# Neil Gorsuch

On May 10, 2006, George W. Bush nominated Neil Gorsuch to the Tenth Circuit. He was confirmed to the Tenth Circuit on July 20, 2006 by voice vote.

Neil Gorsuch was born on August 29, 1967 in Denver, Colorado, and moved to Washington D.C. in 1981. His mother, Anne Gorsuch, served as Administrator of the Environmental Protection Agency (EPA) under President Reagan. He graduated from Georgetown Preparatory School in Washington; Columbia University; and Harvard Law School. After law school, he clerked for Supreme Court Justices Byron White and Anthony Kennedy from 1993–1994. He also obtained a doctorate in philosophy from Oxford University in 1995. Gorsuch served as Principal Deputy to the Associate Attorney General at the U.S. Department of Justice and as a partner at Kellogg, Huber, Hansen, Todd, Evans & Figel.

Judge Gorsuch is a far-right extremist who would manipulate his politically loaded version of "originalist" methodology to overturn basic and well-established Supreme Court precedents and principles of American law and, most importantly, prevent the federal government from properly enforcing countless acts of Congress—for example, critical laws that ensure workers' rights and safety, guarantee equal opportunity, safeguard consumers and investors, ensure the safety of food and drugs, and protect our environment.

Notably, Judge Gorsuch has been critical of progressives who have brought constitutional challenges in the courts. In particular, Judge Gorsuch has harshly condemned those who have turned to the courts to advance LGBT equality, enforce church-state separation in the context of vouchers, and to address individual autonomy and the right to physician aid in dying. He claims this is inappropriately using the courts to debate public policy, ignoring courts' inherent responsibility to address constitutional challenges brought to them by injured parties and his own support for repeated challenges to the Affordable Care Act. In fact, when Gorsuch says courts should not address certain issues, what he really means is that they *should* address them, but issue conservative rulings. He also minimizes the critical role the courts have played in ensuring equality and the enforcement of critical constitutional values through landmark civil rights and women's rights decisions.

Judge Gorsuch has been described as "a predictably socially conservative judge who tends to favor state power over federal power," and as a member of "as good a College of Judicial Cardinals as the conservative and pro-life movements have ever seen."

## Gorsuch would seek to restrict the ability of the federal government to protect all Americans

Gorsuch would make it more difficult for agencies to enforce laws that keep our air and water clean and safe; that ensure our food and medicine are safe; that protect essential workers' rights; and that safeguard consumers and investors.

Gorsuch's position on agencies' authority to do their jobs is extreme, even in contrast to that of the late Justice Scalia. Scalia accepted a legal principle that gives agencies authority to determine how they will carry out their mandates when the law governing their actions might be open to

different interpretations. Gorsuch does not. Rather, he embraces a philosophy that courts should be able to overrule the agency experts when it comes to their important work in enforcing regulations. *See* *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016) and *Caring Hearts Personal Home Services., Inc. v. Burwell*, 824 F.3d 968 (10th Cir. 2016). It is difficult to overstate the damage this would cause to our nation. Eliminating this principle, known as the *Chevron* doctrine, would tie the hands of precisely those entities that Congress has recognized have the depth and experience to enforce critical laws, safeguard essential protections, and ensure the safety of the American people. Importantly, the agency leaders whose expertise Gorsuch would dismiss are answerable to the people's elected representatives in Congress, and anything they do can be overridden by statute. As even Justice Scalia rightly noted, "[i]n the long run, *Chevron* will endure and be given its full scope" because "it more accurately reflects the reality of government, and thus more adequately serves its needs."

In another troubling departure from decades of Supreme Court precedent allowing agencies to set rules protecting the public, Judge Gorsuch has called for reinvigorating a doctrine last used successfully in 1935 by a famously reactionary, and short-lived, Supreme Court majority bent on invalidating New Deal laws. *See* *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015).

Indeed, Justice Scalia himself authored a modern day Supreme Court opinion rejecting the most recent attempt to resuscitate that now-discredited doctrine—the nondelegation doctrine. As Justice Scalia explained, reviving that doctrine would deprive Congress of authority essential to empower agencies to effectively implement and enforce critical statutes that protect the American people in countless areas from ensuring financial stability to controlling health hazards. In Justice Scalia's words, "we [the justices] have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting), because "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive and judicial action," *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting). Judge Gorsuch would flout these principles, overturn decades of precedent, and disable Congress—and the electorate—from making government work for the American people.

**Gorsuch is a friend of big business and harms the rights of workers and consumers**

- In a working paper for the Washington Legal Foundation, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, Washington Legal Foundation 3-4 (2005), Gorsuch recommended that the legislature and courts make securities fraud class actions more difficult to achieve. He lamented that "[b]ecause the amount of damages demanded in securities class actions is frequently so great, corporations often face the choice of 'stak[ing] their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy [into settling] even if they have no legal liability.'"

- In his private practice, Gorsuch drafted a brief in the Supreme Court involving issues related to corporate class actions that advocated for corporate interests. *See* Brief of Amicus Curiae for the United States Chamber of Commerce at 2, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (arguing that the class action rules under securities fraud claims place an excessive burden on businesses). In an article, *No Loss, No Gain*, LEGAL TIMES, Jan. 31, 2005,

discussing the case, Gorsuch launched into an attack on plaintiffs' lawyers for using such cases as vehicles for "free ride[s] to fast riches." He concluded that they involve "frivolous claims . . . [that] impose[] an enormous toll on the economy, affecting virtually every public corporation in America at one time or another and costing business billions of dollars in settlements every year."

- In *Weeks v. Kansas*, 503 F. App'x 640 (10th Cir. 2012), Judge Gorsuch held that a state fire marshal's in-house counsel was not protected under Title VII when she alleged she was fired after she took complaints made to her by employees to the fire marshal. Judge Gorsuch concluded that the attorney's actions, even when she presented evidence that she had taken a position adverse to her employer, were insufficient to show that she had engaged in protected activity. In the opinion, Judge Gorsuch acknowledged that his application of the Tenth Circuit's jurisprudence might have been superseded by a Supreme Court decision, *see Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009), but declined to apply the Supreme Court's test because the plaintiff had not explicitly relied on it in her briefing to the court.

- As a judge, he has consistently ruled against employees, including in a number of dissents. In *Compass Environmental, Inc. v. OSHRC*, 663 F.3d 1164 (10th Cir. 2011) (Gorsuch, J., dissenting), he voted to overturn a Department of Labor fine against a company whose failure to train a worker caused his death. He dissented from a decision upholding an NLRB back pay order where the employer improperly reduced wages. *See NLRB v. Community Health Services, Inc.*, 812 F.3d 768 (10th Cir. 2016) (Gorsuch, J., dissenting). He dissented from a decision that agreed that a trucking company improperly fired an employee because he was a whistleblower. *See TransAm Trucking, Inc. v. Admin. Review Bd.*, No. 15-9504, 2016 U.S. App. LEXIS 13071 (July 15, 2016) (Gorsuch, J., dissenting). And in *Strickland v. UPS*, 555 F.3d 1224 (10th Cir. 2009) (Gorsuch, J., dissenting in part and concurring in part), he dissented from a ruling giving a female UPS driver a chance to prove sex discrimination. Judge Gorsuch argued that the plaintiff had not provided any evidence that she was treated less favorably than her male colleagues even though several of her coworkers testified that the plaintiff was treated differently from her male counterparts. The plaintiff was regularly outperforming her male colleagues, but was required to attend individual meetings and counseling sessions about her performance.

**Gorsuch has demonstrated hostility to women's right to access reproductive health care**

- Judge Gorsuch joined Judge Hartz's dissent from the denial of en banc review in *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315 (10th Cir. 2015). There, the majority opinion had upheld the birth control accommodation for religiously-affiliated non-profit organizations, which allows them to opt out of providing birth control coverage by signing a form, but still ensures that women get that coverage from their regular insurance plan. Judge Gorsuch disagreed with the majority's decision refusing to rehear the challenge brought by the Little Sisters of the Poor.

- In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), later affirmed by the Supreme Court, Judge Gorsuch joined the majority in holding that corporations are persons exercising religion for purposes of the Religious Freedom Restoration Act (RFRA)

and that the ACA contraceptive-coverage requirement was not enforceable as to the corporation. The *Hobby Lobby* decision has been invoked not only to support curtailing employees' access to reproductive health care but also to justify noncompliance with child labor laws, *see* *Perez v. Paragon Contractors Corp. v. Perez*, No. 2:13CV00281-DS, 2014 U.S. Dist. LEXIS 128339 (D. Utah Sept. 11, 2014); anti-kidnapping laws, *see* *United States v. Epstein*, 91 F. Supp. 3d 573 (D. N.J. 2015); and antidiscrimination laws, *see* Comments from United States Conference of Catholic Bishops to Office of Federal Contract Compliance Programs (Mar. 30, 2015).

- Judge Gorsuch would have allowed the Governor of Utah to defund Planned Parenthood of Utah after false videos surfaced, purporting to show other Planned Parenthood affiliates negotiating the sale of fetal tissue. *See* *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016) (Gorsuch, J., dissenting). The Tenth Circuit had granted a preliminary injunction in favor of Planned Parenthood, *see* *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245 (10th Cir. 2016), and Judge Gorsuch dissented from the denial of a request to rehear the case *en banc*. Judge Briscoe, writing in support of the denial of rehearing, accused Judge Gorsuch's dissenting opinion of "mischaracterize[ing] this litigation and the panel opinion at several turns," to reach its desired result. *Planned Parenthood Ass'n of Utah*, 839 F.3d at 3 (Briscoe, J., concurring).

**Gorsuch protects police officers who use excessive force**

- In *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013), Judge Gorsuch held that a police officer was entitled to qualified immunity from a § 1983 excessive force claim arising from his use of stun gun that killed a young man. The officers had approached the man "near an area known to be used" to grow marijuana. *Id.* at 776. After the man admitted the plants were his, he fled, and the officer deployed his taser. Judge Gorsuch reasoned that the use of force was reasonable because "[defendant] was resisting arrest by fleeing from officers after they identified themselves—even if the crime of which he was suspected was not itself a violent one, he was likely to be apprehended eventually, and he hadn't harmed anyone yet." *Id.* at 777.

**Gorsuch is hostile to commonsense environmental regulations**

- In *Wilderness Society v. Kane County*, 632 F.3d 1162 (10th Cir. 2011), Judge Gorsuch concurred in a case that dismissed for lack of standing, a claim brought by several environmental organizations asserting that a county ordinance that opened a large stretch of federal land to off-highway vehicle use was preempted by federal law. The dissent accused the majority of "misstat[ing] and misconstrue[ing] the positions of the parties and the rulings of the trial court to achieve this result." *Id*. at 1180 (Lucero, J., dissenting). The dissent further stated that the holding "will work untold mischief" and "will have long-term deleterious effects on the use and management of federal public lands." *Id*. at 1180, 1195.

**Gorsuch would not protect the rights of disabled students**

- Contrary to an earlier decision by an impartial hearing officer, Judge Gorsuch held that a student with autism did not have a right under the federal Individuals with Disabilities Education Act (IDEA) to an education that would provide a chance to achieve intellectual

and social skills outside the classroom. This, even though Congress made clear that "prepar[ing] [students] to lead productive and independent adult lives, to the maximum extent possible" is a major goal of the IDEA. *See* *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143 (10th Cir. 2008).

- Over a vigorous dissent, Judge Gorsuch authored the majority opinion in *A.F. ex rel Christine B. v. Española Pub. Sch.*, 801 F.3d 1245 (10th Cir. 2015), which held that a student cannot, for technical reasons, assert a claim for violations of the Americans with Disabilities Act if she had earlier settled with a school district for violations of the IDEA even though, as Congress made clear, students have distinct rights under both laws.

- Judge Gorsuch authored the majority opinion in *Garcia v. Board of Education of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008), holding that even when a school violates a student's rights under the IDEA, the student may still be entitled to no remedy for an IDEA violation if the student leaves the school out of frustration with the school's continuous failure to follow the IDEA.