage Requirement

Judge Gorsuch was involved in two Religious Freedom Restoration Act ("RFRA") challenges to the contraceptive coverage rule of the Affordable Care Act before they reached the Supreme Court. In both cases, he participated in or authored a decision siding with the plaintiffs. While the Supreme Court ultimately ruled for the plaintiffs in one of those case, Judge Gorsuch's decisions show less concern for the harm imposed on employees by these claims than the Supreme Court has shown.

In ***Hobby Lobby Stores, Inc. v. Sebelius***, 723 F.3d 114 (10th Cir. 2013), the Tenth Circuit, sitting en banc, ruled in favor of a for-profit corporation's claim that objected, on religious free exercise grounds, to providing health care insurance coverage for certain kinds of contraception for its female employees. Judge Gorsuch joined the majority, and also wrote a separate concurring opinion. Although the majority opinion that he joined recognized that women employees would face an economic burden, it reasoned that the government had not shown that maintaining their contraceptive coverage was necessary to further gender equality or public health. The court dismissed the concern that women would have to pay for birth control out of pocket in order to accommodate their employers' religious beliefs, stating that "[a]ccomodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere." 723 F.3d at 1144-45. Judge Gorsuch's separate concurrence

focused on Hobby Lobby's owners' religious beliefs, and did not mention the burden on women employees that recognizing their claim might entail.

Although the Supreme Court upheld the decision in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), it did so in part because it found that the government could accommodate the employer *without* imposing any harm on female employees. It found that the government could extend to Hobby Lobby and similar religious for-profit corporations an accommodation already available for religiously affiliated non-profits. Under that accommodation, once an employer objects, the health insurance company pays for and provides coverage directly to the employee, without support from the employer. As a result, the Court noted, the burden on women employees would be "precisely zero." *Id*. at 2760. Thus, while the Supreme Court held the accommodation was required in part because no cost was imposed on the female employees, Judge Gorsuch would have required accommodation even if it *did* impose a cost on female employees.

In ***Little Sisters of the Poor v. Burwell***, 794 F.3d 1151 (10th Cir. 2015)**,** religious non-profit organizations challenged the requirement that they notify the government of their objection to providing contraceptive coverage, claiming that doing so would make them complicit in the provision of contraception even if it were entirely paid for by third-party insurance providers. A panel of the Tenth Circuit found that simply notifying the government of one's objection did not substantially burden the employers' religious beliefs, in keeping with the decisions of eight of the nine courts of appeals to address the issue. Judge Gorsuch joined a dissent from the denial of rehearing en banc, 799 F.3d 1315, which deemed the burden on religion as substantial.

When the issue reached the Supreme Court, in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the Court remanded the cases to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id*. at 1560 (internal citations and quotations omitted). Here, too, the Supreme Court recognized the burden to women employees, while the opinion Judge Gorsuch joined did not.

2. Planned Parenthood Defunding

In 2015, politicians around the country took aim at Planned Parenthood after an anti-abortion organization called the Center for Medical Progress ("CMP") released highly edited and misleading undercover videos purporting to show that some Planned Parenthood sites illegally sold fetal tissue. The Governor of Utah used the CMP videos as an excuse to exclude Planned Parenthood of Utah ("PPAU") from participating in several state funded programs, despite the fact that PPAU did not allow patients to donate fetal tissue. Moreover, as the governor later conceded and numerous state investigations found, the allegations levied by CMP in the videos, were false.

PPAU sued, maintaining that the governor violated the unconstitutional conditions doctrine by withholding state funding simply because Planned Parenthood provides abortion. The district court ruled for the governor and a panel of the Tenth Circuit reversed. On the unconstitutional conditions claim, the court found that Planned Parenthood possessed a First Amendment right to speak about abortion, and a Fourteenth Amendment right to provide abortion. The panel held that:

> a reasonable finder of fact is more likely than not to find that [Governor] Herbert, a politician and admitted opponent of abortion, viewed the situation that presented itself by release of the CMP videos as an opportunity to take public action against PPAU, deprive it of pass-through federal funding, and potentially weaken the organization and hamper its ability to provide and advocate for abortion services. This seems especially true given Herbert's concession that the allegations made by CMP are unproven and in fact false, and in light of the current political climate, including the efforts by abortion opponents both in the State of Utah and nationally to defund Planned Parenthood and its affiliates.

Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1262 (10th Cir. 2016).

Judge Gorsuch took the unusual step of voting to rehear the case en banc even though neither party nor any judge on the panel had asked for rehearing of, and the time for petitioning the court for rehearing had passed. 839 F.3d 1301 (10th Cir. 2016). In a procedurally based opinion focusing on the standard of review and burden of proof, he argued that the allegations of illegality were the governor's true motive for terminating Planned Parenthood's contracts.

3. Abortion Rights

Judge Gorsuch has no opinions directly addressing abortion. However, in his 2006 book, *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch discussed the governing abortion rights case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in a manner that provides some insight into his views about the constitutional right to abortion. In particular, Judge Gorsuch expressed serious skepticim about the Court's reasoning underlying the right to abortion, raising questions about the precedential value and integrity of the Court's discussion of a substantive due process right to personal autonomy. This discussion, coupled with his asserted commitment to "originalist" constitutional interpretation, raises serious questions as to his recognition of this long-guaranteed constitutional right.

RELIGIOUS LIBERTY

Judge Gorsuch has been skeptical of longstanding Establishment Clause protections and sympathetic to government-sponsored religious displays. Two cases in particular illustrate Gorsuch's views, ***American Atheists, Inc. v. Davenport***, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 565 U.S. 994 (2011), and ***Green v. Haskell Cty. Bd. of Comm'rs***, 574 F.3d 1235 (10th Cir. 2009), *cert. denied*, 559 U.S. 970 (2010). Both cases involved Establishment Clause challenges to government displays of religious monuments and symbols: *American Atheists* was a challenge to roadside memorial crosses to commemorate fallen troopers, and *Green* involved a Ten Commandments display on a county courthouse lawn. In both cases, three-judge panels deemed the displays unconstitutional, and in both Judge Gorsuch wrote dissents from the denial of rehearing en banc. Judge Gorsuch launched sharply worded attacks on decades-old Establishment Clause tests – the *Lemon* and "endorsement" tests) – , strongly suggesting that he would vote to abandon those tests in favor of a more permissive standard. In short, Judge Gorsuch has shown little inclination to restrain government promotion of religion.

On the other side, Judge Gorsuch has been quite receptive to plaintiffs challenging alleged burdens on the free exercise of religion. In particular, as discussed in the Reproductive Rights section above, Judge Gorsuch has twice voted with religious plaintiffs seeking exemptions, under the Religious Freedom Restoration Act (RFRA), from the contraception

mandate under the Affordable Care Act, despite the burdens such exemptions could impose on third parties.

Judge Gorsuch's robust embrace of free exercise rights is also evident in other cases, where he has been open to statutory claims by an assortment of religious minorities. He has, for example, sided with Muslim prisoners seeking halal meals under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *see* ***Abdulhaseeb v. Calbone***, 600 F.3d 1301 (10th Cir. 2010), and Native American prisoners requesting access to a religious sweat lodge, *see* ***Yellowbear v. Lampert***, 741 F.3d 48 (10th Cir. 2014). Judge Gorsuch's pro-free exercise leanings have their limits, however, as in ***United States v. Quaintance***, 608 F.3d 717 (10th Cir. 2010), in which he authored an opinion rejecting a RFRA defense to criminal drug charges, affirming the district court's conclusion that members of the Church of Cognizance did not hold sincere religious beliefs about the use of marijuana.

RACE DISCRIMINATION

Judge Gorsuch's decisions on race discrimination in employment are for the most part unexceptional. He has sided with employers and employees, and has applied the existing law fairly. In ***Hicks v. Gates Rubber Co.***, 833 F.2d 1406 (10th Cir. 1987), for example, Judge Gorsuch joined the majority opinion to reverse and remand a grant of summary judgment in favor of the employer in a hostile work environment claim brought by a Black woman. The majority wrote that, although the evidence was sufficient to support the findings that a racially hostile environment was absent and that there had been no quid pro quo sexual harassment, a remand was nonetheless required to determine whether the evidence of racial and gender discrimination could combine to make out a hostile work environment sexual harassment claim. In ***Dossa v. Wynne,*** 529 F.3d 911(10th Cir. 2008), he joined the opinion of the panel reversing a district court's finding that a military employee plaintiff born in India had failed to administratively exhaust her claim of gender and national origin discrimination.

Additionally, his description of the equal protection doctrine, including its applications to race, in his panel opinion in ***SECSYS, LLC v. Vigil,*** 666 F.3d 678 (10th Cir. 2012), is within the mainstream of judicial precedent. The case was essentially a class-of-one claim about an allegedly extortionate contracting scheme, but in a long discourse on equal protection, Judge Gorsuch noted, among other things, that "Congress is of course free to supplement the Constitution's equal protection guarantee (and sometimes has) with statutes aimed at rooting out merely foreseen or even unintended discriminations." *Id*. at 685. He also noted that " bitter experience teaches that even rules of general application can harbor lurking discriminatory purposes," *id*. at 686, going on to discuss the poll tax. He then continued to discuss *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), as a case demonstrating that selective enforcement can reveal discriminatory intent.

Judge Gorsuch seems only to have taken part in two discriminatory law enforcement cases that produced written opinions. In both cases, he sided with law enforcement. The first, ***United States v. Coleman,*** 483 F. App'x 419 (10th Cir. 2012), was fairly routine while the second, ***Blackwell v. Strain,*** 496 F. App'x 836 (10th Cir. 2012), although written by another judge, evinces undue skepticism toward these types of claims.

In ***United States v. Coleman,*** 483 F. App'x 419 (10th Cir. 2012), Judge Gorsuch, writing for a unanimous panel, affirmed a district court's denial of a criminal defendant's suppression

motion based on the defendant's claim that he was subject to a racially motivated stop. In a brief four-page opinion, Judge Gorsuch held that the defendant's proffered statistical evidence was irrelevant because it failed to show that the officer at issue, as supposed to the law enforcement agency generally, acted with discriminatory purpose. 483 F. App'x 420. Judge Gorsuch also rejected the defendant's argument that the circumstances of the stop itself were sufficient to give rise to an inference of discriminatory purpose because the most suspicious facts about his truck didn't emerge until the officer decided to conduct the inspection. He held that evidence of the defendant's nervousness and agitation were sufficient to justify the stop on the basis of reasonable suspicion and not race. *Id*. at 421.

In ***Blackwell v. Strain,*** 496 F. App'x 836 (10th Cir. 2012), another selective enforcement case, Judge Gorsuch endorsed a far more questionable opinion over the objection of a dissenting judge (Holloway). A Black truck driver who claimed he was subject to a racially motivated stop presented substantial evidence concerning discrimination at the particular point of entry. The evidence included expert statistical evidence, statements provided by other black truck drivers who claimed they were discriminated against on the basis of race, evidence that state and federal narcotics agents and individuals at the federal public defenders' office believed racial profiling was occurring at the point of entry, and the plaintiff's account of the unusual stop. 496 F. App'x at 438. Based on that evidence, a district court denied the defendant-officer's motion for qualified immunity. *Id*.

Judge Murphy, writing for the himself and Judge Gorsuch, held that the officer was entitled to qualified immunity because although the plaintiff "presented a generous amount of evidence regarding alleged discrimination at the [point of entry] as a whole," he failed to present evidence from which a reasonable jury could conclude that the officer in question was motivated by a discriminatory purpose. *Id*. at 847. Judge Murphy first noted that the three sets of statistical evidence the district court relied on were irrelevant or unreliable. He reasoned that statistical evidence of disparities in stops, inspections, and arrest at the point of entry by the officer in question and his law enforcement unit in general were irrelevant because the data did not provide an adequate basis for comparing incidence of crime among whites. *Id*. at 842. Judge Murphy further noted that statistical evidence showing that the officer disproportionally stopped Black and Hispanic truckers and subjected every one of them to a higher level of inspection than the white truckers he pulled over that day were unreliable because the sample size was too small. *Id*. at 843.

Judge Murphy also rejected plaintiff's allegation that the officer's conduct during the stop was evidence of discriminatory intent. Although the officer "made him wait an inordinately long period of time before conducting the inspection of his vehicle; accused him of being under the influence of drugs or alcohol; administered a field sobriety test; told him he had a 'problem,' subjected him to a subsequent unwarranted breathalyzer test; pressured him to sign the citation; and otherwise exhibited a disturbingly hostile, aggressive, unprofessional, and confrontational demeanor for no apparent reason," *id*. at 845-846, the court reasoned that such behavior did not indicate discriminatory intent because "[t]here is no indication [that the officer] behaved the way he did, even in part, because [the plaintiff] is black. For all we know, Officer Strain behaves in this same manner toward all of the truckers he interacts with . . . regardless of their race," *id*. at 846. Judge Murphy finally rejected evidence of state and federal narcotics agents and federal public defenders who claimed that racial profiling was occurring at the check point because it did not implicate the officer in question individually. *Id*. at 847.

GENDER DISCRIMINATION

On gender discrimination, Judge Gorsuch's record is again mixed. He has enforced the Violence Against Women Act to protect women, but has called for courts to abandon the framework for analyzing employment discrimination claims that the Supreme Court established more than forty years ago, a position that does not bode well for workers seeking to prove they experienced discrimination or harassment. In addition, and more generally, Judge Gorsuch's oft-noted criticisms of judicial doctrines requiring deference to administrative agencies in the interpretation of statutes they are charged with enforcing may bode ill for women's rights, as several agencies, including the Departments of Justice, Labor, Education, Health and Human Services, and Housing and Urban Development, have extended critical civil rights protections to women through regulations.

1. Employment Discrimination

McDonnell-Douglas Framework. Given that most employers have learned not to admit that they are relying on illegal criteria in making employment decisions, the *McDonnell Douglas* burden-shifting framework for proving discrimination through circumstantial evidence is more critical than ever. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). It provides that once a plaintiff makes out a prima facie case that an impermissible motive was at play in an employment decision, the burden shifts to the employer to show a legitimate nondiscriminatory reason for its action. Judge Gorsuch has criticized *McDonnell Douglas* as being "of limited value," and inviting "confusion and complexities." ***Walton v. Powell***, 821 F.3d 1204, 1210-11 (10th Cir. 2016). These drawbacks, he observed, have prompted "more than a few keen legal minds . . . [to] question[] whether the *McDonnell Douglas* game is worth the candle even in the Title VII context." *Id.* at 1211. (Gorsuch cited for this proposition two appellate concurrences and a 2008 law review article.) *See also* ***Barrett v. Salt Lake Cty.***, 754 F.3d 864, 867 (10th Cir. 2014) (Gorsuch, J.) ("Some of our colleagues have . . . questioned whether McDonnell Douglas . . . continues to be helpful enough to justify the costs and burdens associated with its administration."). Ultimately, in *Walton*, Gorsuch rejected application of the *McDonnell Douglas* framework to the claims of a public employee challenging her discharge on First Amendment political affiliation grounds. *Id.*

Sex Discrimination, Sexual Harassment, and Retaliation. Judge Gorsuch's record in cases involving sex discrimination and harassment claims is mixed, although he has ruled inin favor of employers more than employees. . *Compare* ***Orr v. City of Albuquerque***, 531 F.3d 1210, 1217-18 (10th Cir. 2008) (reversing summary judgment for defendant in Pregnancy Discrimination Act case where two female police officers who, while on maternity leave, were required to exhaust their sick leave before using vacation time, and were prohibited from using compensatory time, where plaintiffs "show[ed] not only that defendants' putative [leave] policy was regularly flouted . . . but also that the controlling written policy actually permitted the sort of leave they sought" and that human resources "singled out the FMLA leave requests of ten separate pregnant women over the course of three years" for similarly negative treatment) *with* ***du Merac v. Colo. Sch. of Mines***, 643 F. App'x 709 (10th Cir. 2016) (affirming summary judgment against graduate student's constitutional claims of reverse sex discrimination arising from his suspension after he was accused of sexual harassment); *Ferguson v. Shinseki*, 543 F. App'x 750 (10th Cir. 2013) (affirming summary judgment for defendant on Title VII sex discrimination claim where plaintiff's qualifications were dubious and the only evidence of discrimination she presented were sexist comment by hiring manager about daughter-in-law and

nearly decades-old sexually crude alleged comments by co-workers unconnected to adverse decision); *Carrera v. Tyson Foods, Inc.*, 449 F. App'x 753 (10th Cir. 2011) (affirming summary judgment for defendant in hostile environment case arising from single incident of harassment that employer promptly remedied); *Lopez-Fisher v. Abbott Labs*, 441 F. App'x 602 (10th Cir. 2011) (affirming summary judgment against plaintiff raising Title VII claims for sex, race, color, and national origin discrimination arising from discharge, where employee did not show she successfully completed performance improvement plan, and where same person hired and fired her in short period of time); *Johnson v. Weld County, Colo.*, 594 F.3d 1202 (10th Cir. 2010) (affirming summary judgment in favor of employer on sex discrimination and ADA claims arising from promotion denial); *Nez v. BHP Navajo Coal Co.*, 227 F. App'x 731 (10th Cir. 2007) (upholding summary judgment against female electrician alleging discharge due to race, gender, and retaliation, where plaintiff was absent three times in ten days without excuse and supervisor who allegedly retaliated against her was not aware of plaintiff's prior union grievance).

Judge Gorsuch has ruled for employees much more often with respect to claims for retaliation. *See, e.g.*, 754 F.3d at 868 (denying defendant's motion for post-verdict judgment because there was "ample evidence" that the plaintiff was subject to retaliation, including plaintiff's consistently positive reviews until his supervisor learned of his support of a co-worker's sexual harassment claim, other employees' punishment for providing similar assistance, and spoliation of evidence); ***Williams v. W.D. Sports, N.M., Inc.***, 497 F.3d 1079, 1093 (10th Cir. 2007) (reversing summary judgment on employee's retaliation claim, finding that employer's threats to spread falsehoods about the employee's sexual conduct and to ruin her marriage, along with opposing her claim for unemployment benefits by falsely claiming that she had been fired for sexual misconduct tantamount to sexual harassment, was sufficient to dissuade a reasonable employee from alleging discrimination). *Cf. Weeks v. Kansas*, 503 F. App'x 640, 642-43 (10th Cir. 2012) (affirming summary judgment where in-house lawyer alleged she was fired for advising employer of two complaints of unlawful conduct, relying on precedent that complaints raised in scope of one's duties not protected activity under Title VII).

In a few sex discrimination cases, however, Gorsuch has betrayed a lack of understanding as to both the applicable legal standards and the complexities of how harassment and discrimination manifest themselves in the real world. **In *Gaff v. St. Mary's Reg'l Med. Ctr.***, 506 F. App'x 726 (10th Cir. 2012), Gorsuch upheld summary judgment against a female plaintiff who was fired after complaining of sexual harassment. The plaintiff alleged that the harasser stared at her, flirted with her, "joked" that her husband was leaving her for another woman, and, most egregiously, told her, "All you need is a good f---." 506 F. App'x at 727. After being faced with discharge for telling her harasser that the comment about her husband is "the kind of joke that can get someone shot," or words to that effect, the plaintiff complained about the harasser's conduct. No investigation was conducted, and the plaintiff was fired. Gorsuch concluded that summary judgment was appropriate because (a) the harasser was the subordinate of the plaintiff (a nurse) and "had no authority over her" (even though such authority is not generally required for a harassment claim); (b) the harassment "never interfered in any way with [the plaintiff's] work performance" (which is not required, either); (c) the harasser's behavior was primarily non-sexual (also not a bar to liability); and (d) most of the behavior merely was "boorish" and "immature" (a question of fact). *Id.* at 727-28. *See also Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 1233 (10th Cir. 2009) (Gorsuch, J., dissenting) (dissenting from reversal of summary judgment on former UPS account executive's sex discrimination claim, on grounds that supervisor who berated and scrutinized plaintiff was equally abusive to

men; majority had acknowledged such conduct but found sufficient additional abuse of plaintiff to find it discriminatory).

2. Violence Against Women

Judge Gorsuch's few opinions regarding violence against women reflect a fair and measured application of the law. *See* ***Pennington v. Uinta Cty., Wyo.***, 442 F. App'x 409, 410 (10th Cir. 2011) (upholding summary judgment for Sheriff and other government defendants on female inmate's Section 1983 claims arising from her sexual assault by a correctional officer; although the officer's addiction to painkillers had been known to the defendants, he had shown no propensity for violence throughout full background checks and fitness-for-duty exams); ***Hostetler v. Green***, 323 F. App'x 653, 659 (10th Cir. 2009) (affirming denial of summary judgment on qualified immunity defense to Section 1983 claim brought by female inmate against correctional guard, who had allowed male inmate access to her cell unsupervised, resulting in her sexual assault).

LGBT RIGHTS

Judge Gorsuch has joined in only two cases addressing LGBT equality, both involving transgender rights. On the one hand, they suggest that Judge Gorsuch recognized that discrimination against transgender individuals is a form of sex discrimination. On the other hand, in both cases he ultimately voted to uphold the challenged government actions against transgender individuals.

Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009). As a visiting judge sitting on a Ninth Circuit panel, Judge Gorsuch joined a decision about transgender rights. The decision held that a transgender woman excluded from the women's restroom by her employer stated "a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor" for the exclusion. *Id*. at 493. The panel further held, however, that the employer banned her from the restrooms "for safety reasons," and those reasons were not sufficiently rebutted by Kastl. While the court's recognition that the plaintiff set out a prima facie case of sex discrimination is encouraging, its conclusion that safety concerns justified excluding her from restrooms was insufficiently supported, and contrary to experience, in which transgender people customarily use restrooms associated with their gender identity without any safety issues

Druley v. Patton, 601 F. App'x 632 (10th Cir. 2015). Judge Gorsuch joined an opinion rejecting arguments made by a transgender female prisoner that the Oklahoma Department of Corrections violated her Eighth Amendment rights by denying her medically necessary hormone treatment and feminine clothing. The decision does not adequately appreciate that transgender people face a serious medical need for hormone therapy, a point several other federal courts have recognized.

VOTING RIGHTS

Judge Gorsuch has participated in very few voting rights cases. Only three merit discussion, and in these three cases, he authored only one opinion: a dissent from denial of rehearing en banc in ***Kerr v. Hickenlooper***, 759 F.3d 1186 (10th Cir. 2014), a case concerning the justiciability of the Republican Guarantee Clause, U.S. Const., Art. IV, sec. 4. Collectively, the cases tell us very little, but suggest that Judge Gorsuch is unlikely to be receptive to a

constitutional challenge to partisan gerrymandering, an issue on which the current Court is closely divided.

In ***Valdez v. Squier***, 676 F.3d 935 (10th Cir. 2012), Judge Gorsuch joined a unanimous panel opinion on a narrow question of statutory interpretation construing the National Voter Registration Act ("NVRA") in favor of the plaintiffs. The *Valdez* plaintiffs alleged that New Mexico's Human Services Department ("HSD") violated Section 7 of the NVRA by failing to provide voter registration forms to public assistance benefits applicants. *Id.* at 938. In particular, Section 7 of the NVRA requires public assistance offices to distribute, with each application for assistance, a "declination form" asking applicants if they would like to register to vote. 52 U.S.C. § 20506(a)(6)(B). Plaintiffs argued that Section 7 of the NVRA requires that public assistance applicants be given a voter registration application *unless* the applicants checked "no" on the declination form. The New Mexico HSD's policy, however, was to provide a benefits applicant with a voter registration form *only* if applicants checked "yes" on the declination form. *Id.* at 939. In other words, HSD did not provide voter registration forms to those applicants who left the form blank. *Id.* The panel affirmed the district court's ruling in favor of the plaintiffs, relying on language in the statute providing that applicants must be provided registration forms "unless the applicant, in writing, declines to register to vote." 52 U.S.C. § 20506(a)(6)(A). Judge Gorsuch did not write separately.

In ***Kerr v. Hickenlooper***, 759 F.3d 1186 (10th Cir. 2014), Judge Gorsuch dissented from the Tenth Circuit's denial of a request for rehearing en banc. The case involved, *inter alia*, a claim that Colorado's Taxpayer's Bill of Rights ("TABOR") – which was adopted by voter initiative and which amended Colorado constitution to prohibit state legislature from increasing taxes or imposing new taxes without voter approval – violated the Constitution's Guarantee Clause, U.S. Const., Art. IV, sec. 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

The panel ruled that legislators had standing to challenge TABOR, and that their Guarantee Clause claim was justiciable, 744 F.3d at 1176-78. Rehearing en banc was denied, and Judge Gorsuch wrote one of four dissenting opinions. In his dissent, Judge Gorsuch argued that the plaintiffs in this case did not articulate any judicially manageable standards that would empower the court to decide their case, and thus concluded that the case should be dismissed. 759 F.3d at 1194-96 (Gorsuch, J. dissenting). Judge Gorsuch characterized TABOR as "a limited dose of direct democracy." *Id.* at 11195. Rather broadly, he also expressed his view that nothing "credibly suggests" that TABOR "is constitutionally problematic." *Id.* (Gorsuch, J., dissenting). Judge Gorsuch also expressed concern that forcing a state to engage in expensive and time-consuming litigation over such a claim offends "[f]ederalism and comity." *Id.* (Gorsuch, J., dissenting).

Most notably, Judge Gorsuch referenced the Supreme Court's decision in the partisan gerrymandering case, *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.), for the proposition that "[l]egislatures may act in ways that are 'inconsistent, illogical, and ad hoc.'" 759 F.3d at 1193 (Gorsuch, J., dissenting). He concluded that this case was "more than a little reminiscent of the one the Supreme Court faced in *Vieth*," which he characterized as the culmination of "18 years of experimenting by various courts [which] failed to yield any sure standards for litigating those sorts of cases." *Id.* at 1196 (Gorsuch, J., dissenting).

Judge Gorsuch's reliance on and characterization of *Vieth* suggest that he would be unlikely to find that partisan gerrymandering claims are cognizable. No other judge on the Tenth Circuit joined Judge Gorsuch's dissent.[1]

In ***Fleming v. Gutierrez***, 785 F.3d 442 (10th Cir. 2015), Judge Gorsuch joined a unanimous panel opinion granting a plaintiffs' motion to dismiss the appeal of a preliminary injunction in an elections case, because the election at issue transpired while the appeal was pending. The case arose after the 2012 election, as several voters in Sandoval County, New Mexico filed a § 1983 action challenging the County's administration of the election. Plaintiffs argued that misallocation of election-day resources resulted in long lines, sometimes with wait time exceeding five hours. *Id.* at 443. Plaintiffs argued that this deterred would-be voters from casting ballots. The district court entered a preliminary injunction that required the County to adhere to new regulations increasing the number of voting centers and voting machines. *Id.* The County appealed and filed a motion for expedited review, the latter of which was denied. *Id.* at 444. The 2014 election happened with the injunction still in place. *Id.*

After the 2014 election, the plaintiffs moved to dismiss the appeal of the preliminary injunction as moot. The panel granted the motion, reasoning that a decision affirming or reversing the district court's preliminary junction would not have any real effect on the parties, because the election and the effective time period of the preliminary injunction had passed. *Id.* at 445. The court noted, however, that some of the issues the County raised in their appeal could still be litigated in the district court as part of the continuing proceedings over the need for a permanent injunction. *Id.* Gorsuch did not write separately.

IMMIGRATION

Judge Gorsuch's few immigration-related decisions indicate that, in reviewing administrative adjudication, his rulings have engaged in limited review and, where his decisions have reached the merits, they have often upheld Board of Immigration Appeals' decisions ruling against immigrants. The two cases in which Judge Gorsuch refused to defer to the BIA both involved the same question on appeal – the retroactivity of the agency's statutory interpretation – a question that is not specific to the immigration context. Outside of the agency adjudication context, Judge Gorsuch's rulings have also resulted in outcomes adverse to immigrants.

Garcia-Carbajal v. Holder, 625 F.3d 1233 (10th Cir. 2010). Judge Gorsuch authored the majority opinion dismissing a petition for review of a Board of Immigration Appeals ("BIA") decision on the grounds that the petitioner, Garcia-Carbajal, had not exhausted his administrative remedies. Garcia-Carbajal argued on appeal to the Tenth Circuit that his prior conviction was not a crime involving moral turpitude that rendered him ineligible for relief. In reaching the conclusion that Garcia-Carbajal had failed to exhaust, the court took an exceedingly narrow view

[1] The Supreme Court ultimately granted *certiorari*, vacated, and remanded this case in light of *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S.Ct. 2652, (2015), which held that a state legislature has standing to challenge a ballot initiative removing the congressional redistricting process from the Arizona legislature, but that such a measure did not violate the Elections Clause of the Constitution, U.S. Const., Art. I, sec. 4, cl. 1. The Court did not expressly rule on the justiciability of claims under the Guarantee Clause, but observed that "[t]he people's sovereign right to incorporate themselves into a State's lawmaking apparatus . . . is one this Court has ranked a nonjusticiable political matter," while also observing that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *Id.* at 2660 n.3 (internal quotation marks and citations omitted).

of the argument Garcia-Carbajal made to the BIA, finding that he argued only that the immigration judge failed to follow the proper process to analyze his conviction and did not make the substantive claim that the judge reached the wrong result – i.e., that his conviction was not, in fact, a crime involving moral turpitude. *Id.* at 1236-37. The court also rejected Garcia-Carbajal's alternative contention that his failure to exhaust was excused because the BIA considered the unexhausted claim sua sponte. *Id.* at 1240. Judge Gorsuch thus refused to review the merits of the noncitizen's legal claim based on an aggressive application of the exhaustion doctrine, even though the agency itself had had considered the claim.

Bhattarai v. Holder, 408 F. App'x 212 (10th Cir. 2011). Judge Gorsuch joined a majority opinion upholding the BIA's denial of a motion to reopen the removal proceedings of a Nepalese citizen who had sought asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). In denying the motion to reopen, the BIA concluded that Bhattarai did not establish a prima facie case on his CAT claim, and the majority found that the BIA did not abuse its discretion. *Id.* at 217. The dissent contended that the BIA's four sentence discussion on the CAT claim lacked sufficient analysis and accused the majority of improperly reevaluating the evidence presented to the BIA and substituting its own reasoning for the BIA's in affirming the denial. *Id.* at 221-223 (Lucero, J., dissenting).

Green v. Napolitano, 627 F.3d 1341 (10th Cir. 2010). Judge Gorsuch joined a panel opinion holding that the revocation of the approval of a petition for immigration status under 8 U.S.C. § 1155 is discretionary and, therefore, unreviewable by the court based on the jurisdiction-stripping provision in 8 U.S.C. § 1252(a)(2)(B)(ii). *Id.* at 1346. Reginald Green, a U.S. citizen, had filed an immigration petition on behalf of his Nigerian-citizen wife, Njideka Frances Abajue. The Department of Homeland Security approved the petition and then revoked it based on statements made by Abajue's former spouse claiming that their prior marriage was fraudulent. The BIA affirmed the decision, concluding that Green failed to submit sufficient evidence that Abajue's prior marriage was bona fide in response to the agency's notice of intent to revoke his petition. *Id.* at 1343. Green and Abajue then filed a complaint in the district court, claiming the revocation of the petition violated their due process rights. The Court held that the district court lacked jurisdiction to review the agency's decision to revoke the petition because such decisions are discretionary and therefore subject to the jurisdictional bar in § 1252(a)(2)(B)(ii). Troublingly, in affirming the district court's dismissal of the suit, the Tenth Circuit also held that the district court lacked jurisdiction to review the couple's due process claim, *id.* at 1346-48, even though compliance with the Constitution is not a "discretionary" decision.

United States v. Adame-Orozco, 607 F.3d 647 (10th Cir. 2010). Judge Gorsuch wrote the majority opinion rejecting Adame-Orozco's challenge to his conviction for illegal reentry based on a deportation order that he claimed was invalid. Adame-Orozco, a non-citizen, argued that his illegal reentry conviction was improper because he was deprived of the opportunity for judicial review of his deportation order. Specifically, he argued that his removal proceedings had not afforded him adequate time to attack collaterally the underlying conviction. *Id.* at 651-62. The Tenth Circuit held that the statute at issue, 8 U.S.C. § 1326, which provides a defense in illegal reentry cases based on the deprivation of judicial review, permitted the non-citizen to raise the defense only if he could show that the initial "*deportation proceedings at which the order was issued* improperly deprived" him "of the opportunity for judicial review." *Id.* at 652 (internal quotation marks omitted). The court concluded, however, that the statute did not

guarantee him review of the conviction on which his deportation order was based, nor did it require the immigration judge or BIA to stay his proceedings until he could complete a collateral attack on the conviction. *Id.* at 655.

United States v. Hernandez-Hernandez, 519 F.3d 1236(10th Cir. 2008). Judge Gorsuch wrote the opinion upholding a non-citizen's conviction for illegal reentry, in which the non-citizen claimed that he was intoxicated and had no memory of crossing the border. The district court barred evidence relating to the defendant's mental state, applying precedent that only "general intent" (i.e. willingness) is required. *Id*. at 1240. The Tenth Circuit upheld the conviction and low *mens rea* standard as a matter of statutory interpretation; and found no constitutional violation regarding the right to present evidence. In defending the low *mens rea* standard, the Court stated that "we have recognized that laws pertaining to border control are matters over which Congress holds plenary power, are generally subjected by Congress 'to stringent public regulation,' and are often treated as nearly . . . matters of 'strict liability.'" *Id.* (quoting *Martinez–Morel*, 118 F.3d at 716 (10th Cir. 1997)).

Montano-Vega v. Holder, 721 F.3d 1175 (10th Cir. 2013). Judge Gorsuch drafted the opinion denying a noncitizen's challenge to a rule providing for withdrawal of an appeal pending departure from the country. Vega, a non-citizen, was charged with illegal entry, but asked permission to leave the country voluntarily in order to avoid a ten-year bar on readmission. Although the immigration judge had discretion to consider his petition for voluntary departure, the immigration judge refused because of Vega's criminal record. Vega filed an appeal with BIA, but then had "a hard choice." *Id*. at 1176-77. If he left, his BIA appeal would be immediately abandoned under 8 C.F.R. § 1003.4, and he would have to wait out the ten-year ban. If he stayed in the country to appeal, he risked losing and facing a second ten-year ban, for a year of unlawful presence. The defendant left, then challenged the validity of §1003.4.

The court rejected the noncitizen's challenge to § 1003.4's rule providing for withdrawal of appeal upon departure. The court dismissal as inapposite cases striking down a different regulation deeming motions to reopen abandoned upon a noncitizen's departure. *Id.* at 1178.

De Niz Robles v. Lynch, 803 F.3d 1165(10th Cir. 2015) & ***Gutierrez-Brizuela v. Lynch***, 834 F.3d 1142(10th Cir. 2016). Both cases considered a tension between two immigration statutes,

> 8 U.S.C. §§ 1255(i)(2)(A), which provides that the Secretary of Homeland Security "may" adjust a noncitizen's status to that of a lawful permanent resident, and
>
> 8 U.S.C. § 1182(a)(9)(C)(i), which provides that a person who has been unlawfully present in the United States for an aggregate period of over one year and who has been removed from the United States is inadmissible, but is eligible for a waiver of inadmissibility if more than 10 years have passed since the person's last departure from the United States.

In 2005, the Tenth Circuit resolved this tension in favor of the Attorney General's discretion to adjust status. This ruling was then overturned by the BIA in *Briones*, 24 I. & N. Dec. 355 (BIA 2007), which found that the AG could not give exemptions to the 10-year waiting period. The Tenth Circuit then upheld the BIA's interpretation out of *Brand X* deference, because the

underlying statute was ambiguous. *Padilla–Caldera II*, 637 F.3d 1140, 1148–52 (10th Cir. 2011).

De Niz Robles (2015) (Gorsuch): The BIA sought to apply *Briones* retroactively to block relief for petitioners who applied for it *before* the BIA contradicted the Tenth Circuit's initial rule. Gorsuch held that this was not allowed. "Because the agency's promulgation of a new rule of general applicability under *Chevron* step two and *Brand X* is an exercise of delegated legislative policymaking authority, it is subject to the presumption of prospectivity that attends true exercises of legislative authority." *Id*. at 1167.

Gutierrez-Brizuela (2016) (Gorsuch for majority): The BIA then sought to apply *Briones* retroactively to a petitioner who applied for relief ***after*** *Briones*, but ***before*** the Tenth Circuit upheld *Briones* in *Padilla-Caldera II*. Gorsuch again found that this was not acceptable.

NATIONAL SECURITY

As a judge on the Tenth Circuit, Judge Gorsuch has not had occasion to rule on national security or separation of power cases, so his judicial record provides no indication of his views on these subjects. He did, however, serve in the Justice Department under President George W. Bush, and in that capacity, was involved in some of the Bush administration's most controversial national security initiatives. He was involved in an attempt to convince Congress to restrict judicial review of military commission decisions involving Guantánamo detainees, the invocation of a "state secrets" privilege to bar an innocent man's efforts to obtain damages for his unlawful abduction and torture by the CIA, and Bush's warrantless wiretapping program, which authorized electronic surveillance of Americans without a court order. See Charlie Savage, *Neil Gorsuch Helped Defend Disputed Bush-Era Terror Policies*, N.Y. Times, March 15, 2017. Gorsuch's involvement in these matters deserves careful attention by the Senate. He should be asked about his views on the power of the executive in times of crisis, the role of separation of powers, and particularly the responsibility of the courts to check overreaching by the political branches.

DISABILITY RIGHTS

Judge Gorsuch has ruled on a number of disability rights cases, some favorable to the claimant, and others not. The most concerning is the *Hwang* case, which ignored a large body of appellate case law, created a Circuit split, and was unduly dismissive of the plaintiff's claims.

1. Scope of Reasonable Accommodation Under the Americans with Disabilities Act ("ADA")

Hwang v. Kansas State U., 753 F.3d 1159 (10th Cir. 2014). Assistant professor Hwang, a successful state university employee with 15 years' seniority, took a six-month leave of absence to recover from a bone marrow transplant, a treatment for cancer. When she sought a further short leave to avoid an on-campus flu epidemic that would threaten her compromised immune system – during which time she was ready and able to work remotely – she was terminated. The district court dismissed Hwang's Rehabilitation Act claims on the pleadings, with no opportunity for discovery. In the face of extensive countervailing appellate authority upholding reasonable accommodation leaves of absence of significantly longer periods of time, and the reasoning of the U.S. Supreme Court in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002) Judge Gorsuch wrote an

opinion upholding the dismissal of the case. He wrote that an employee must "show up" to work, and that the initial six-month leave was "more than sufficient to comply with the Act."

2. Individuals with Disabilities Education Act ("IDEA") Exhaustion

A.F. ex rel Christine B. v. Espanola Pub. Schools, 801 F.3d 1245 (10th Cir. 2015). After Christine B. failed half of her classes for two years, her parents moved her to a private school and filed an administrative complaint under the IDEA. A settlement of the administrative complaint was reached at mediation, providing compensatory education services, transportation, and partial tuition reimbursement. Thereafter, the family sued for damages under the ADA and the Rehabilitation Act, a remedy unavailable under the IDEA. Judge Gorsuch wrote the majority opinion for a divided panel upholding the dismissal of the complaint on the pleadings based upon a purported failure to exhaust under the IDEA. Judge Briscoe, dissenting, argued that the exhaustion language of the IDEA should "be interpreted as merely requiring a claimant to make full use of the procedures outlined" to attempt to resolve her IDEA claim. The Supreme Court rejected a similarly stringent administrative exhaustion argument under the IDEA in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017).

3. Scope of Obligation to Provide a Free Appropriate Public Education Under IDEA

Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P., 540 F.3d 1143 (10th Cir. 2008). Concerned with their autistic son's lack of progress in "generalizing" skills – applying skills learned at school to other environments – and his severe behavioral problems at home, Luke. P's parents moved him from public school to a residential program, and informed the school district that they would seek tuition reimbursement through the administrative procedures of the IDEA. Following a five-day hearing, the impartial hearing officer (IHO) held that a residential placement was necessary for Luke, citing "his inability to generalize his learning experiences at school to home and community environments," and found that the district was obligated under IDEA to pay the costs of that placement. On appeal before the Colorado Office of Administrative Courts, an Administrative Law Judge agreed. The school district brought suit in federal district court, seeking review and reversal of the ALJ's and IHO's judgments; the district court agreed with the administrative decisions that Luke's generalization deficiency warranted his placement in a residential program. In an opinion reiterating the worst elements of the *Rowley* standard [*Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)], and without acknowledging post-*Rowley* Congressional amendments, Judge Gorsuch reversed the three prior reviews, and found that because Luke was making "some progress," the school district met its obligations under the IDEA. The continued viability of the *Rowley* standard is currently under review in *Endrew F. v. Douglas County School District*, __ S. Ct. __ (No. 15-827)(argued Jan. 11, 2017).

In ***Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.***, 702 F.3d 1227 (10th Cir. 2012), the panel unanimously affirmed the district court, which in turn had affirmed the outcome of the IDEA administrative process, which had ordered reimbursement to the family for residential treatment. Judge Gorsuch wrote separately to articulate a version of his views in the *Luke* case – making a sharp distinction between "educational" benefits and other benefits for purposes of the IDEA. But as the petitioners argue in *Endrew F.*, Congress has amended and reauthorized the IDEA twice since *Rowley*, in 1997 and 2004. The amendments expand the IDEA's goals to include independent living, economic self-sufficiency, and transition planning at the end of high school.

Garcia v. Bd. of Educ. of Albuquerque Pub. Schools, 520 F.3d 1116 (10th Cir. 2008). Plaintiffs alleged that the school district failed to provide an individualized educational plan (IEP) for Myisha in the Fall of 2003 (when she was in tenth grade); this failure was undisputed and occurred following Myisha's release from juvenile detention. The hearing officer ruled that although the school district failed to have and implement the IEP, there was no denial of educational rights under the IDEA because, given her truancy during the same time frame, it would not have made any difference to Myisha. The administrative appeal officer disagreed, finding that having the IEP in place might have altered the truancy, and ordered limited remedies. The family brought suit in federal court seeking additional compensatory education, and the school district sought reversal of the remedies that were ordered. The district court ruled in favor of the school district, agreeing that it was Myisha's own behavior that caused any loss of educational opportunity. On appeal, the Tenth Circuit affirmed, with Judge Gorsuch writing. The appellate court rejected the district's argument that the controversy was moot given that the court could still award compensatory education. And as to liability, the appellate court noted facts on both sides:

> On the one hand, we acknowledge potential pitfalls in deeming harmless procedural violations of IDEA for students who fail to exhibit enthusiasm for school. After all, a student's lack of enthusiasm, at least in some cases, may be related to his or her disability. Such students are perhaps most in need of vigilant attention from their schools, and there is at least the possibility that, had the school district reassessed Myisha's needs and implemented a new IEP at the start of the Fall 2003 semester, the school might have been successful in helping Myisha to overcome her behavioral tendencies and to increase her commitment to school – a possibility not entirely out of the question on this record in light of the potential Myisha demonstrated in 2004-2005, the very next school year.
>
> On the other hand, liability under IDEA is determined not by imagining the possibilities of what might have been, but rather by determining whether the preponderance of the evidence indicates that the school district's procedural failures resulted in a denial of educational benefit to the student. As the district court points out, such an inquiry implicitly seems to require determining whether the school district's actions *caused* the student to suffer an educational loss. And on the facts of this case, there is strong evidence indicating that, regardless of what actions the school district did or did not take in Fall 2003, Myisha's poor attitude and bad habits would have prevented her from receiving any educational benefit.

Ultimately, noting that the impact of Myisha's behavior on the district's liability would be a "novel" question of law, the court decided that it would not rule on liability at all. Instead, the court stated, it would review the district court's remedial order (that is, its decision not to order a remedy), an assessment that required only an abuse of discretion standard, and not the modified *de novo* review used to review liability determinations. Given the "equitable" considerations cited by the district court, including Myisha's lack of interest in obtaining an education, her failure to attend school, and her "significant record of disciplinary problems and truancy," Judge Gorsuch affirmed.

4. Restraint and Seclusion

Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243 (10th Cir. 2008) . The parent of a six-year-old child with emotional disturbance brought claims against a school district, including the allegation of "inappropriate reliance upon timeouts and physical restraint" that was not effective in ameliorating the behaviors. The district court denied summary judgment on qualified immunity grounds, holding that the plaintiff's facts, if true, demonstrated that the teacher violated M.C.'s clearly established rights when she seized him and placed him in a "closet-like" timeout room without proper procedures. On interlocutory appeal, the panel opinion reversed, finding that the individual defendants did not violate M.C.'s constitutional rights because each challenged seizure was reasonable and the total amount of restraint and seclusion did not constitute the functional equivalent of suspension.

- As to one that was imposed not for safety but for the child's failure to follow instructions to begin working on a phonics assignment, the panel reasoned that "[t]he Fourth Amendment does not hold that ensuring the safety of the class is the sole permissible reason for sending students to time out" and "[i]f corporal punishment is a constitutionally acceptable form of discipline for a student's defiance, it is implausible that timeouts are not."

- As to the length of time the child was locked in the room without improvement – one hour and 42 minutes according to district records, and much longer according to the plaintiff – the panel reasoned that the time was reasonable given the defendants' "reasonable fear of violence," and that the length of time increased based on the child's "continued misbehavior" on the way to the timeout room or while inside.

- That the timeouts lasted 25 minutes with the child typically becoming more and not less distraught did not make them unreasonable, as "it is safe to assume that specially-trained and experienced teachers will know far more than we do about techniques best designed to improve a child's behavior."

- As to the conditions of the timeout room – a closet-like room, with nothing in it, no exterior window, dim light, and black construction paper over the window – the panel again found no violation of constitutional standards given that the room was lit and unlocked, and found the teachers' decision to forcibly restraining the door shut to be "a reasonable response to a child who was scratching and kicking at the door while shouting curse words and death threats."

- That the child begged to be released to use the bathroom, and urinated on himself, did not indicate an unreasonable seizure where "the teachers were unfortunately faced with a 'boy who cried wolf' situation."

- Nor was the total amount of time spent in the timeout room without due process a constitutional violation. Although the district court found that over the course of approximately two and one-half months, the defendants placed the child in the timeout room 21 times for a total of approximately twelve hours, the appellate panel found that this was not a "more than trivial ... exclusion" sufficient to trigger procedural due process concerns.

CRIMINAL LAW

Judge Gorsuch's decisions in the criminal law area are also mixed. He has demonstrated a sensitivity to the need to protect the Fourth Amendment in the digital age. He has ruled for the prosecution far more often than for criminal defendants asserting rights violations, but that does not distinguish him from most federal judges. He has never upheld a claim of prosecutorial misconduct, but he has a mixed record with respect to extending qualified immunity to government officials sued for damages for constitutional violations in the enforcement of the criminal law.

1. Fourth Amendment

Of twenty opinions that Judge Gorsuch wrote on addressing Fourth Amendment issues, sixteen sided with law enforcement and four sided with the defendant raising a Fourth Amendment challenge. Judge Gorsuch seems to be relatively sympathetic to Fourth Amendment claims made with respect to developing technologies. His opinions demonstrate an appreciation of the privacy interests at stake in one's private computer or e-mail, as well as a sophisticated understanding of technological limitations in other arenas (*e.g.*, the difference between a GPS tracker and a "beeper," or limitations in criminal justice databases). *See United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016); *United States v. Esquivel-Rios*, 725 F.3d 1231 (10th Cir. 2013).

United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016). Defendant Walter Ackerman, appealed the denial of his motion to suppress evidence found after AOL forwarded an e-mail from his outbox to the National Center for Missing and Exploited Children ("NCMEC"). As part of its automatic screening system, AOL flags e-mail attachments with certain pieces of code (a "hash value") that match known images of child pornography and, without opening the images itself, sends those images to NCMEC to investigate. Mr. Ackerman appealed on the grounds that this warrantless search of his e-mail by NCMEC violated his Fourth Amendment rights. Judge Gorsuch reversed the district court ruling, holding that: (1) NCMEC is a governmental entity for Fourth Amendment purposes and (2) a warrantless search occurred when NCMEC opened the e-mail forwarded to it by AOL. *Id.* at 1292. Judge Gorsuch avoided the question of whether third-party doctrine should preclude the defendant's claim of a reasonable expectation of privacy when sending e-mail over a private ISP such as AOL. Another point of interest is that Judge Gorsuch goes out of his way to unpack the Supreme Court's decision in *U.S. v. Jacobsen*, 466 U.S. 109 (1984) and questions its holding that a drug test performed by the DEA after receiving a package from FedEx employees was not a "search" for Fourth Amendment purposes. Judge Gorsuch even suggests that, "[r]eexamining the facts of *Jacobsen* in light of *Jones*, it seems at least possible the Court today would find that a 'search' *did* take place [in *Jacobsen*.]" *Id.* at 1307 (citing *United States v. Jones*, 565 U.S. 400 (2012).

United States v. Carloss, 818 F.3d 988 (10th Cir. 2016)**.** Defendant Ralph Carloss appealed the district court's decision to deny his motion to suppress on Fourth Amendment grounds when two police officers performed "knock and talk" at his home despite the fact that several "No Trespassing" signs were posted on the walk up to his front door. The majority affirmed the district court, but Judge Gorsuch wrote a scathing dissent in favor of the homeowner's privacy rights and ability to revoke the implied license to enter the curtilage of his home and knock on the front door. Judge Gorsuch rejected the two main arguments presented by the Government on appeal: (1) that police officers should enjoy "an irrevocable right to enter a

home's curtilage to conduct a knock and talk," *id.* at 1004, and (2) that the only way to avoid a knock-and-talk is to "hid[e] in the home and refus[e] to answer the door." *Id.* at 1008. Judge Gorsuch chastised the majority and concurring opinions for failing to address either of these points.

Judge Gorsuch's strongly-worded dissent in *Carloss* suggests that he will be protective of homeowners' privacy interests under the Fourth Amendment. As he write, "the government appears to be moved by [this] worry: that if clearly posted No Trespassing signs can revoke the right of officers to enter a home's curtilage their job of ferreting out crime will become marginally more difficult. But obedience to the Fourth Amendment always bears that cost and surely brings with it other benefits." *Id.* at 1015.

United States v. Esquivel-Rios, 725 F.3d 1231 (10th Cir. 2013). A state trooper spotted a minivan along Interstate 70 and, for no apparent reason, called in the registration tag on the vehicle. Upon hearing that the tag wasn't showing up as registered, the officer stopped the driver, Mr. Esquivel-Rios. A consent search of the minivan yielded over a pound of methamphetamine. Over Fourth Amendment objections by the defendant, the district court held that the trooper had reasonable suspicion that the minivan was displaying a forged registration tag. However, when the trooper called the law enforcement dispatcher to run the registration tag, the dispatcher said both, "'that's a negatory on record, not returning,'" *id.* at 1234, *and* "*Colorado temp tags usually don't return.*" *Id*. at 1235. Judge Gorsuch authored the opinion addressing whether an investigative stop might be invalidated by unreliable technology or a faulty database. The opinion takes pains to discuss the limitations of computer technology with sentences such as "garbage in, garbage out," and "[o]f course, nothing in life is perfect." *Id.* at 1234–35. Judge Gorsuch emphasizes how low the "reasonable suspicion," standard is and concludes "it is pretty plain that no one—and no computer—has to be perfect, or even close to perfect, to provide or help provide legally sufficient grounds for a traffic stop." *Id.* at 1236. Ultimately, however, Judge Gorsuch reversed the district court's conclusion because the case "hinges entirely on the reliability of a computer database" and the record did not support the district court's factual conclusion about that database. *Id.* at 12

Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011). In *Kerns*, Judge Gorsuch granted qualified immunity to a sheriff who, while investigating the shooting down of a police helicopter, sent a letter to a Veterans Affairs hospital asking for the shooting suspect's psychiatric records. Without deciding whether this warrantless request for medical records violated the Fourth Amendment, Gorsuch concluded that at the time of the request the law was not clearly established on whether a warrant was required and therefore the sheriff was entitled to qualified immunity.

United States v. Mitchell, 653 F. App'x 651 (10th Cir. 2016). *Mitchell* involved the question of how to apply the Supreme Court's 2012 decision in *United States v. Jones* requiring police to get a warrant before attaching a GPS tracker to a suspect's car. In *Mitchell*, police had used a GPS device to track the defendant's car without a warrant in 2011, prior to the *Jones* decision. Writing for a unanimous panel, Judge Gorsuch held that evidence from the warrantless GPS tracking could be used in court because at the time of the tracking police had not been on notice that a warrant was required. *United States v. Perrine*, 518 F.3d 1196 (10th Cir. 2008): Judge Gorsuch joined a unanimous panel opinion holding that a person has no reasonable expectation of privacy under the Fourth Amendment in subscriber information (including name and address) provided to an internet service provider. In other words, under the third-party

doctrine, a person has given up their privacy interest in the information by sharing it with the service provider. Therefore, the panel held, the government did not violate the Fourth Amendment by requesting such information without a warrant.

Doe v. Shurtleff, 628 F.3d 1217 (10th Cir. 2010). Judge Gorsuch joined a unanimous panel opinion upholding a Utah law requiring sex offenders "to register their 'internet identifiers' and the corresponding websites with the state." The opinion rejected arguments under the First Amendment, Fourth Amendment, and Ex Post Facto Clause. It concluded that the registration requirement did not burden the First Amendment right to engage in anonymous online speech, and that there is no Fourth Amendment protection for internet account identifiers because people do not have a reasonable expectation of privacy in information they have shared with a third party (here, the account username or other "identifier").

United States v. Harris, 735 F.3d 1187 (10th Cir. 2013). Defendant Germain Harris appealed a conviction that arose from a search warrant being executed on his auto shop. Law enforcement had a warrant to search the auto shop in connection with a separate crime—a murder-for-hire scheme propagated by another man, Alonzo Johnson—and in the execution of the search warrant, found illegal guns and drugs belonging to Mr. Harris. Mr. Harris appealed his conviction, arguing that the search warrant was defective on its face for failing to establish a "nexus" between the crime officers sought to investigate and the auto shop. *Id.* at 1190. Judge Gorsuch disagreed, and upheld the search as reasonable, citing specific evidence linking the murder-for-hire scheme to Mr. Harris's auto shop.

Martinez v. Carr, 479 F.3d 1292 (10th Cir. 2007). Plaintiff Jeramy Martinez sought damages under 42 U.S.C. § 1983 when a state police officer issued him a criminal citation under the threat of arrest and jail if he did not sign it. The officer appealed a district court decision denying his qualified immunity claim on summary judgment. Upon review, Judge Gorsuch analyzed Plaintiff's Fourth Amendment claim and found that the issuing of the citation did not amount to a seizure. "[I]t seems of immediate significant to us that Office Carr gave Mr. Martinez the *choice* of accepting the citation or being arrested—something very nearly the opposite of a *seizure*, which is commonly understood as circumstances when 'a reasonable person would have believed that he was not free to leave.'" *Id.* at 1295 (quotations omitted).

United States v. Martinez, 518 F.3d 763 (10th Cir. 2008). Defendant Henry Osvaldo Martinez was stopped by a Kansas State Trooper for failure to properly display a vehicle license under a Kansas statute. Though Mr. Martinez showed other documentation for the car and explained that he was moving from California to New York, the trooper was puzzled by novelties in the documentation, including something called a "One Trip Permit" that the trooper had never seen before. The trooper issued Mr. Martinez a written warning for failure to properly display his license. However, upon reconsideration, the trooper doubled back to Mr. Martinez's car, got consent to search it, and found nine kilograms of cocaine upon searching. Mr. Martinez appealed the denial of his motion to suppress evidence, arguing that his continued detention based on the improper display of his license was unreasonable under the Fourth Amendment. Judge Gorsuch affirmed the district court, reasoning that under the Fourth Amendment analysis, the length of the detention was not objectively unreasonable.

United States v. Nicholson, 721 F.3d 1236 (10th Cir. 2013). (Gorsuch, J., dissenting) In a case involving an erroneous traffic stop—a police officer misinterpreting a left-turn law stopped defendant Jesse Nicholson and eventually found contraband in his car—the majority ordered the

exclusion of evidence and dismissal of charges. Judge Gorsuch wrote a lengthy dissent, criticizing the majority for creating a "new rule" of Fourth Amendment law and for entering a ruling without remanding to the district court to develop more facts for the "totality of the circumstances" inquiry.

United States v. Christie, 717 F.3d 1156 (10th Cir. 2013). Defendant, Rebecca Christie, was convicted of second-degree murder and child abuse after her three-year-old daughter died from apparent dehydration. She appealed on Fourth and Sixth Amendment grounds, arguing that (1) two warrants used to search her computer were issued in violation of the Fourth Amendment, and (2) the exclusion of her husband from the courtroom while his daughter testified violated her right to a public trial.

With respect to the first warrant, Ms. Christie argued that the five-month delay between the seizure of her computer and the issuance of a warrant to search it was unreasonable. Judge Gorsuch disagreed, reasoning that consent provided to seize the computer, given by Ms. Christie's husband, considerably offset—even eliminated—her Fourth Amendment privacy interest in the computer: "one individual with common and at least apparent authority over the computer freely gave it to authorities and the other individual never objected." *Id.* at 1163.

Ms. Christie challenged a provision in the second warrant, authorizing the search of "[a]ll records and information, including any diaries or calendars, showing the day-to-day activities of Rebecca Christie and/or [the victim]." *Id.* at 1165. Ms. Christie challenged this provision as lacking adequate particularity. Judge Gorsuch found that the provision was sufficiently restricted by the warrant's opening language: "[a]ll records and information relating to the murder, neglect, and abuse of [BW] from June 19, 2002 (date of birth) to May 4, 2006, (date computer seized)." *Id.* Judge Gorsuch cited and relied on the "new" field of warrant particularity and computer searches, favoring leeway for law enforcement to conduct their search. "[W]e've gone so far as to suggest that it is 'unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename or extension or to attempt to structure search methods—that process must remain dynamic.'" *Id.* at 1166 (citing *United States v. Burgess*, 576 F.3d 1078, 1093).

Porro v. Barnes, 624 F.3d 1322 (10th Cir. 2010). Plaintiff Alfredo Yero Porro sued a law enforcement officer who tasered him three times after he was already restrained, as well as the county sheriff, under 42 U.S.C. § 1983. At the time he was restrained and tasered, Mr. Porro was a federal immigration detainee. The district court sided with Mr. Porro and awarded him $100,000 in damages. Judge Gorsuch ruled that, while the $100,000 judgment against Mr. Lovett, the man who tased Mr. Porro, was valid, Mr. Porro could not recover against either of the county sheriffs. *Id.* at 1329–30.

United States v. Martin, 613 F.3d 1295 (10th Cir. 2010). Michael Martin was confronted by officers in the entryway of his apartment building as a suspect in a shooting, searched, and a gun was found on his person. He was ultimately charged with being a felon in possession of a firearm. His motion to suppress the evidence found on him was denied, and on appeal Judge Gorsuch affirmed that denial. Judge Gorsuch concluded that the police officers had probable cause to arrest Mr. Martin, and that exigent circumstances justified the execution of the arrest inside his apartment building. In so ruling, Judge Gorsuch overcomes the presumption that warrantless searches and seizures in the home are "presumptively unreasonable," and concludes that Mr. Martin wasn't "seized" for Fourth Amendment purposes until the moment he was placed in handcuffs. 613 F.3d at 1299–1301.

Garcia v. Commandant, United States Disciplinary Barracks, 380 F. App'x 762 (10th Cir. 2010). Mr. Garcia brought a habeas petition challenging his conviction before a court martial in the military, arguing that the military court did not adequately review a Fourth Amendment claim. Mr. Garcia was convicted a first time and appealed, and the Court of Appeals for the Armed Forces (CAAF) found Mr. Garcia's counsel to be ineffective. On retrial, Mr. Garcia pled guilty, was sentenced, and appealed a second time. While his second appeal was pending, the U.S. Supreme Court decided *Georgia v. Randolph*, 547 U.S. 103 (2006), which Mr. Garcia argued pertained to the consent given in the search in his case. Before the Tenth Circuit, Judge Gorsuch concluded that Mr. Garcia's *Randolph* claims were adequately considered by the military courts (which ruled that he "waived" such an argument with his guilty plea, though he could not have anticipated the *Randolph* ruling) and that the Article III courts lacked jurisdiction to hear his habeas appeal.

United States v. Cortez-Galaviz, 495 F.3d 1203 (10th Cir. 2007). In a fact pattern similar to *Esquivel-Rios*, Defendant Ramses Cortez-Galaviz argued that a traffic stop made based on the outputs from a computer database violated his Fourth Amendment rights. However, unlike his conclusion in *Esquivel-Rios*, here Judge Gorsuch concluded that "the information from the database provided objective, particularized, and, while perhaps not perfect or immediate, sufficient information to justify a brief traffic stop." *Id.* at 1204. The key difference between this case and *Esquivel-Rios* seems to be the lack of questioning of the computer output: in *Esquivel-Rios* the officer had some indication that the database output may be meaningless ("temporary tags 'usually' don't return," *Esquivel-Rios*, 725 F.3d at 1236), but in this case a finding that the vehicle wasn't insured generally led to an officer pulling the driver over to investigate. *Cortez-Galaviz*, 495 F.3d at 1205.

2. Qualified Immunity

Judge Gorsuch's jurisprudence on qualified immunity is mixed. While he has authored at one troubling opinion that suggest great deference to law enforcement's discretionary decisions even in the face of what appeared to have been violations of clearly established law, Judge Gorsuch does not always cast wide the protective net of qualified immunity.

The most concerning decision by Gorsuch in this context is ***Wilson v. City of Lafayette***, 510 F. App'x 775 (10th Cir. 2013), granting qualified immunity for a police officer who killed a marijuana suspect during a chase by deploying a taser to the suspect's head. Gorsuch found qualified immunity on the grounds that the law was not clearly established prohibiting the police from tasing someone who flees from police even when the crime alleged was not violent, the suspect was likely to be apprehended eventually, and the suspect hadn't harmed anyone yet. Gorsuch wrote:"With the perspective of hindsight one can easily imagine ways in which this tragedy might have been averted, and no doubt everyone wishes it had been. But the events happened as they did and they happened under highly tense, uncertain, and rapidly evolving circumstances without any *clear* direction in the law that might have warned Officer Harris his conduct was unlawful." *Id.* at 779.

By contrast, one of the concurring judges noted that "[t]he majority's analysis gives scant attention to the … egregious conduct of Officer Harris—an intentional or reckless shot to the head with a taser with a targeting function and from merely ten to fifteen feet away," *id.* at 786, particularly when "it is not clear [the officer] could have reasonably believed that Ryan Wilson posed an immediate danger to himself or to the other officers," *id.*, and considering "'it is

excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance.'" *Id.* at 787 (quotation omitted).

In ***Pauly v. White***, 817 F.3d 715 (10th Cir. 2016), which involved a fatal police shooting where officers did not identify themselves or issue a warning before shooting, Gorsuch joined a dissent arguing that officers should be given qualified immunity because their actions were neither objectively unreasonable nor in violation of clearly established law. The Supreme Court ultimately agreed by vacating the Tenth Circuit opinion on the grounds that the law was not clearly established that a reasonable officer who arrives late to an ongoing police action cannot assume that proper procedures, such as officer identification, have already been followed. *See*, *White v. Pauly*, 137 S.Ct. 548 (2017).

In ***Cortez v. McCauley***, 478 F.3d 1108 (10th Cir. 2007), which arose from a § 1983 claim by a babysitter and her husband against law enforcement officers and county board of commissioners for various constitutional violations stemming from an unsubstantiated claim of child molestation, Gorsuch agreed with the majority that there was no probable cause to arrest (where there was only one victim and, therefore, no corroboration from two different accounts; the child was barely past the age of language acquisition; and the statement that plaintiff "hurt [the child's] pee pee" was ambiguous, *id*. at 1116), but dissented from the majority's conclusion that the law was clearly established that that "*any* reasonable officer *clearly should have known* from our case law that an arrest based solely on the statement of a two-year-old victim was illegal." *Id.* at 1142.

Gorsuch has also rejected qualified immunity in several cases. In ***Blackmon v. Sutton***, 734 F.3d 1237 (10th Cir. 2013), the court affirmed the denial of qualified immunity to juvenile detention center staff for use of a restraint chair and sitting on an 11-year-old detainee to punish him. Gorsuch observed:

> Weeks before eleven-year-old, 4'11", 96-pound Brandon Blackmon arrived at the juvenile detention center in Sedgwick, Kansas, officials there made a new purchase: the Pro–Straint Restraining Chair, Violent Prisoner Chair Model RC–1200LX. The chair bore wrist, waist, chest, and ankle restraints all. In the months that followed, the staff made liberal use of their new acquisition on the center's youngest and smallest charge. Sometimes in a legitimate effort to thwart his attempts at suicide and self-harm. But sometimes, it seems, only to punish him.

Id. at 1239.

In ***A.M. v. Holmes***, 830 F.3d 1123 (10th Cir. 2016), Gorsuch dissented from a decision granting qualified immunity to a school resource officer and other school officials stemming from the arrest and handcuffing of a student for burping in class, writing that New Mexico courts "long ago alerted law enforcement that the statutory language on which the officer relied for the arrest in this case does not criminalize 'noise[s] or diversion[s]' that merely 'disturb the peace or good order' of individual classes," *id.* at 1169 (quoting *New Mexico v. Silva*, 86 N.M. 543, 547 (N.M. Ct. App. 1974)), and thus it would seem that "this authority [would be] sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far." *Id.* at 1170.

In ***Browder v. City of Albuquerque***, 787 F.3d 1076 (10th Cir. 2015), Gorsuch denied qualified immunity for a police officer who struck and killed another driver while speeding in his police cruiser during non-work hours, stating: "In a society governed by laws and not men officers acting as private persons on private time have traditionally enjoyed no special immunities for their conduct." *Id.* at 1080. Judge Gorsuch also wrote a concurring opinion in *Browder*, which was not joined by the other two judges, suggesting that when "we have state courts ready and willing to vindicate [fundamental] rights using a deep and rich common law that's been battle tested through the centuries," *id.* at 1084, litigants should not "turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of 1983 and the Constitution in order to vindicate fundamental rights." *Id.*

Unpublished decisions also include ***Herrera v. Bernalillo Cty. Board of Cty. Comm'rs***, 361 F. App'x 924 (10th Cir. 2010) (upholding district court's denial of qualified immunity at the summary judgment stage for officers alleged to have used excessive force during an arrest given that the suspected crime was not serious, the suspect posed no immediate danger, and the suspect was not resisting, and because it was clearly established at time of arrest that gratuitous use of force against arrestee who was not resisting arrest violated Fourth Amendment) and ***Hostetler v. Green***, 323 F. App'x 653 (10th Cir. 2009) (a § 1983 action brought against prison guards by female inmate attacked after male inmate was allowed access to her cell unsupervised, the court upheld the denial of summary judgment on grounds of qualified immunity, since a female inmate's right to be protected from substantial risk of sexual assault by male inmate was clearly established law and the jailer had subjective knowledge of threat posed by allowing male inmate to remain in female inmate's cell unsupervised for period of ten minutes).

3. Prosecutorial Misconduct

Of roughly 75 cases in which habeas petitioners alleged prosecutorial misconduct, Judge Gorsuch not once voted to grant a habeas petitioner's request for a Certificate of Appealability (COA). He has been very deferential to lower court determinations regarding prosecutorial misconduct allegations and related procedural issues, particularly those arising out of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Following are some of these decisions.

Ly v. McKune, 394 F. App'x 502 (10th Cir. 2010). Denying request of pro se § 2254 habeas petitioner for a COA re: numerous post-conviction claims, including prosecutorial misconduct; court upheld district court's rejection of all claims.

McCormick v. Schmidt, 469 F. App'x 661 (10th Cir. 2012). Denying request of pro se § 2254 habeas petitioner for a COA on grounds that district court was correct to dismiss petition without prejudice, where petitioner had failed to exhaust some (though not all) of his claims—including prosecutorial misconduct claims—in state court.

United States v. Tucson, 248 F. App'x 959 (10th Cir. 2007). Finding that a prosecutor's statement in closing argument regarding defense counsel's failure to call the government's confidential informant to testify did not amount to prosecutorial misconduct; the court distinguished such statements from any comments regarding the *defendant's* decision not to testify on his own behalf.

United States v. Ramos-Carrillo, 511 F. App'x 739 (10th Cir. 2013). Rejecting Defendant's argument that the prosecution engaged in reversible misconduct when one of its

witnesses presented false testimony at trial; court noted that there was nothing in the record to suggest that the prosecutor knowingly allowed the witness to testify falsely, but rather that the prosecutor immediately corrected the witness's statements in open court.

United States v. Chon, 434 F. App'x 730 (10th Cir. 2011). Denying pro se § 2255 habeas petitioner's request for a COA; summarily upholding district court's rejection of petitioner's prosecutorial misconduct claim.

United States v. Foreman, 2009 WL294354 (10th Cir. 2009). Denying pro se § 2255 habeas petitioner's request for a COA; upholding district court's rejection of Petitioner's prosecutorial misconduct claim on grounds that petitioner failed to show cause and prejudice required to overcome procedural default.

Van De Weghe v. Chambers, 569 F. App'x 617 (10th Cir. 2014). Rejecting § 1983 litigant's malicious prosecution claim, which alleged that the district attorney paid her employees a cash bounty in exchange for felony convictions, irrespective of how those convictions were won; court upheld the district court's finding that, as an "arm of the state," the district attorney was entitled to sovereign immunity under the Eleventh Amendment.

United States v. Taylor, 514 F.3d 1092 (10th Cir. 2008). Rejecting Native American defendant's claim of prosecutorial misconduct, where the prosecutor noted in opening statements that the jury should convict the defendant of assault, in part, in order to "end the cycle of violence" on Indian reservations; court found that the trial court's curative instruction, which was given in response to defense counsel's objection, was sufficient and was never challenged by Defendant as being an inadequate corrective measure.

Banks v. Workman, 692 F.3d 1133 (10th Cir. 2012). Upholding district court's ruling that, in failing to disclose a note written by the mother of co-defendant indicating that the defendant's brother may have been involved in the murder, the government did not violate *Brady*; the court noted that, in order to prevail on a *Brady* claim, the exculpatory evidence in question must be admissible or reasonably likely to lead to the discovery of admissible evidence. Here, the court found that the note (and its substance) constituted double-hearsay and therefore would not be admissible. Court also rejected Defendant's challenge to a number of comments made by prosecutors during the trial, including commenting on the defendant's silence at trial. Court found that the district court did not err in concluding that none of the comments amounted to reversible prosecutorial conduct. With respect to the comment on the defendant's silence, the court found that the comment was harmless, particularly given the district court's curative and contemporaneous instruction to the jury.

Matthews v. Workman, 577 F.3d 1175 (10th Cir. 2009). Affirming the state court's determination that none of the remarks made by the prosecutor during closing arguments amount to prosecutorial misconduct; court made it a point to note the high level of deference required under AEDPA, which permits reversal only if the state court's determination was unreasonable.

United States v. Ford, 550 F.3d 975 (10th Cir. 2008). The court affirmed the denial of a motion for a new trial, and Judge Gorsuch mounted a strong dissent. The jury had considered three illegal gun sales and a defense of entrapment. It acquitted the defendant of the first two counts but convicted on the third. Subsequently, it was discovered that the government failed to disclose three emails between the defendant and the informant he claimed entrapped him. The court concluded that, although they were favorable to the defendant, the emails were cumulative

and thus not material, and consequently that no *Brady* violation had occurred. Judge Gorsuch disagreed. His dissent is fact-intensive. He points out that although the suppressed emails were indeed just a few among over one hundred contacts between the defendant and an informant, one email in particular provided the only evidence that the defendant had not initiated the third gun sale. In fact, the only evidentiary difference between the counts on which the defendant was acquitted and the count on which he was convicted was who was shown to have initiated the particular sale. At trial the government had suggested the defendant initiated the third sale, but this email showed he did not. Thus Judge Gorsuch concluded that the suppressed email was material to the issue of entrapment and that, because of its suppression, the defendant-appellant had been deprived of a fair trial and his verdict ought not to stand.

4. Sixth Amendment Right To Counsel

Judge Gorsuch's most significant opinion on the right to counsel is ***Grant v. Trammell***, 727 F.3d 1006 (10th Cir. 2013), a death penalty case involving both the Supreme Court's permissive standard for reviewing the effectiveness of appointed counsel and the AEDPA's deferential standard for reviewing decisions by state criminal courts. An Oklahoma jury convicted John Grant of capital murder and sentenced him to death for fatally stabbing a civilian prison employee while serving a lengthy felony prison sentence., *Id*. at 1010. Defense counsel focused primarily on avoiding a death sentence. But even this effort was limited, consisting primarily of a psychiatrist who diagnosed Mr. Grant with borderline personality disorder, and an argument that Mr. Grant's future risk could be managed with adequate mental health care. *Id.* at 1011. Mr. Grant was his only character witness, and he "briefly recounted for the jury his troubled childhood." *Id.*

Grant's post-conviction attorneys established in federal habeas proceedings that trial counsel was deficient for failing to present testimony from a number of Grant's family members. *Id.* at 1018. His family collectively established that Grant's early life was marred by abuse, neglect, and poverty, but that they still cared for him. They further testified that Grant turned to crime at a young age largely to support his family. But the federal habeas court sided with the Oklahoma courts in finding that none of this evidence would have saved Grant from the death penalty.

Because Oklahoma requires unanimous jury verdicts to impose a death sentence, the issue before the Tenth Circuit was whether the state court credibly determined that it was "reasonably probable that at least one juror" would have voted against death if presented with this new evidence. *Id.* at 1018–19 (quotations omitted). Judge Gorsuch's majority opinion denying relief painstakingly discounts the impact Grant's mitigating evidence may have had at trial. He repeatedly notes the "double-edged" quality of abuse and mental health evidence. *E.g.*, *id.* at 1021. Gorsuch then found that the state courts reasonably determined that testimony from Grant's family was merely cumulative of Grant's own testimony, despite Gorsuch having himself characterized Grant's presentation as brief. *Id.* at 1024. Finally, Gorsuch credited the state court finding that Grant "had no meaningful contact with family members." *Id.* This despite the fact that, as Chief Judge Briscoe noted in a lengthy and impassioned dissent, Grant's family moved from Oklahoma to Oregon during his incarceration, yet still made yearly visits to the prison and regularly kept in touch through calls and letters. *Id.* at 1035–36 (Briscoe, C.J., dissenting). The Chief Judge's dissent highlights how close a case this was, and that the majority was not simply applying clearly established law.

One other noteworthy case is ***Williams v. Jones,*** 571 F.3d 1086 (10th Cir. 2009). Before sitting trial for first-degree murder charges, Michael Williams was offered a plea deal of ten years imprisonment if he pled guilty to second-degree murder. Mr. Williams's attorney believed Mr. Williams was innocent, and threatened to withdraw from the case if his client took the plea deal. The case proceeded to trial, Mr. Williams was convicted, and he was sentenced to life without parole. Upon finding that the trial counsel's performance was deficient, the Oklahoma Court of Criminal Appeals modified Mr. Williams's sentence to life *with* the possibility of parole. Mr. Williams then brought a federal habeas challenge, arguing that the remedy of his modified sentence was inadequate, which ultimately came before the Tenth Circuit on appeal.

The majority opinion found that the remedy afforded Mr. Williams was objectively unreasonable and reversed the district court. Judge Gorsuch issued a lengthy dissent, arguing that Mr. Williams received a fair trial and therefore was not prejudiced by his attorney's counseling on the plea bargain: "[a]s the Supreme Court has repeatedly held, plea bargains are matters of executive discretion, not judicially enforceable entitlement; due process guarantees a fair trial, not a good bargain." 571 F.3d at 1094. Judge Gorsuch forewarns of a system in which a defendant can "take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the foregone plea." *Id.* At length, Judge Gorsuch distinguishes plea bargains from trials and argues that the Sixth Amendment provides no protections for the former. Three years later, the Supreme Court held that the Sixth Amendment right to counsel does in fact apply to plea bargaining, because it is a critical stage of the prosecution. *Missouri v. Frye*, 566 U.S. 133 (2012).

PRISONERS' RIGHTS

Judge Gorsuch has ruled on a handful of prisoners' rights cases, sometimes ruling for the prisoner, other times for the prison. In ***Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso***, 543 F.3d 597 (10th Cir. 2008), Judge Gorsuch authored an opinion affirming the district court's refusal to certify a class in a challenge to allegedly unconstitutional conditions for jail detainees with mental illness, resulting in dismissal of the case. Judge Gorsuch affirmed the district court's conclusion that a class action could not be maintained because each prisoner would require different relief based upon his or her specific mental illness. This decision is concerning because class actions are an important means of challenging unlawful government conduct that affects large numbers of people, and if minor differences in individual circumstances can defeat class certification, the availability of the class action device will be significantly limited. In particular, because of the high turnover rate among jail detainees, challenges to jail conditions must, as a practical matter, be brought as class actions, and a denial of class certification will often have the effect of ending the case, as it did here.

In ***Porro v. Barnes***, 624 F.3d 1322 (10th Cir. 2010), Judge Gorsuch ruled that an immigration detainee held in a county jail who had been tasered three times while in a restraint chair could not sue the county's Sheriff. The Tenth Circuit ruled that the detainee had failed to show that the Sheriff was personally responsible for the use of force or that the county's use of force policies constituted deliberate indifference to his rights. Judge Gorsuch acknowledged that the force used was excessive and noted that the district court had awarded the plaintiff a $100,000 judgment against the corrections officer who had tasered him, which was not before the court on appeal.

Judge Gorsuch has also ruled in favor of prisoners asserting civil rights claims. In ***Yellowbear v. Lampert***, 741 F.3d 48 (10th Cir. 2014), he wrote an opinion reversing the lower court's grant of summary judgment against a Native American prisoner seeking access to a sweat lodge. The Tenth Circuit held that summary judgment was precluded by factual issues as to whether denying the prisoner access to the sweat lodge served a compelling governmental interest and was the least restrictive means of advancing that interest, as required by the Religious Land Use and Institutionalized Persons Act (RLUIPA). In *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), Judge Gorsuch authored an opinion denying qualified immunity to staff of a juvenile detention center in a lawsuit by a former detainee alleging that he had suffered physical abuse and denial of mental health care while detained.

In ***Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr.***, 492 F.3d 1158 (10th Cir. 2007), Judge Gorsuch wrote an opinion reversing the district court's dismissal of a *pro se* prisoner's civil rights lawsuit, ruling that the lower court had provided the prisoner insufficient instruction on how to comply with court rules and failed to consider sanctions other than dismissal. This opinion is more about Judge Gorsuch's views on a district court's responsibility to *pro se* litigants than it is about the substantive rights of prisoners.

DEATH PENALTY

In his decade on the federal bench, Judge Gorsuch has overwhelmingly denied relief in capital cases. He has reviewed scores of habeas cases arising from the Oklahoma state convictions and affirmed nearly every death sentence. *But see*, ***Taylor v. Workman***, 554 F.3d 879 (10th Cir. 2009) (unanimous decision, joined by Judge Gorsuch, holding the state court's failure to give a lesser included instruction was an unreasonable application of clearly established federal law). In at least two cases, a dissenting judge would have granted relief, making Judge Gorsuch's vote against relief decisive. *See* ***Eizember v. Trammel***, 803 F.3d 1129 (10th Cir. 2015); ***Grant v. Trammel***, 727 F.3d 1006 (10th Cir. 2013). In another case, Judge Gorsuch dissented from the sentencing relief the panel ordered. *See* ***Hooks v. Workman***, 689 F.3d 1148 (10th Cir. 2012). And in an interlocutory appeal brought by the government in a federal death-penalty case, Judge Gorsuch provided the decisive vote against a capital defendant in a panel otherwise split over whether to affirm a district court's careful ruling barring introduction of the defendant's prior crimes as unfairly prejudicial in a capital proceeding. ***United States v. Lujan***, 603 F.3d 850 (10th Cir. 2010).

Judge Gorsuch repeatedly advanced a strict interpretation of the bars to federal review presented by the Antiterrorism and Effective Death Penalty Act (AEDPA). For example, he dissented from the en banc decision granting an evidentiary hearing to a death row inmate's claim on ineffective assistance of counsel in ***Wilson v. Workman***, 577 F.3d 1284 (10th Cir. 2009) (en banc). The majority held that the state appellate court's summary denial of an evidentiary hearing without consideration of non-record evidence was not an adjudication on the merits entitled to deference. *Id.* at 1287. Judge Gorsuch dissented based on his strict interpretation of AEDPA:

> This case requires us to interpret the words of a federal statute. . . This language (of AEDPA) brooks no exception. Yet rather than applying AEDPA's deferential statute to the claims before us, the court today finds itself applying de novo review. How can this be? . . . Substantively, [the majority view] is inconsistent with AEDPA's plain terms and structure, contradicts the decisions of several other

> circuits, and effectively frustrates AEDPA's central purpose by getting us back in the business of grading state court procedures rather than focusing on the reasonableness of the results they reach.

Id. at 1315 (Gorsuch, J., dissenting). *See also, **Wilson v. Trammel***, 706 F.3d 1286(10th Cir. 2013) (Gorsuch, J., concurring) (denying relief on the merits and writing separately to note that the defendant should not have been granted an evidentiary hearing).

In ***Eizember v. Trammel***, 803 F.3d 1129 (10th Cir. 2015), Judge Gorsuch again demonstrated his strict view of the AEDPA. He wrote the majority opinion upholding the defendant's death sentence against a claim of improper selection of two jurors. The defendant contended that the jurors' expressed views about the death penalty impaired their ability to serve. *Wainwright v. Witt*, 469 U.S. 412 (1985). The dissenting opinion would have granted relief on the claim on the grounds that: (1) the state court did not apply the correct legal standard; and (2) controlling Supreme Court precedent prevents the participation of a juror who has shown that she cannot impartially consider the sentencing options. *Eizember*, 803 F.3d at 1149 (Briscoe, C.J., dissenting and concurring). In a concurring opinion, the third judge agreed with the dissent that the state court had applied the wrong legal standard, but found that the defendant had not preserved that argument and thus voted to deny relief. *Id*. at 1163 (McHugh, J., concurring). Judge Gorsuch's majority opinion took a narrow view of what grounds were raised and preserved by the defendant. It insinuates that under AEDPA even if the state court appears to apply the wrong legal standard, as long as it cites the correct case name, the federal courts should view it as having applied the correct legal standard. *Id*. at 1142.

Judge Gorsuch has shown a willingness to review egregious state law errors in capital cases. In ***Williams v. Trammel, cert. denied sub nom. Williams v. Warrior***, 136 S. Ct. 806 (2016), the panel denied the capital defendant's claims of ineffective assistance of counsel and unreasonable application of law by the state court. Judge Gorsuch wrote separately to strongly suggest to the Oklahoma Court of Criminal Appeals ("OCCA") that its statements about accessorial liability, allowing strict liability to trigger the death penalty, ran afoul of *Enmund v. Florida*, 458 U.S. 782 (1982). Executing someone for a strict liability crime would also violate the common law at the time of the founding. Judge Gorsuch did not vote to grant relief on this issue, however, because the state appellate court had decided the case on an alternative ground and the issue was thus not presented.

Judge Gorsuch has repeatedly rejected challenges to lethal injection on Eighth Amendment grounds. He joined the opinion in ***Estate of Lockett v. Faillin***, 841 F.3d 1098 (10th Cir. 2016) denying relief to Lockett's estate, which challenged his botched execution as an Eighth Amendment violation because Lockett was observed writhing in pain. The Tenth Circuit panel rejected the constitutional claim, holding that Lockett's experience was the kind of "isolated mishap" or "innocent misadventure" that did not demonstrate an intolerable risk of harm. *Id.* at 1110 (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) and *Farmer v. Brennan*, 511 U.S. 825, 846 (1994)). *See also Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015) (no showing of Eighth Amendment violation despite problems with Midazolam in lethal injection protocol, joined by Judge Gorsuch), *aff'd sub nom. Glossip v. Gross*, 135 S. Ct. 2726 (2015), *Wackerly v. Jones*, 398 F. App'x 360 (10th Cir. 2010) (lethal injection protocol not shown to create risk of severe pain sufficient to warrant a stay, joined by Judge Gorsuch).

In ***Hooks v. Workman***, 689 F.3d 1148(10th Cir. 2012), Judge Gorsuch dissented from the granting of relief on a claim of ineffective assistance of counsel, where the majority found prejudice from "an extraordinarily limited case in mitigation," and aggravating evidence and argument from defense counsel. *Id*. at 1202. Judge Gorsuch's opinion suggests a skeptical view of the power of mitigating evidence to influence jurors, "[g]iven the comparatively equivocal nature of the unproduced evidence in this case, it is hard to see how it would have mitigated for anyone on the jury the fact Mr. Hooks brutally beat his pregnant wife to death over the course of approximately two hours, leaving her body barely recognizable and his unborn child dead." *Id*. at 1212 (Gorsuch, J., dissenting). Gorsuch also dissented from the holding that defendants are entitled to counsel in *Atkins* claims that first arise in state-post conviction proceedings. He reprimanded the majority for reaching the question, which was unnecessary in his view, and noted his skepticism that any such right exists, "the idea that Mr. Hooks lacked a Sixth Amendment right to counsel in the course of a post-conviction *Atkins* proceeding seems, at least on first blush, entirely consistent with (maybe even compelled by) Supreme Court precedent." *Id*. at 1209.