



JUDGE NEIL GORSUCH'S RECORD ON WOMEN'S LEGAL RIGHTS

Confirms Trump's Promises - and
Women's Worst Fears

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Introduction

On January 31, 2017, President Trump nominated Tenth Circuit Court of Appeals Judge Neil Gorsuch to the Supreme Court.¹ President Trump's nomination of Judge Gorsuch followed his repeated and unprecedented commitments as to the kind of individual he would nominate as a Supreme Court Justice. First, Trump guaranteed that his Supreme Court nominees would vote to overturn *Roe v. Wade*, even declaring that if he were elected *Roe* would be overturned "automatically."² Second, he said that he would nominate a Justice "in the mold" of the late Justice Scalia, a Justice who, in addition to consistently voting to overturn *Roe v. Wade*, voted to strip legal and constitutional antidiscrimination protections from women and girls at work, at school, and in their communities. This is a promise confirmed by Judge Gorsuch's words and legal approach. A recent study analyzing Judge Gorsuch's ideology concluded that he would, if confirmed, actually be more conservative than Justice Scalia – and "probably one of the least likely to drift [ideologically] once he got on the Court."³

Third, Trump promised to only select someone who appeared on lists approved by the Heritage Foundation and the Federalist Society – in effect, outsourcing the vetting of his Supreme Court nominees to these right-wing groups. Judge Gorsuch appeared on their approved list. Indeed, when he announced the nomination, President Trump proclaimed that he was "a man of his word" – in other words, that nominating Judge Gorsuch fulfilled his campaign promises.⁴

Judge Gorsuch's nomination was also made in the context of the President's unprecedented attacks on the independence of the judicial branch. During the campaign, Trump launched personal attacks at Judge Gonzalo Curiel, the federal judge presiding over a fraud trial involving Trump University, asserting that Judge Curiel was biased against him because of the judge's ethnicity.⁵ And, after federal district court Judge James Robart issued a preliminary injunction against the first travel ban, President Trump referred to him as a "so-called judge" and said in a speech that the "courts would seem to be so political."⁶ These remarks by a President threaten the independence of the judicial branch, and make it even more important for Judge Gorsuch to demonstrate that he can exercise independent judgment even if contrary to the outcomes desired by the Administration that nominated him.

Every Supreme Court Justice makes a profound difference on the Court and a single Justice can shape the court for generations to come. Each nominee therefore has the burden of demonstrating, as an affirmative matter, not only that he or she meets the necessary requirements of honesty, integrity, character, temperament, intellect, and lack

of bias in applying the law, but also a commitment to protecting the rights of ordinary people, including civil rights and individual liberties, rights embedded in core constitutional principles and statutes that include protections for women's most central legal rights.

Given Trump's explicit promises and attacks on judicial independence, it is especially important to scrutinize Judge Gorsuch's fitness to serve on this most important court. In reviewing a nominee's record, the National Women's Law Center focuses, in particular, on the constitutional right to privacy (which includes the right to abortion and related aspects of women's reproductive rights and health) and on antidiscrimination protections, including prohibitions against sex discrimination under the Equal Protection Clause or statutory provisions that protect against discrimination in education and employment, and beyond. In addition, protections of women's health and safety, social welfare, access to justice and public benefits represent areas of importance to women, and thus to the Center. Moreover, given that Gorsuch was described not only as "a good strong conservative" but also as a "true loyalist" when applying to a political position in the Bush Department of Justice,⁷ and that, after Judge Gorsuch's nomination, Trump Administration officials have said that President Trump and Judge Gorsuch "support each other,"⁸ and that Judge Gorsuch "represents the type of judge that has the vision of Donald Trump,"⁹ the issue of judicial independence and willingness to serve as a check on the Executive Branch, are also highly relevant questions pertaining to this nomination.

Our review of Judge Gorsuch's record reveals a troubling pattern of narrowly approaching the legal principles upon which every day women across the nation rely. The record demonstrates that Judge Gorsuch's approach to the law disadvantages women and routinely favors corporations, employers, and entrenched powers, whether by ruling that corporations are "persons" that can hold religious beliefs and that those religious beliefs can deny women birth control coverage, espousing an approach to the Constitution that would curtail protections for women against their employers and other powerful entities, or by threatening other critically important advances for women and girls at school, in health care and beyond. Further, Judge Gorsuch's record fails to establish that he would exercise judicial independence and enforce firm limits on executive power.

Based on a broad review of Judge Gorsuch's record, the Center has concluded that his confirmation to the Supreme Court would mean a serious setback for women in this country and for generations to come.

I. Biographical Background

Before his appointment to the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch served as Principal Deputy Associate Attorney General in the Department of Justice during the administration of President George W. Bush. Prior to his service in the Department of Justice, Judge Gorsuch was a partner in the private law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. He served as a law clerk for Justices Byron White and Anthony Kennedy, and for Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit. He was an active member of the Federalist Society, which promotes a strict “originalist” approach to the Constitution. A graduate of Columbia University, Harvard Law School, and Oxford University, he also has taught as an adjunct professor of law at the University of Colorado Law School.¹⁰

II. Hostility Towards Longstanding Legal Protections for Reproductive Rights and Health

Supreme Court decisions have an enormous impact on whether the constitutional right to privacy and liberty, including an individual’s right to abortion and birth control, has true meaning in the lives of individuals in our country.

A review of Gorsuch’s writings and opinions in this area raises serious concerns, as he has consistently written and ruled in ways that would undermine these rights and protections, particularly for reproductive rights and health. His record shows hostility to the constitutional right to privacy, criticizing Supreme Court abortion jurisprudence, supporting an anti-abortion politician’s effort to defund Planned Parenthood without legal basis to do so, and allowing the professed religious beliefs of employers and other institutions to override women’s access to birth control and abortion.

A. Hostility to the Constitutional Right to Privacy.

On multiple occasions, Gorsuch has shown hostility to the Constitution’s core principles of liberty and privacy.

In his 2006 book, *The Future of Assisted Suicide and Euthanasia*, Gorsuch evinces a general hostility towards constitutional protections of personal autonomy.¹¹ He argued that a broad reading of the Constitution’s protections of personal and intimate decisions creates a slippery slope, which could end in allowing acts such as polygamy or consensual duels.¹² In fact, the Constitution’s protection of personal and intimate decisions is the basis for the right to obtain birth control for married and single people, to

consensual same-sex sexual relationships, to marry, and to decide how to rear one's children, in addition to whether to have an abortion.

With respect to the right to abortion, Gorsuch sought to minimize the impact of the Supreme Court's decision in *Planned Parenthood v. Casey*, which – in addition to reaffirming the central premise of *Roe v. Wade* – reaffirmed that the Constitution protects those decisions that are among “the most intimate and personal choices a person makes in a lifetime.”¹³ The Court in *Casey* went on to state that “at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁴ Together, these passages form the core of the *Casey* decision, building on a long line of cases and recognizing that a woman's right to decide whether to have an abortion is matter of personal autonomy and liberty. Yet, in his 2006 book and in a 1996 *amicus* brief, Gorsuch dismissed these passages in *Casey* as “no more than dicta”¹⁵ and “arguably inessential”¹⁶ to the Court's decision. Instead, Gorsuch has argued that the Court's decision in *Casey* was only the result of *stare decisis* – or respect for Court precedent, or not based on the merits of the right itself.¹⁷

B. Extreme Deference to Political Efforts to Defund Planned Parenthood for Improper Purposes.

Planned Parenthood Association of Utah v. Herbert, 828 F.3d 1245 (10th Cir. 2016), involved an attempt by the governor of Utah to strip the Utah Planned Parenthood affiliate of critical funding, which would have led to individuals losing access to STI testing, health education, and preventive care. The governor's move came as part of a wave of political efforts around the country to strip Planned Parenthood of funding following the release of misleading and inflammatory videos put out by an antiabortion group.

A three-judge panel of the Tenth Circuit temporarily blocked the governor's attack on Planned Parenthood on the grounds that it violated the “unconstitutional conditions doctrine” – which prevents the government from withholding funds to impose a condition that is a waiver of a constitutional right.¹⁸ In this case, the constitutional rights at stake are the rights under the 1st Amendment to advocate for access to legal abortion and associate with other abortion providers and under the 14th Amendment, the right to provide legal abortion services. Both sides agreed that if the governor in fact suspended funding in retaliation for Planned Parenthood's advocacy in favor of abortion and provision of legal abortion care the governor, such an action would have violated the constitutional conditions clause.¹⁹ The case therefore largely turned on the governor's motive for eliminating funding – the governor asserted that his actions were prompted by

the misleading video and Planned Parenthood argued that he acted in retaliation for their exercise of constitutional rights.²⁰

The court granted Planned Parenthood's motion for a preliminary injunction, finding that it was likely to prevail in its claim that the governor withdrew funds in order to retaliate against Planned Parenthood for exercising its constitutional rights, relying largely on statements made by the governor, including that he did not think that the videos depicted any unlawful conduct in the state of Utah.²¹ In addition, the court found that the governor, an "admitted opponent of abortion, viewed the situation that presented itself by release of the ... videos as an opportunity to take public action against [Planned Parenthood], deprive it of pass-through federal funding, and potentially weaken the organization and hamper its ability to provide and advocate for abortion services."²²

After the panel's decision, neither party asked for the decision to be reviewed, but in a step characterized by a Tenth Circuit judge as "extraordinary" and "unusual," one judge on the Tenth Circuit called for the entire court to rehear the case.²³ In his testimony before the Senate Judiciary Committee on March 21, 2016, Gorsuch acknowledged that he was that judge. The Tenth Circuit refused to consider the case again. Gorsuch wrote the dissenting opinion that criticized the majority's decision to block the Governor from defunding Planned Parenthood, arguing that the court should have deferred to the Governor's stated reasons for defunding Planned Parenthood. Gorsuch's dissent drew a sharp rebuke from a fellow Tenth Circuit judge, who stated that "there is no merit to the dissent's complaints," and identified several places where Gorsuch's reasoning "mischaracterize[d]" the lower court decision.²⁴ Gorsuch's willingness to take such unusual procedural steps, including crediting the demonstrably baseless reasons provided by the Governor, in order to achieve a result that allows a governor to shut down Planned Parenthood, leaving women without essential health care services, demonstrates how far he would stretch the law and court processes to limit women's reproductive rights and health.

C. Allowing Corporations' Religious Beliefs to Override Women's Insurance Coverage of Contraception.

On two occasions, Gorsuch has addressed challenges to the birth control benefit in the Affordable Care Act, which requires health insurance plans to ensure women have coverage of all FDA-approved methods of birth control without cost-sharing. In both cases, his opinions elevated the employer's asserted beliefs over the health needs of women workers, allowing an employer's religious beliefs to override employees' right to

insurance coverage of birth control. And in both cases, his legal reasoning showed little regard for the harm imposed on the women denied coverage of contraception.

In *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), Gorsuch joined the decision preceding the Supreme Court's *Hobby Lobby* decision, and also wrote a separate concurring opinion. The case presented a challenge to the birth control benefit under the Religious Freedom Restoration Act (RFRA), which requires courts to determine if a person's religious exercise rights have been "substantially burden[ed]" and if so, whether the law both furthers a compelling government interest that can justify the burden and then, whether the law is narrowly tailored to further the interest.²⁵

Citing to *Citizens United v. FEC*,²⁶ the Tenth Circuit held that for-profit corporations like Hobby Lobby – a commercial craft store chain employing more than 13,000 people – can be "persons" with religious beliefs and that such employers can use their asserted religious beliefs to block employees' insurance coverage of birth control, despite the burden placed on the women denied the coverage.²⁷ It was a fractured opinion, but Gorsuch joined the decision in its entirety, including the extreme holding that promoting gender equality and public health were not compelling government interests. Gorsuch also would have ordered a preliminary injunction in favor of the companies, allowing them to refuse to comply with the birth control benefit, a view that was not shared by a majority of the other judges.²⁸ Instead, the Tenth Circuit sent the case back to the lower court to consider whether to grant a preliminary injunction.

Gorsuch's separate concurrence focused specifically on the Hobby Lobby owners in order to explain not only why the owners had standing to bring claims against the birth control benefit, but also why they were entitled to a preliminary injunction to allow them to not comply with the benefit while the case proceeded to the merits. Other judges on the court wrote separately to question Gorsuch's willingness to raise legal questions that were unnecessary in order to grant relief that was premature.²⁹ Gorsuch also elaborated in his concurrence on the substantial burden question, giving near-absolute deference to the plaintiffs' articulation of what constitutes a substantial burden, arguing the individual plaintiffs' plain assertion was determinative even when, as another judge explained, "factual disputes" existed regarding the science behind the plaintiffs' claims that a contraceptive could be considered an abortifacient.³⁰ Gorsuch's reading would render meaningless RFRA's requirement that courts determine whether a regulation imposes a substantial burden. Finally, Gorsuch notably did not even acknowledge the employees who would lose insurance coverage under his approach and the serious financial burden on women.³¹

The case went to the Supreme Court, which decided in 2014 by a 5-4 vote that certain closely-held family-owned for-profit businesses like Hobby Lobby are “persons” capable of exercising religion under RFRA and can bring religious exercise claims under that law.³² Unlike the Tenth Circuit majority that included Gorsuch, the Supreme Court assumed the benefit forwarded a compelling interest,³³ and five Justices explicitly affirmed that the birth control benefit advances a compelling interest in women’s health and well-being.³⁴ But the Court found that the birth control requirement was not narrowly tailored. It pointed to the accommodation that was already provided to non-profit organizations to show that less restrictive means were available for their employees to receive contraceptives.³⁵ Under the accommodation, certain non-profit employers with religious objections to birth control can opt out of the benefit by filling out paperwork to notify either their insurance plan or the federal government of their objections. When a qualifying employer does so, the accommodation guarantees employees receive coverage separately through their regular insurance plan. In its determination, the Supreme Court made it clear that courts must take into account the effect on women workers,³⁶ finding that the effect of the accommodation on women would be “precisely zero.”³⁷ This stands in sharp contrast to the decision by the Tenth Circuit, which disregarded the women workers, and Gorsuch’s concurrence, which gave the workers no mention at all.

Following *Hobby Lobby*, the 10th Circuit considered *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315 (10th Cir. 2015), a RFRA challenge to that very accommodation offered to non-profit organizations. In this case, the non-profit employers who qualified for the accommodation claimed that the simple act of filling out a form was too burdensome. After the Tenth Circuit decided against the objecting employers, the entire Circuit Court decided not to review the decision *en banc*. However, Gorsuch joined a dissent that went far beyond the Supreme Court’s *Hobby Lobby* precedent. The dissent argued that even the accommodation constituted a substantial burden on religious exercise.³⁸ Eight of the nine circuit courts of appeals to consider this question found that the accommodation was not a substantial burden,³⁹ relying on the Supreme Court’s own language in *Hobby Lobby*.

Moreover, despite the fact that the Supreme Court’s *Hobby Lobby* decision made clear that as part of RFRA’s balancing test courts must consider the impact on women, the dissent Gorsuch joined in *Little Sisters* did not address the women who would lose essential birth control coverage if their employers’ claims prevailed.⁴⁰ In fact, the *Little Sisters* dissent Gorsuch joined was dismissive of any impact on individuals, declaring, “The opinion of the panel majority is clearly and gravely wrong – on an issue that has

little to do with contraception and a great deal to do with religious liberty.”⁴¹ In contrast, when the Supreme Court later considered the issue in *Zubik v. Burwell*,⁴² the Court remanded the case, instructing the parties 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.”⁴³

Gorsuch’s willingness to give near-absolute deference to employers making RFRA challenges – and virtually no regard to the burden on women – could have major adverse consequences for women’s health and rights, and be applied to a range of rights and protections. Following the Supreme Court’s *Hobby Lobby* decision, there have been attempts to use RFRA beyond the context of contraception to challenge various antidiscrimination laws, including laws that protect women, LGBTQ individuals, and students from discrimination. In addition, plaintiffs have attempted to use RFRA to undermine laws that protect employees by allowing them to unionize; promote public health by requiring vaccinations; and require pharmacies to fill lawful prescriptions.⁴⁴ It has even been raised as a defense in a case involving violent kidnappings.⁴⁵ While these kinds of claims have been largely unsuccessful, they demonstrate litigants’ willingness to use RFRA to harm others. Gorsuch’s understanding of how courts should apply RFRA’s test would be far more favorable to these types of claims. If such cases were to reach the Court, his vote could be the difference in allowing a plaintiff to use RFRA to harm others, change the legal contours of how RFRA is applied by courts, and even expand the law’s reach, in harmful ways.

D. Allowing Hospitals’ Religious Beliefs to Override a Woman’s Ability to Secure Abortion.

The 1996 *amicus* brief Gorsuch co-authored, mentioned above, raises additional concerns that he would allow religious beliefs to prevail over women’s legal right to reproductive health care. The brief criticized an Alaska Superior Court decision enjoining a hospital’s policy of refusing to provide abortions except in very limited circumstances.⁴⁶ The Alaska court found that because the hospital was the only hospital in the Mat-Su borough, an area of more than 25,000 square miles, and because of “Alaska’s relative geographic isolation,” the hospital’s refusal to provide abortions would impose “substantial physical, emotional and financial hardship” on women seeking abortions.⁴⁷ The court later permanently blocked the policy for these reasons in a decision that was affirmed by the Alaska Supreme Court.⁴⁸ The 1996 Gorsuch brief, however, claimed the court in the Alaska case “distorted” the constitutional right to abortion.⁴⁹ Further, the brief characterized the decision as “courts feel[ing] free to override the conscience of

health care providers.”⁵⁰ In fact, the decision did not force individual health care providers to treat women seeking an abortion, but rather the requirement was limited to the hospital, allowing individuals to opt out of providing abortion care.⁵¹ Again, the brief disregards the Alaska women seeking abortion care, and blurs the religious rights of individuals and corporate entities.

III. Approach Would Limit Antidiscrimination Protections

The Supreme Court determines the reach of critical antidiscrimination protections at work, at school, in federal spending and beyond. But just as Judge Gorsuch’s record in cases involving reproductive rights elevate the rights of corporate employers and hospitals over women’s rights to their own religious beliefs, health care, and personal autonomy, his approach to antidiscrimination protections, particularly in the workplace, works to the disadvantage of women.

A. *“Backwards-Looking” Approach to Constitutional Protection Against Sex Discrimination.*

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws.” Since 1973, the Supreme Court has held that laws or government policies that draw distinctions on the basis of sex are subject to heightened judicial scrutiny. The government must demonstrate an exceedingly persuasive justification that is substantially related to an important state interest.

Justice Scalia, praised by both Trump and Gorsuch, voted against this longstanding heightened protection of women from government-sponsored sex discrimination under the Equal Protection Clause of the Fourteenth Amendment, precisely because of the nation’s history of official discrimination against women.⁵² In addition, Scalia did not believe that the Equal Protection Clause permitted race-conscious university admissions policies intended to increase diversity.⁵³ Justice Scalia was, moreover, a vociferous opponent of constitutional antidiscrimination protections for LGBTQ individuals.⁵⁴

Judge Gorsuch has embraced an approach to judging that evokes Justice Scalia’s brand of textualism and originalism. Gorsuch wrote that

judges should strive (if humanly and so imperfectly) to apply the law as it is, *focusing backward, not forward* (emphasis added), and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be. . . .⁵⁵

This “backwards” approach, if applied to the Equal Protection Clause of the Constitution, called into question whether Gorsuch would adhere to the longstanding heightened scrutiny standard for reviewing sex discrimination if confirmed to the Supreme Court. It is little comfort that Judge Gorsuch has accurately described heightened scrutiny for race and sex discrimination under the Equal Protection Clause as it now stands, given the narrow ways he has applied these standards in practice.⁵⁶ For example, Judge Gorsuch joined an opinion summarily concluding that a public employer’s decision to bar a transgender employee from using the restroom that conformed to her gender identity did not violate the Equal Protection Clause.⁵⁷

B. Narrow Construction of Statutory Protections that Limit Women’s Rights in the Workplace.

Congress has passed a number of laws that protect against sex discrimination, including Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, race, national origin, or religion, Title IX of the U.S. Education Amendments of 1972, which prohibits discrimination on the basis of sex in education, and the Family and Medical Leave Act. Other laws protect against discrimination on the basis of age or disability in the workplace and in schools. The courts’ interpretation and enforcement of all of these laws have been critical to women’s opportunity and advancement at work, at school, and beyond. Justice Scalia, it should be noted, narrowly read these statutory protections against sex discrimination in employment,⁵⁸ and in education,⁵⁹ in ways that would have left many women and girls without recourse in the face of discrimination.

C. Evidence of Endorsement of Discriminatory Practices.

A letter submitted to the Senate Judiciary Committee raises significant concerns about Judge Gorsuch regard for women’s workplace rights. That letter, written by a former student, states that Judge Gorsuch made a series of disturbing comments in a Legal Ethics and Professionalism course that he taught in 2016 at the University of Colorado Law School: according to the student, Judge Gorsuch indicated that women commonly manipulate employers by accepting jobs without disclosing their plans to become pregnant, accepting maternity benefits from their employers, and then failing to return to work after maternity leave.⁶⁰ She went on to say:

Judge Gorsuch outlined how law firms, and companies in general, had to ask female interviewees about pregnancy plans in order to protect the company. . . Judge Gorsuch told the class that not only could a future employer ask female interviewees about their family and pregnancy plans,

companies must ask females about their family and pregnancy plans to protect the company. . . Throughout this class Judge Gorsuch continued to make it very clear that the question of commitment to work over family was one that only women had to answer for....Instead, Judge Gorsuch continued to steer the conversation back to the problems women pose for companies and the protections that companies need from women.

A second former student from the same class submitted an anonymous declaration stating that Judge Gorsuch “said that many female lawyers became pregnant, and questioned whether they should do so on their law firms’ dime.”⁶¹

If, as the student alleges, Judge Gorsuch stated that companies can and indeed must ask women (and only women) about their plans in regard to family and pregnancy in order to protect corporate interests, those statements are wildly at odds with longstanding protections against pregnancy discrimination and other forms of sex discrimination at work.⁶² Title VII prohibits employment discrimination on the basis of sex, specifically including discrimination on the basis of pregnancy and childbirth, and indisputably prohibits taking an adverse employment action against a female employee based on her pregnancy or her intention to become pregnant. Similarly, the law is clear that an employer cannot discriminate against an employee based on the fact that she has children if male employees are not held to the same standards.⁶³

There are two possible interpretations of Gorsuch’s alleged statements—and either should be considered disqualifying. The first is that employers should disregard the law, putting their own perceived financial self-interest above their legal obligations to treat female applicants and employees fairly. The second is that, given the opportunity, Judge Gorsuch would seek to overturn the long-established principle that denying women employment opportunities because they have children, or because they may have children in the future, is one of the most persistent and harmful forms of sex discrimination,⁶⁴ relegating women to second-class status at work. After all, the statements certainly imply that employers should be permitted to reject female applicants based on their intention to have a family, while making no such queries or judgments as to male applicants.

D. Deferring to Employers in Discrimination Claims.

The reported statements by Judge Gorsuch regarding female job applicants are inconsistent with both the letter and purpose of Title VII (as well as the FMLA). But they are in many ways consistent with Gorsuch’s record in employment discrimination cases, where he has demonstrated a repeated tendency to narrowly construe workplace antidiscrimination protections and reflexively defer to employers’ stated rationales for

adverse employment actions against employees, even when this means ignoring applicable precedent. Judge Gorsuch has favored employers in discrimination cases. He ruled for the employer in a full nine out of 12 published employment discrimination decisions he authored,⁶⁵ issued a mixed decision in two,⁶⁶ and ruled for the employee in only one.⁶⁷ His unpublished decisions are in line with this trend.⁶⁸ Examples of women⁶⁹ in many workplace settings who were denied relief in cases in which he participated include:

- Carole Strickland alleged that her supervisors subjected her to continual criticism and imposed standards on her that were not imposed on the male employees in her position (at least one of whom trailed her on every sales measure).⁷⁰ She finally felt forced to leave her job. In *Strickland v. United Parcel Service*, 555 F.3d 1224 (10th Cir. 2009), the Tenth Circuit panel reversed and remanded the district court's judgment as a matter of law for the employer on her sex discrimination claim--but Gorsuch dissented. He argued that Strickland had failed to produce evidence demonstrating that her supervisor treated her less favorably than her male counterparts. As the majority noted, however, testimony from multiple coworkers established that Strickland was treated differently from her male counterparts and subjected to requirements that were not imposed on them, even as she outperformed some of them. Gorsuch's dissent demonstrates his tendency to construe facts in the light most favorable to the employer, even when, as here, the applicable legal standard demands that the facts be viewed in the light most favorable to the employee.
- Betty Pinkerton alleged that in December 2002, her supervisor began to sexually harass her.⁷¹ Over the next two months, on multiple occasions he asked Pinkerton questions about her sexual habits, her breast size, and about whether she missed being with men since her divorce, and he asked to have lunch at her house. In February 2003, Pinkerton reported his conduct. Over dissent, Gorsuch joined an opinion in *Pinkerton v. Colo. Dep't of Transportation*, 563 F.3d 1052 (10th Cir. 2009), ruling against Pinkerton on the basis that her failure to report the harassment for two months was unreasonable, even though isolated remarks only become a pattern of harassment over time and upon repetition. As the dissenting judge observed, it will often take multiple inappropriate statements to constitute sexual harassment under law – “a hostile environment must be intolerable, and often it may take more than one inappropriate statement for the environment to become intolerable.”⁷² Moreover, two months is hardly a long period of time for an employee to wait to complain. Not only did Gorsuch's approach ignore the law,

it ignores the nature of workplace harassment and the workplace realities that the law is designed to address.

- Judge Gorsuch's decision in *Weeks v. Kansas* is also noteworthy. Rebecca Weeks, a state fire marshal's in-house counsel, argued that she was fired after she had advised her employer to take two pregnancy discrimination complaints seriously.⁷³ Gorsuch's decision affirmed summary judgment in favor of the employer on the plaintiff's Title VII retaliation claim. In the opinion, he acknowledged that his decision relied on 10th Circuit authority that may have been superseded by a subsequent Supreme Court case, but Gorsuch declined to apply the standard set out by the Supreme Court, because Weeks had not raised the controlling Supreme Court case in her brief. Thus, while Judge Gorsuch did not uniformly rule against protections against retaliation for workers, his failure in *Weeks* to consider relevant court decisions, especially Supreme Court decisions, undermines the very substance and purpose of civil rights laws' sweeping mandate to eradicate discrimination and is reinforcing of a troubling tendency to strain to find a means to deny plaintiffs' claims of discrimination.
- When Grace Hwang was diagnosed with leukemia, she was provided six months of leave for treatment by the university that employed her. She then requested additional leave through the end of the semester, because there was a flu epidemic on campus and her immune system was compromised by treatment. She offered to work from home, including online teaching, but the university refused, claiming that employees were entitled to a maximum of six months of leave pursuant to its policy, with no exceptions.⁷⁴ Hwang argued that her employer's refusal to accommodate her disability by allowing her to work from home violated the Rehabilitation Act. Gorsuch disagreed, writing in *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014), that an employee who was unable to work for more than six months was categorically unable to perform the essential duties of her position, discounting her availability to work from home. In rejecting her claim, Gorsuch ignored the Rehabilitation Act's requirement that employers evaluate accommodation requests on a case by case basis, rather than imposing inflexible rules about what forms of accommodation are reasonable. Indeed, other courts have declined to adopt the standard he set out, which narrows the law's protections.⁷⁵
- Rebecca Kastl, a transgender woman, was barred from using the women's restroom at the school district where she worked until she could prove she had

completed gender reassignment surgery.⁷⁶ She was then terminated. Gorsuch joined a memorandum opinion in *Kastl v. Maricopa County Community College District*, 325 Fed. App'x 492 (9th Cir. 2009), finding that the employer's actions did not constitute gender discrimination under Title VII or Title IX, or violate the Equal Protection Clause. The court acknowledged its own precedent, as well as Title VII precedent from another circuit, established that discrimination against a transgender individual for failure to conform to gender norms constitutes sex discrimination. Nevertheless, in a conclusory decision only a single paragraph long, the opinion stated that Kastl had failed to demonstrate that the district's decision to ban her from the restroom in fact was based on her gender, rather than on "safety concerns," though the decision to ban her from the restroom based on her transgender status should have been considered facially discriminatory. The panel's reasoning has been rejected by the EEOC,⁷⁷ conflicts with the multiple federal courts of appeals decisions that have affirmed that discrimination on the basis of gender identity constitutes sex discrimination,⁷⁸ and relies on the outmoded, paternalistic idea that discrimination is justified by a need to protect women. The case again demonstrates Gorsuch's tendency to reflexively defer to employers' stated rationales, even in the face of legal standards and precedent that support the plaintiff.

E. Hostility to Plaintiffs' Claims Seeking Educational Opportunity and Access.

A review of Judge Gorsuch's education cases reveals a similarly troubling approach to core antidiscrimination protections. This is especially true in the area of legal protections that provide students with disabilities access to public education. These statutes are crucial to ensure all students, regardless of ability, can learn and thrive. Yet without robust judicial enforcement consistent with the disability laws' purpose, students' rights on paper cannot ensure educational opportunities in practice.

As an appellate judge, Gorsuch has repeatedly failed to protect the rights of students with disabilities, instead putting roadblocks in their way. For example, in *A.F. v. Española Public Schools*, 801 F.3d 1245 (10th Cir. 2015), Gorsuch wrote for the majority, requiring the mother of a New Mexico student with a disability to exhaust unnecessary procedural obstacles before filing suit under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act – obstacles that the Supreme Court held this year were not required by law.⁷⁹

Gorsuch has stated that he understands schools' responsibilities under disability rights law to be limited. He wrote a concurrence in *Jefferson County School District R-1 v.*

Elizabeth E., 702 F.3d 1227 (10th Cir. 2012), arguing that schools have no responsibility to address the “emotional, social, or medical needs” of students with disabilities under the Individuals with Disabilities Education Act (“IDEA”). This argument stands in stark contrast to the fact that, as the Third Circuit noted in *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir.1981), such “social, emotional, medical and educational problems” are “inextricable,” as educators have long known. Gorsuch has also repeatedly opposed Fourth Amendment protections for students with disabilities subject to cruel disciplinary practices. On the Tenth Circuit, Gorsuch joined two opinions, *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775 (10th Cir. 2013), and *Couture v. Board of Education*, 535 F.3d 1243 (10th Cir. 2008), rejecting constitutional claims by students with disabilities who were secluded in “timeout rooms” – one for as long as two hours without any light or windows – that exacerbated their symptoms and caused physical and mental harm. Such maltreatment of students with disabilities is counter to the very purpose of the applicable civil rights law: to ensure students of all abilities can learn in a healthy, safe, and inclusive environment.

Although not a disability case, *Simpson v. University of Colorado*, 500 F.3d 1170 (10th Cir. 2007), is one of the few cases where Judge Gorsuch sided with a plaintiff in a discrimination case. Under Title IX, the civil rights law prohibiting sex discrimination in federally funded education programs, schools must address sexual harassment. The *Simpson* case concerned the University’s practice of putting female students at known risk of sexual assault through its official policy assigning them to show visiting recruited male athletes “a good time,” sometimes with the specific promise of sex. The University continued this appalling practice despite being warned by the District Attorney about the University’s need to reform after the rape of a high school girl at a recruiting party some years before the rapes of University students at issue in *Simpson*. Judge Gorsuch sat on a panel that unanimously concluded the school was liable given its own policies lead to female students being raped. *Simpson* is consistent with the Supreme Court’s decision in *Gebser v. Lago Vista School District*.⁸⁰ Because *Simpson* was such a clear-cut and extreme case, Gorsuch’s vote in *Simpson* does little to provide reassurance about his legal views on antidiscrimination protections in light of his overall record.

IV. Lack of Deference to Federal Agencies When They Support the Rights of Individuals.

Federal agencies have the legal responsibility to interpret, implement, and enforce core labor and employment rights, as well as civil rights protections in the context of education, health care, and elsewhere. Through their day-to-day work fulfilling these

responsibilities, agencies build deep expertise in these issues. Often agency regulations define, for all practical purposes, the contours of the protections established by statute.

A critical legal principle that respects the authority and expertise of federal agencies is “*Chevron* deference,” whereby the judicial branch defers to agencies’ reasonable interpretations of federal law when the statute is susceptible to different interpretations. It stems from Supreme Court precedent, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Judge Gorsuch has directly questioned this longstanding Supreme Court precedent requiring judicial deference to government agency interpretations of laws when Congress has granted the agency authority to interpret and implement the law in question.⁸¹ Indeed, in this regard, Gorsuch shows himself to be more conservative than Justice Scalia, who was a strong proponent of *Chevron* deference.⁸² Further, it is fully consistent with the Trump Administration’s recent actions pledging to rescind agency standards and regulations from the FDA to the EPA,⁸³ limiting the issuance of new regulations,⁸⁴ and generally defunding federal agencies.⁸⁵

Eliminating or limiting such deference could result in real-world adverse consequences for women. For example, the Department of Education’s Title IX regulations and guidance interpret the law’s core protection against sex discrimination in education. Among other things, these regulations and guidance define and clarify school’s obligations to ensure equal athletic opportunities to girls, to accommodate pregnant and parenting students, and to address sexual assault. As just one example, in 1979, the Department of Education published a policy guidance explaining how schools should promote equal athletics opportunities for girls. Today, nearly 1.5 million more high school girls participate in sports than they did the year before the guidance.⁸⁶ The lack of deference advocated by Gorsuch for such guidance, however, could have made these regulations susceptible to challenge – foreclosing athletic opportunities for millions of girls.

In his jurisprudence, Gorsuch has repeatedly demonstrated reluctance to defer to agency expertise in interpreting the laws that they implement and enforce, and this has often resulted in concrete adverse consequences for workers, as in the *Hwang* case described above. He has instead sought to substitute his own judgment for agency interpretations and decisions, which threatens to undermine critical worker protections. For example:

- In *TransAm Trucking, Inc., v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016), Gorsuch’s dissent took the majority to task for deferring to the Department of Labor’s interpretation of the whistleblower provision of a

workplace health and safety law, the Surface Transportation Assistance Act (STAA). A Department of Labor administrative law judge had ruled that the employer violated the STAA when it terminated a truck driver for failing to stay in his tractor-trailer awaiting a repair person after he reported that it broke down in subzero temperatures. After waiting several hours in the extreme cold, the truck driver unhitched the trailer and drove off, because he had no heat in his truck and could no longer bear the cold, and because he refused to drag the trailer with frozen brakes, as had been suggested by dispatch. The administrative law judge ruled that the refusal to drag the trailer with frozen brakes based on valid safety concerns was protected activity under the STAA, as it constituted a refusal to “operate” the vehicle because of safety concerns. The Tenth Circuit majority deferred to that interpretation of the law. Gorsuch criticized the majority for deferring to the agency’s interpretation that the law protected the truck driver, because the agency had not raised the issue of the legal deference to which its own interpretation of the whistleblower provision was entitled. He would instead have substituted his interpretation of the phrase “refuse to operate” for the agency’s, and upheld the driver’s termination.

- In *NLRB v. Community Health Services, Inc.*, 812 F.3d 768 (10th Cir. 2016), Gorsuch dissented from the majority’s holding, which deferred to the National Labor Relations Board’s (NLRB) rationale for its decision to disregard interim earnings when calculating back pay awards for employees whose hours were unlawfully reduced. An administrative law judge ruled that the employees were entitled to back pay for the employer’s violation of the National Labor Relations Act (NLRA), and rejected the employer’s argument that earnings from other sources during the back pay period should be deducted from the employee’s back pay calculation. Gorsuch argued that the NLRB’s decision lacked a satisfactory rationale, and was not entitled to judicial deference because it exceeded its statutory authority to provide back pay for losses suffered. But the majority recognized that the NLRB was granted broad discretion in fashioning a back pay award, so long as it was not an attempt to achieve ends other than the policies promoted by the NLRA. Gorsuch’s refusal to defer to the NLRB’s analysis would have limited the liability of the employer who had been found to violate the law and replaced his own judgment for that of the expert Board, while limiting protections for the workers.

Beyond educational opportunities and worker protections, the failure to defer to agencies would have serious implications in innumerable other areas of the law, from the environment to consumer protections to the health and safety of people in this country.

Conclusion

Every Justice on the Supreme Court makes a difference, with many critical cases decided by narrow margins. Landmark decisions on women's right to equality and liberty, marriage equality, enforcement of antidiscrimination principles at work and at school, and voting rights, among many others, show why every vote on the Supreme Court counts.

The country needs Justices on the Supreme Court who respect core constitutional values of liberty, equality, and justice for all, and who respect laws designed to protect individuals against unfair and harmful actions by employers, educational institutions, and other powerful forces. Yet the kind of nominee that President Trump promised to appoint would eviscerate vital legal rights and protections for those who turn to the courts for fairness, and most especially women. Indeed, Judge Gorsuch's record demonstrates that he would fulfill the President's promises and fail to act as an independent check on executive power. If Judge Gorsuch is confirmed to a lifetime position on the Supreme Court, women could suffer the devastating impact of his decisions for generations to come.

¹ It should of course be noted that in March 2016, President Obama nominated Judge Merrick Garland to fill the current vacancy on the Court to which Judge Gorsuch has been nominated. Because of the unprecedented obstruction of Senate Republican leadership, Judge Garland, whose nomination had bipartisan support, *see* Paul Kane, *The Influential Chorus of Conservatives Supporting Garland's Nomination*, WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/politics/the-influential-chorus-of-legal-conservatives-supporting-garlands-nomination/2016/04/07/6cb750fe-fc12-11e5-80e4-c381214de1a3_story.html?utm_term=.d2fdbfe67430, did not receive a hearing or vote.

² Emily Crockett, *Trump on 60 Minutes: If Roe v. Wade is Overturned, Women Will "Have to Go to Another State"*, VOX (Nov. 14, 2016), <http://www.vox.com/policy-and-politics/2016/11/13/13618556/trump-60-minutes-roe-v-wade-abortion>.

³ Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017) (quoting Professor Lee Epstein), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html>.

⁴ *Full Transcript and Video: Trump Picks Neil Gorsuch for Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/full-transcript-video-trump-neil-gorsuch-supreme-court.html>.

⁵ Nina Totenberg, *Who is Judge Gonzalo Curiel, the Man Trump Attacked for his Mexican Ancestry?*, NPR (June 7, 2016), <http://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry>.

⁶ Matt Ford, *Federal Judges Refuse to Reinstate Trump’s Travel Ban*, ATLANTIC MONTHLY (Feb. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/02/ninth-circuit-trump-ruling/516228/>.

⁷ Email from Luke Frans, Chairman, Republican National Committee to Jennifer Harrington, Mar. 11, 2005,

https://d3n8a8pro7vhmx.cloudfront.net/ncapa/pages/89/attachments/original/1489760592/Email_2_-_mehlman.pdf?1489760592.

⁸ Fox News, *Conway: Merits of Executive Order Will Prevail in Court*, FOX NEWS (Feb. 9, 2017), <http://video.foxnews.com/v/5317841227001/?#sp=show-clips> (begins at 4:01).

⁹ Andrew Rafferty, *Neil Gorsuch Presents Himself as Consensus Builder at SCOTUS Confirmation*, NBC NEWS (March 20, 2017), <http://www.nbcnews.com/politics/politics-news/supreme-court-nominee-neil-gorsuch-s-confirmation-hearings-begin-n735716>.

¹⁰ NEIL GORSUCH, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT, SENATE JUDICIARY COMMITTEE 1-2 (2017), available at

[https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJO%20\(Public\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJO%20(Public).pdf).

¹¹ A full two chapters of Gorsuch’s book, which is otherwise focused on arguing against allowing medical aid in dying, are dedicated to explaining and deconstructing arguments about personal autonomy and the right to medical aid in dying. He goes so far as to argue that if personal autonomy arguments prevailed it would have “ripple effects... on social and cultural norms” and points to instances of mass suicides and cannibalism, implying incidents of this type of behavior would increase or even be made legal. NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 99-101 (Princeton Univ. Press 2006).

¹² *Id.* at 81-82.

¹³ *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833, 851 (1992).

¹⁴ *Id.*

¹⁵ Brief of Amicus Curiae of the American Hospital Assoc. in Support of Petitioners at *7, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹⁶ GORSUCH, *supra* note 11, at 80.

¹⁷ *Id.*

¹⁸ *See Planned Parenthood Assoc. of Utah v. Herbert*, 823 F.3d 1245 (10th Cir. 2016).

¹⁹ *Id.* at 1258-63.

²⁰ *Id.* at 1260-62.

²¹ *Id.* at 1261-62.

²² *Id.* at 1261.

²³ *Planned Parenthood Assoc. of Utah v. Herbert (Planned Parenthood II)*, 839 F.3d 1301, 1302 (10th Cir. 2016).

²⁴ *See e.g., id.* at 1302, 1304, 1306.

²⁵ 42 U.S.C. § 2000bb-1 (2012).

²⁶ 558 U.S. 310 (2010).

²⁷ The Tenth Circuit noted the impact on employees—stating “Of course, employees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would have an economic burden not shared by employees of companies that cover all twenty methods”—but not did address it further, suggesting they did not consider it relevant to the outcome of the case. *Hobby Lobby*, 723 F.3d at 1144.

²⁸ *Id.* at 1152 (Gorsuch, J., concurring).

²⁹ “Regarding the threshold question of the applicability of the Anti-Injunction Act (AIA), three judges would have us take the unnecessary step of concluding that the AIA is not jurisdictional, but instead a waivable, non-jurisdictional ‘claims processing rule.’” (*id.* at 1164 (Briscoe, J., concurring in part and dissenting in part)); “But, by recognizing a new ‘management standing’ rule applicable to the individual plaintiffs, Judge Gorsuch and Judge Matheson ‘upend th[is] traditional understanding’” (*id.* at 1177 n.13 (Briscoe, J., concurring in part and dissenting in part)); “I do not believe we can conclude at this point that

the Greens are entitled to relief. Because this court raised the standing issue and asked the Government to brief it, I do not think we should decline to consider the Government’s prudential standing arguments.”).

³⁰ *Id.* at 1177 (Briscoe, J., concurring in part and dissenting in part).

³¹ Notably, many of Hobby Lobby employees work as retail workers—low-wage jobs disproportionately likely to be held by women. Many of these women may be unable to take on the financial burden of paying the out of pocket costs for birth control, particularly the steep up-front costs of long-acting reversible contraceptives like the IUD which can cost up to \$1,000 up-front. These are the women Gorsuch’s opinions ignore. *See* NAT’L WOMEN’S LAW CTR., *LOW-WAGE JOBS HELD PRIMARILY BY WOMEN WILL GROW THE MOST OVER THE NEXT DECADE* (April 2016), available at <https://nwlc.org/wp-content/uploads/2016/04/Low-Wage-Jobs-Held-Primarily-by-Women-Will-Grow-the-Most-Over-the-Next-Decade.pdf>.

³² *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).

³³ *Id.* at 2780.

³⁴ “It is important to confirm the premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.” *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). “[T]he Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women’s well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence.” *Id.* at 2799 (Ginsburg, J., dissenting).

³⁵ *Id.* at 2758.

³⁶ *See, e.g., id.* at 2781 n.37 (“It is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’”) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *see also id.* at 2760 (“we certainly do not hold or suggest that RFRA demands accommodation . . . no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.” (internal quotation marks and alterations omitted)).

³⁷ *Id.* at 2760.

³⁸ *See Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315, 1316 (10th Cir. 2015) (Hartz, J., dissenting).

³⁹ *Priests for Life v. U.S. Dep’t of Health and Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Geneva Coll., et al. v. U.S. Sec’y Dep’t of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell, et al.*, 786 F.3d 606 (7th Cir. 2015); *Wheaton Coll. v. Burwell, et al.*, 791 F.3d 792 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015); *East Tex. Baptist Univ. v. Burwell, et al.*, 793 F.3d 449 (5th Cir. 2015); *Catholic Health Care System, et al. v. Burwell, et al.*, 796 F.3d 207 (2d Cir. 2015); *Michigan Catholic Conference and Catholic Family Services, et al. v. Burwell et al.*, 807 F.3d 738 (6th Cir. 2015); *Grace Schools, et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al.*, 801 F.3d 788 (7th Cir. 2015); *Eternal World Television Network v. U.S. Dep’t of Health and Human Servs.*, No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). But *see Sharpe Holdings, Inc. v. U.S. Dep’t of Health and Human Servs.*, 801 F.3d 927 (8th Cir. 2015); *Dordt Coll., et al. v. Burwell*, 801 F.3d 946 (8th Cir. 2015).

⁴⁰ *See Little Sisters* 799 F.3d 1315 (Hartz, J., dissenting).

⁴¹ *Id.* at 1316-1317 (Hartz, J., dissenting).

⁴² 136 S.Ct. 1557 (2016).

⁴³ *Id.* at 1560.

⁴⁴ *See* NAT’L WOMEN’S LAW CTR., *THE HOBBY LOBBY “MINEFIELD”: THE HARM, MISUSE, AND EXPANSION OF THE SUPREME COURT DECISION* (2015), available at https://nwlc.org/wp-content/uploads/2015/08/nwlc_hobbylobbyreport2015.pdf (last visited March 21, 2017).

⁴⁵ *Id.* at 5.

⁴⁶ Brief of Amicus Curiae of the American Hospital Assoc. in Support of Petitioners, *supra* note 15, at 9.

⁴⁷ *Mat-Su Coalition for Choice v. Valley Hosp. Assoc.*, No. 3PA-92-1207, slip op. 8 (Alaska Super. Ct. Feb. 9, 1993).

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- ⁴⁸ Valley Hosp. Assoc. v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska 1997).
- ⁴⁹ Brief of Amicus Curiae of the American Hospital Assoc. in Support of Petitioners, *supra* note 15, at 9.
- ⁵⁰ *Id.*
- ⁵¹ See Mat-Su Coalition, 948 P.2d. 963.
- ⁵² See J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994) (Scalia, J., dissenting); U.S. v. Virginia, 518 U.S. 515 (1996) (Scalia, J., dissenting).
- ⁵³ See Grutter v. Bollinger, 539 U.S. 306 (2003) (Scalia, J., concurring in part and dissenting in part); Fisher v. Univ. Texas, 570 U.S. ___ (2013) (Scalia, J., concurring).
- ⁵⁴ See Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 575 (2003) (Scalia, J., dissenting); Obergefell v. Hodges, 576 U.S. ___ (2015) (Scalia, J., dissenting).
- ⁵⁵ Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).
- ⁵⁶ See SECSYS, LLC v. Vigil, 666 F.3d 678, 686-687 (10th Cir. 2012).
- ⁵⁷ See Kastl v. Maricopa Cnty. Cmty. College Dist., 325 F. App'x 492 (9th Cir. 2009). Gorsuch also wrote the majority opinion in Druley v. Patton, 601 F. App'x 632 (10th Cir. 2015). In this case, a transgender woman sued the Oklahoma Department of Corrections for violating her constitutional rights by starting, and then stopping, her prescribed hormone medications, giving her inadequate doses of the medication, and housing her in an all-male facility. Gorsuch's opinion diverged from seven other circuit courts, which have recognized gender dysphoria as a serious medical need requiring adequate treatment under the Eighth Amendment's prohibition against cruel and unusual punishment.
- ⁵⁸ See, e.g., Young v. UPS, 575 U.S. ___ (2015) (Scalia, J., dissenting) (pregnancy discrimination); Vance v. Ball State University, 570 U.S. ___ (2013) (harassment); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (class actions); Ledbetter v. Goodyear Tire, 550 U.S. 618 (2007) (equal pay); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (sexual harassment); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (sexual harassment).
- ⁵⁹ See, e.g., Davis v. Monroe Country Board of Education, 526 U.S. 629 (1999).
- ⁶⁰ Arnie Seipel & Nina Totenberg, *Former Student: Gorsuch Told Class That Women 'Manipulate' Maternity Leave*, NPR (Mar. 20, 2017), <http://www.npr.org/2017/03/20/520743555/former-law-student-gorsuch-told-class-women-manipulate-maternal-leave>.
- ⁶¹ Letter from Jennifer Sisk, Former Student of Judge Gorsuch, to the Senate Judiciary Committee (Mar. 17, 2017) available at <https://www.nela.org/index.cfm?pg=stopgorsuch>. Another student in the same class submitted a letter to the Judiciary Committee disputing the recollections of his classmate and stating that in fact Judge Gorsuch was merely exploring “the tension between building a career in a time-intensive profession and starting a family and raising children—especially for women.” See Emily Martin, *Reported Gorsuch Statements Show Disqualifying Disregard for Women's Workplace Rights*, NAT'L WOMEN'S LAW CTR. BLOG (Mar. 19, 2017), <http://nwlc.org/blog/reported-gorsuch-statements-show-disqualifying-disregard-for-womens-workplace-rights/>. In his testimony before the Committee on March 21, Judge Gorsuch stated he did not ask his students to raise their hands if they knew of a woman who had taken maternity benefits from a company and then left the company after having a baby, but did not directly refute the specific details described by Jennifer Sisk in her letter. C-SPAN-3, Supreme Court Confirmation, Day 1, <https://www.c-span.org/video/?425138-1/supreme-court-nominee-faces-questions-judicial-independence-abortion-waterboarding>.
- ⁶² See, e.g., Int'l Union v. Johnson Controls, 499 U.S. 187, 199 (1991) (“Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.”); *id.* at 204 (“Women who are either pregnant or potentially pregnant must be treated like others ‘similar in their ability ... to work.’ In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”); Cal. Fed. Sav and Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (describing the animating purpose behind the Pregnancy Discrimination Act as “to guarantee women the basic right to participate full and equally in the workforce, without

denying them the fundamental right to full participation in family life”); Equal Employment Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015) (“Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.”), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

⁶³ See, e.g., *Phillips v. Martin Marietta Corp.*, 500 U.S. 542 (1971); Equal Employment Opportunity Commission, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (May 23, 2007); see generally *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”).

⁶⁴ See, e.g., *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

⁶⁵ *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014); *Myers v. Knight Protective Serv., Inc.*, 774 F.3d 1246 (10th Cir. 2014); *Roberts v. Int’l Business Machines Corp.*, 733 F.3d 1306 (10th Cir. 2013); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012); *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174 (10th Cir. 2011); *Johnson v. Weld Cnty.*, 594 F.3d 1202 (10th Cir. 2010); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187 (10th Cir. 2008); *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007); *Young v. Dillon Companies, Inc.*, 468 F.3d 1243 (10th Cir. 2006).

⁶⁶ *Barrett v. Salt Lake City*, 754 F.3d 864 (10th Cir. 2014); *Williams v. W.D. Sports, N.M. Inc.*, 497 F.3d 1079 (10th Cir. 2007).

⁶⁷ *Orr v. City of Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (reversing grant of summary judgment for employer in Pregnancy Discrimination Act case when plaintiff presented evidence that pregnant employees were required to exhaust sick time for FMLA leave and were not allowed to use compensatory leave, while employees seeking FMLA leave for non-pregnancy related reasons were allowed to use compensatory leave, vacation leave, and sick leave, in whatever manner they chose).

⁶⁸ See, e.g., *Bergesen v. Shelter Mutual Ins. Co.*, 229 F. App’x 750 (10th Cir. 2007). Paul Bergesen claimed he had been fired in retaliation for reporting the discriminatory practices of his insurance company employer. He observed a pattern of cancellation of Hispanic clients’ auto insurance policies, and after his employer canceled yet another Hispanic client’s policy, he referred the client to the Kansas Insurance Department (KID). The client filed a formal complaint with KID and Bergesen both complained of the discrimination to his employer and later himself filed a formal complaint with KID. Three weeks after Bergesen filed the complaint he was placed on probation, and four weeks after that he was terminated. Gorsuch wrote the opinion affirming a grant of summary judgment in favor of the insurance company employer on Bergesen’s state law retaliatory discharge claim. Gorsuch found that the seven weeks between Bergesen’s formal complaint and his termination might be too long to establish that the complaint had caused the termination, even though case law allowed causation to be shown by a six-week lapse. He concluded the court need not resolve that issue because, he stated, Bergesen did not present adequate evidence “to rebut . . . performance questions” or to demonstrate “that he responded to his supervisors concerns.” The opinion provides few details on the employer’s concerns, but summarily dismisses the relevance of the award Bergesen received several months before his termination and the praise he received from a state manager the previous year. Gorsuch thus again resolved conflicting evidence in favor of an employer rather than leaving it to a jury to decide the disputed questions.

⁶⁹ Gorsuch’s narrow readings of employment laws have also harmed male plaintiffs, in decisions construing legal rules that impact women as well. See, e.g., *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007) (concurring in judgment and concurring separately to affirm grant of summary judgment to employer on Title VII claim of discriminatory termination on basis of race and national origin); *Bergesen v. Shelter Mutual Ins. Co.*, 229 F. App’x 750 (10th Cir. 2007) (writing majority opinion

affirming grant of summary judgment to employer in Title VII retaliation claim premised on report of racially discriminatory conduct by employer).

⁷⁰ *Strickland v. United Parcel Service*, 555 F.3d 1224 (10th Cir. 2009).

⁷¹ *Pinkerton v. Colo. Dep't of Trans.*, 563 F.3d 1052 (10th Cir. 2009).

⁷² *Id.* at 1068-69.

⁷³ *Weeks v. Kansas*, 503 F. App'x 640 (10th Cir. 2012).

⁷⁴ *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).

⁷⁵ The Tenth Circuit has previously recognized that the Rehabilitation Act generally does not allow per se rules and that whether an accommodation is reasonable should be determined on a case-by-case basis. *See Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004). Other Circuits have also determined that there is no per se rule against a lengthy leave under either the Rehabilitation Act or the Americans with Disabilities Act. *See Garcia-Ayala v. Lederle Parenterals, Inc.* 212 F.3d 638 (1st Cir. 2000) (reversing summary judgment against a plaintiff where the district court had not given an individualized assessment of a request for an accommodation extending a one-year leave by five months); *see also Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999) (reversing summary judgment in favor of an employer where the plaintiff had requested a leave of eight to nine months); *Cehrs v. Northwest Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (noting that "we are not sure that there should be a per se rule that an unpaid leave of indefinite duration (or a very lengthy period, such as a year) could never constitute a 'reasonable accommodation' under the ADA"). Judge Gorsuch's ruling also contradicted EEOC guidance. *See QUESTIONS & ANSWERS ABOUT CANCER IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA)*, EEOC, Examples 6, 13 <https://www.eeoc.gov/laws/types/cancer.cfm> (last visited Mar. 20, 2017) (recognizing the possibility of leave in excess of six months).

⁷⁶ *Kastl v. Maricopa Cnty. Cmty. College Dist.*, 325 F. App'x 492 (9th Cir. 2009).

⁷⁷ *See Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (holding that discrimination on the basis of transgender status is sex discrimination in violation of Title VII); *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015) (holding that denial of equal access to a common restroom corresponding to the employee's gender identity is sex discrimination in violation of Title VII, and that employers cannot condition access to the common restroom on proof of gender reassignment surgery or a medical procedure).

⁷⁸ *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

⁷⁹ *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

⁸⁰ 524 U.S. 274 (1998).

⁸¹ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016) (Gorsuch, J., concurring). Gorsuch wrote this separate concurring opinion in addition to authoring the majority opinion reviewing and remanding a decision by the Board of Immigration Appeals to deny an immigrant's application for adjustment of status. Indeed, Judge Gorsuch listed this case as the most important case over which he had presided as a judge, as part of his questionnaire to the Senate Judiciary Committee. NEIL GORSUCH, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT, *supra* note 10, at 25-26.

⁸² *See, e.g., Jonathan Adler, Gorsuch's Judicial Philosophy Is Like Scalia's — With One Big Difference*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias--with-one-big-difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html?utm_term=.89a30e4030c3.

⁸³ Devin Henry, *Report: Trump Aiming to Sign Executive Orders on EPA*, THE HILL (Feb. 15, 2017), <http://thehill.com/policy/energy-environment/319667-report-trump-aiming-to-sign-sweeping-epa-executive-orders>.

⁸⁴ Bourree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, THE ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-epa/515007/>.

⁸⁵ Alicia Parlapiano & Gregor Aisch, *Who Wins and Loses in Trump's Proposed Budget*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/interactive/2017/03/15/us/politics/trump-budget-proposal.html>.

⁸⁶ NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2015-2016 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2016), http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf.