ACLJ
American Center for Law & Justice

CASE ANALYSES OF
NEIL MCGILL GORSUCH
NOMINEE TO THE UNITED STATES SUPREME COURT

January 30, 2017

Authored by **Harry Hutchison**

SUMMARY:

The following is an examination of Neil Gorsuch's participation in the following cases: *Hobby Lobby v. Sebelius*, 723 F. 3d 114 (10th Cir., 2013); ***Little Sister of the Poor v. Burwell*, 799 F. 3d 1315, (**10th Cir. 2015) (petition for rehearing en banc); ***Summum v. Pleasant Grove City,* 499 F.3d 1170** (10th Cir.) (petition for rehearing en banc); **Planned *Parenthood of Utah v. Herbert,* 839 F. 3d 1301 (**10th Cir., 2016) (motion for rehearing en banc); ***American Atheists v. Davenport,* 637 F. 3d 1095 (**10th Cir. 2010) (petition for rehearing en banc).

INTRODUCTION:

A careful review of the above-referenced cases establishes that Judge Neil Gorsuch is a serious and well-respected constitutional conservative. This memo is prompted by prior analyses, which are currently circulating.[1] The cases selected are drawn largely from the contested domains of religious liberty and abortion jurisprudence. Three of the cases, *Hobby Lobby, Little Sisters of the Poor*, and *Summum* reached the United States Supreme Court. The Supreme Court's examination of these cases largely vindicated—directly or indirectly—Judge Gorsuch's analysis. Although, his participation in several of the above-referenced cases arose out of petitions for rehearing en banc rather than from a thorough appellate review of the merits of each case, it is nevertheless true that an impartial examination of Judge Gorsuch's concurring commentary and his decision to join well-crafted dissents authored by others, provides reliable inferences and great support for the proposition that his judicial philosophy is guided by conservative jurisprudential principles.

Hobby Lobby v. Sebelius,

[1] *See e.g.*, Ed Whelan, *Misguided 'Pro-life' Attack on Trump Supreme Court Candidate Neil Gorsuch*, THE NATIONAL REVIEW (Nov. 30, 2016), http://www.nationalreview.com/bench-memos/442581/schlafly-attack-gorsuch; Andy Schlafly, (Nov. 28, 2016) email claiming Neil Gorsuch probably would not be pro-life available at https://s3.amazonaws.com/eppc/wp-content/uploads/2016/11/29093236/veto-these-sup.-ct.-nominees.pdf; and Eric Citron, *Potential nominee profile: Neil Gorsuch,* THE SCOTUS BLOG (Jan. 13, 2017), http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/.

723 F. 3d 114 (10th Cir., 2013).

Judge Gorsuch's decision to join the Tenth Circuit Court's decision in *Hobby Lobby Stores v. Sebelius*, in combination with his separate concurrence, does not cast any doubt on his understanding of well-established principles of religious liberty. A divided panel of the U. S. Supreme Court upheld the 10th Circuit's judgment and analysis in *Burwell v. Hobby Lobby* 134 S. Ct. 2751.

Litigation was commenced by two privately held, for-profit secular corporations (Hobby Lobby & Mardel) and the Green family as individuals, who owned or controlled the corporations, against the Secretary of Health and Human Services (HHS) and other government officials and agencies seeking declaratory and injunctive relief regarding regulations issued under the Patient Protection and Affordable Care Act (ACA). The plaintiffs alleged that the preventive services coverage mandate for employers violated constitutional and statutory protections of religious freedom by forcing them to provide health insurance coverage for abortion-inducing drugs and devices. The 10th Circuit en banc panel majority found that (1) corporations had Article III standing to challenge regulations; (2) Anti-Injunction Act (AIA) did not apply to bar action; (3) corporations were "persons," within the meaning of the Religious Freedom Restoration Act (RFRA); (4) corporations had protected rights under the Free Exercise Clause; (5) corporations showed a substantial likelihood of success on the merits, as to the substantial-burden element of their RFRA claim; (6) government's claimed interests in public health and gender equality did not constitute compelling interests so as to preclude consideration of individualized exceptions to regulation; (7) corporations satisfied the irreparable injury prong of test for preliminary injunctive relief; and (8) remand was required for consideration of remaining preliminary injunction factors.

First, the 10th Circuit majority panel found that the religious liberty interests of corporations were protected by applicable free exercise jurisprudence within the meaning of RFRA and the Free Exercise Clause of the First Amendment. Per the text of RFRA, judicial scrutiny requires a court to consider not only the burden the federal government places on religious adherents, but also the strength of the government's interest and how narrowly tailored the federal government's requirement is under the circumstances. The latter component of judicial scrutiny indicates that the government must show with particularity how its compelling interest would be adversely affected by granting the requested exemption. (*Hobby Lobby v. Sebelius*, 723 F.3d at 1143).

Second, Judge Gorsuch joined by Judge Kelly, and Judge Tymkovich, wrote a concurrence vindicating the liberty interest of the Green family in their own right. He did so by arguing that the Green family, in their capacity as individuals, were entitled to Article III standing for purposes of relief within the meaning RFRA. Implicating RFRA and the Free Exercise Clause of the First Amendment, Judge Gorsuch's concurrence reflects a model perspective on the importance of protecting the conscience of "those who seek guidance from their faith." (*Hobby Lobby Stores v. Sebelius* 1114, 1152 (Gorsuch, J. concurring)).

Although the opinion of the majority panel of the 10th Circuit was sufficient to protect the Green family's interest as shareholders and operators of the closely held for-profit corporations (Hobby Lobby & Mardel respectively) from being required to include abortifacients in their health care

coverage, Judge Gorsuch's concurrence broadened the foundation on which the plaintiffs or future plaintiffs could validate their Article III standing as a necessary predicate to pursuing religious liberty claims. He did so by tying the claimants claim to parallel claims validated by the Supreme Court in *Thomas* and *Lee.*

While the U.S. Supreme Court did not rely on Judge Gorsuch's concurrence analysis in upholding the claims of the corporate plaintiffs in *Hobby Lobby*, his approach is nonetheless helpful. This is so because, as the Supreme Court noted[2], HHS advanced two preclusive arguments designed to prohibit relief.

> HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences. (*Burwell v. Hobby Lobby,* 134 S. Ct. 2751, 2767).

Judge Gorsuch's concurrence would completely defeat HHS's preclusive arguments. Before unpacking Gorsuch's concurrence, it is noteworthy that his analysis could serve to sustain the viability of the plaintiffs' religious liberty claims in the event that some future Supreme Court would decide that for-profit secular corporations lack standing under RFRA. Gorsuch's analytical gifts vindicate the notion that RFRA prevents persons (corporations or individuals) from becoming complicit in the wrongdoing of others. He observes, "whether an act of complicity is or isn't'too attenuated' from the underlying wrong is sometimes itself a matter of faith we must respect. *Thomas* and *Lee* teach no less." (*Hobby Lobby v. Sebelius*, 723 F. 3d at 1154, (J. Gorsuch, concurring)). Respecting the Green family's complicity argument, he found that the family had Article III standing "because the company shares of which they are the beneficial owners would decline in value if the [ACA's] mandate's penalties were enforced." (*Id*.).

Judge Gorsuch then turned to the merits of the Green family's claim. He found:

> Unlike Hobby Lobby and Mardel, there can be no colorable question that the Greens are "persons" entitled to RFRA's protections. Neither can there be any colorable question that the Greens face a "substantial burden" on their "exercise of religion." This statutory threshold is met when, among other things, the government presents a plaintiff with a "Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir.2010). As we have already seen, the Greens face precisely that—a choice between abiding their religion or

[2] *Burwell v. Hobby Lobby Stores* 134 S. Ct. 2751, 2766 n. 17 (2015) (Given its RFRA ruling, the court declined to address the plaintiffs' free-exercise claim or the question whether the Greens could bring RFRA claims as individual owners of Hobby Lobby and Mardel. Four judges, however, concluded that the Greens could do so, see 723 F.3d, at 1156 (Gorsuch, J., concurring); *id.*, at 1184 (Matheson, J., concurring in part and dissenting in part), and three of those judges would have granted plaintiffs a preliminary injunction, see *id.*, at 1156 (Gorsuch, J., concurring)).

> saving their business. With respect to the remaining statutory and equitable factors, Judge Tymkovich shows why they all favor granting rather than withholding the requested relief, and none of that discussion warrants repetition here. Here it is enough to observe simply that the Greens, no less than Hobby Lobby and Mardel, merit the court's protection while this case proceeds. (*Hobby Lobby v. Sebelius*, 723 F. 3d at 1154 (Gorsuch, J. concurring at 1156)).

Judge Gorsuch's participation in this case advances two important conclusions. First, he advances the conclusion articulated by the 10th Circuit panel majority, which found that for-profit corporations have standing and thus are persons for purposes of religious liberty jurisprudence. This view commanded the support of seven members of the Supreme Court in *Hobby Lobby*.[3] Second, his concurrence advances the contention that individual family members who operate for-profit firms have separate religious liberty interests that can be substantially burdened by the ACA's contraceptive mandate. Taken together, Judge Gorsuch's analysis operates as a justifiable constraint on the ability of unaccountable bureaucrats to impose rules and regulations that are consistent with their preferences and defy the notion of ordered liberty. By protecting the Green family's religious liberty interest in two distinct ways—corporately and individually—Judge Gorsuch's analysis delimits proponents of ever-expanding government power and provides future plaintiffs with ammunition to defend their religious liberty claims against encroachment. Judge Gorsuch's analysis in *Hobby Lobby* sustains two additional observations: first, James Madison's perspective that religion ought to be free in the sense that it is a domain "wholly exempt from [government's] cognizance"[4] and second, the strong inference that Judge Gorsuch is a serious and substantial judge who is prepared to defend that which Madison and the U.S. Constitution sought to protect.

Little Sisters of the Poor v. Burwell,
799 F. 3d 1315, (10th Cir. 2015)
(petition for rehearing en banc).

As an initial matter, the 10th Circuit Court's decision denying a petition for a rehearing en banc is unexceptional on its face. But appearances can be deceiving. This case was initiated by religious non-profit organizations and self-insured church plans. These entities alleged that a provision of the ACA requiring employer-sponsored group health plans to cover contraceptive services for women as a form of preventative care violated their rights under the First Amendment and RFRA. The plaintiffs—non-church entities—were contesting the adoption by the HHS of opt-out regulations enabling religious non-profit organizations to receive some shelter from rules, which would otherwise require payment for contraceptive coverage. The religious non-profits contend that compliance with either the contraceptive mandate or HHS's proffered accommodation scheme imposes a substantial burden on their religious exercise. (*Little Sisters of the Poor v. Burwell,* 799 F.3d at 1159). The District Court for the District of Colorado denied plaintiffs' motion for preliminary injunction, while the District Court for the Western District of Oklahoma

[3] *Hobby Lobby*, 134 S. Ct. 2806 (Breyer, J. and Kagan J., dissenting) (although Justice Breyer and Justice Kagan agree that the *Hobby Lobby* plaintiffs' challenge to the contraceptive coverage requirement fails on the merits, these Justices did not decide that for-profit corporations or owners are ineligible to bring claims under RFRA).
[4] STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 169 (2014).

granted plaintiffs' motions for a preliminary injunction. (*Id* at 1160). Of course, an appeal followed the conflicting district court decisions.

The 10th Circuit court's post-*Burwell v. Hobby Lobby* decision held that: (1) the contested regulatory scheme for accommodating organizations' objections to the contraceptive mandate did not violate RFRA; (2) the regulatory scheme did not violate organizations' rights under the Free Exercise Clause; (3) differential treatment of churches and organizations did not violate Establishment Clause and (4) the regulatory notification requirement did not violate the Free Speech Clause. (*Id* at 1175-83). The plaintiffs' refusal to comply with the HHS' regulatory scheme exposed them to substantial penalties. (*See e.g*., *Burwell v. Hobby Lobby,* 134 S. Ct. at 2757).

Clearly, Judge Gorsuch did not participate in the decision on the merits of the plaintiffs' pursuit of a preliminary injunction in this case. Instead, the case comes before Judge Gorsuch and the entire 10th Circuit Court on a motion for a rehearing. (*Little Sisters of the Poor*, 799 F. 3d 1315).

Judge Gorsuch's participation was limited to his decision to join Judge Hartz's response to the 10th Circuit's denial of the motion to rehear the case. (*Little Sisters of the Poor,* 799 F. 3d at 1316 (Hartz, J. dissenting)). Critically considered, the dissent is impeccable and crisp in critiquing the majority's cramped understanding of free exercise and religious liberty. Judge Hartz's dissent offers analysis that is consistent with the principles of conservative jurisprudence within the domain of religious liberty. In explaining why, the panel majority's approach is deficient, he states:

> 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. When a law demands that a person do something the person considers sinful, and the penalty for refusal is a large financial penalty, then the law imposes a substantial burden on that person's free exercise of religion. All the plaintiffs in this case sincerely believe that they will be violating God's law if they execute the documents required by the government. And the penalty for refusal to execute the documents may be in the millions of dollars. How can it be any clearer that the law substantially burdens the plaintiffs' free exercise of religion? (*Little Sisters of the Poor*,799 F. 3d at 1316-17 (Hartz, J. dissenting)).

Of course, the panel majority rejected the logic of Judge Hartz's analysis. To the contrary, it held otherwise, thus raising the question: where did it go wrong? Judge Hartz offered a clear answer. He states that the panel majority:

> [D]oes not doubt the sincerity of the plaintiffs' religious belief. *But it does not accept their statements of what that belief is. It refuses to acknowledge that their religious belief is that execution of the documents is sinful. Rather, it reframes their belief*. It generalizes the belief as being only opposition to facilitating the use and delivery of certain contraceptives to which they object. Under this reframing, the plaintiffs have no *religious* objection to executing the forms; it is just that executing the forms burdens their religious opposition to certain contraceptives.

> The burden would be akin to that caused by a tax on sales of religious tracts at the church bookstore, where the church has no religious objection to paying a tax but complains that the tax will make it harder to spread the Gospel. After so framing the plaintiffs' belief, the panel majority then examines the particulars of the governing law and decides that executing the documents does not really implicate the plaintiffs in the use or delivery of the contraceptives. (*Id*. at 1317).

Judge Hartz seized upon the infirm logic of the panel majority—logic that on its face is designed to diminish religious liberty—by first positing a speculative basis for the correctness of the panel's view of sin. Then he demolished the coherence of the panel's approach. Consider the following:

> If one accepts this reframing of plaintiffs' belief, the analysis of the panel majority may be correct; perhaps one could say that the exercise of this reframed belief was not substantially burdened. But it is not the job of the judiciary to tell people what their religious beliefs are. [. . .] Put another way, the panel majority may be saying that it is the court's prerogative to determine whether requiring the plaintiffs to execute the documents substantially burdens their core religious belief, regardless of whether the plaintiffs have a "derivative" religious belief that executing the documents is sinful. (*Id*.).

Having demolished the panel majority's approach, one that would enable courts and bureaucrats to tell parishioners what their religious views are or ought to be, Judge Hartz explained why the 10th Circuit's analysis was both unsustainable and dangerous to religious liberty. He asks:

> *Could we really tolerate letting courts examine the reasoning behind a religious practice or belief and decide what is core and what is derivative?* A Christian could be required to work on December 25 because, according to a court, his core belief is that he should not work on the anniversary of the birth of Jesus but a history of the calendar and other sources show that Jesus was actually born in March; a December 25 work requirement therefore does not substantially burden his core belief. Or a Jewish prisoner could be provided only non-kosher food because the real purpose of biblical dietary laws is health, so as long as the pork is well-cooked, etc., the prisoner's religious beliefs are not substantially burdened. *The Supreme Court has refused to examine the reasonableness of a sincere religious belief—in particular, the reasonableness of where the believer draws the line between sinful and acceptable*—at least since *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707, 715, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (*Little Sisters of the Poor*,799 F. 3d at 1317-18, (Hartz, J. dissenting) (emphasis added)).

Judge Hartz's defense of religious liberty was largely endorsed on appeal in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). There, the Supreme Court declined to reach the merits of the case but instead decided to remand the case (along with several other related cases) to the respective appellate courts. The Supreme Court's per curiam opinion said:

> Following oral argument, the Court requested supplemental briefing from the parties addressing "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners." *Post*, p. 1561. Both petitioners and the Government now confirm that such an option is feasible. Petitioners have clarified that their religious exercise is not infringed where they "need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception," even if their employees receive cost-free contraceptive coverage from the same insurance company. Supplemental Brief for Petitioners 4. *The Government has confirmed that the challenged procedures "for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage."* Supplemental Brief for Respondents 14–15. (Zubik v. Burwell at 1560) (emphasis added).

In light of "gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded 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*.).

The Supreme Court's assessment of the religious liberty interests of the non-profit religious organizations in *Zubik v. Burwell* signifies that it quite possible that the plaintiffs' objections to HHS' contraceptive regulatory scheme can be accommodated through additional regulatory modification. This implies that the HHS rules, as originally formulated for purposes of accommodation, *were not necessarily narrowly tailored as required by RFRA*. In the likely event that the plaintiffs in *Little Sisters of P*oor can now show their beliefs were burdened by the original accommodation rules issued in connection with the assumed governmental interest in preventive care, they are likely to prevail on the merits of their initial claim unless newly issued rules can be formulated in order to comply with the narrowly tailored prong of RFRA.

While the ultimate outcome of *Little Sisters of Poor* remains in doubt, the 10th Circuit dissent authored by Judge Hartz clarified the case for religious liberty and demonstrated the dangers associated with any effort to allow unelected bureaucrats at the HHS or the courts themselves to decide which religious beliefs are reasonable and thus defensible. This intuition is supported by the Supreme Court's decision to order remand. Judge Hartz's analysis upends the logic of the 10th Circuit Court panel majority, which somehow decided that a person's free exercise was not substantially burdened when a significant penalty was imposed for refusing to do something that is prohibited by the person's sincere religious belief (*Little Sisters of the Poor*, 799 F. 3d. at 1318 (Hartz, J. dissenting)). Simply put, it is not the job of courts or government to decide whether beliefs are silly or strange because such a view is directly contrary to religious liberty. (*Id*.) This proposition is inconvertible

Properly appreciated, Judge Hartz's dissent is convincing. His dissent, in combination with the Supreme Court's *Zubik v. Burwell* decision to order remand, should impel reasonable observers

to infer that Judge Gorsuch's decision to join with the dissent in *Little Sisters of the Poor* displays his bona fide conservative credentials.

***Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir., 2007).**

Summum arose out of a simple fact pattern. The city of Pleasant Grove maintained a public park including at least 11 permanent, privately donated displays, including a Ten Commandments monument. Summum, a religious organization wanted the city to erect a monument containing the "Seven Aphorisms of Summum." One example of the proffered aphorisms was: "Nothing rests; everything moves; everything vibrates." As most constitutional law commentators know, the "Free Speech Clause restricts government regulation of private speech but not speech by the government."[5] As a consequence, "when a government entity speaks, it may say what it wishes, and select the views that it wants to promote."[6] Although a park is often seen as a traditional public forum for speeches, it must be observed that speeches are transitory in nature.[7] Different analysis is required when a city chooses to display permanent monuments in a public park.[8]

With these principles in mind, impartial observers should note that Judge Gorsuch's participation in this case was limited to his decision to join in Judge Michael McConnell's dissent to the 10th Circuit's equally divided panel opinion denying two separate petitions for rehearing, both with en banc suggestions filed by the appellees (*Summum v. Pleasant Grove City,* 449 F. 3d at 1171 (McConnell, J. dissenting)). The requests for a rehearing were denied by the original panel that decided these cases and then, after en banc petitions were transmitted to all of the judges of the court, the en banc requests were also denied. On the other hand, Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant a rehearing en banc.

Turning to Judge McConnell's dissent, he noted that the original panel's opinions "hold that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content-unless their reasons for refusal rise to the level of 'compelling' interests." (*Id*. at 1174-75 (McConnell, J. dissenting)). Judge McConnell observed that (1) "the religious nature of the donated monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge)"; (2) the public parks are not public forums and the contrary conclusion accepted by the 10th Circuit is unsupported by Supreme Court precedent; (3) in neither of the contested cases giving rise to *Summum* did the city, by word or deed, invite private citizens to erect monuments of their own choosing in these parks. Judge McConnell also observed that in *Van Orden v. Perry*, 545 U. S. 677 (2005), "the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a state display, and applied Establishment Clause doctrines applicable to government speech."

---

[5] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1283 (8th ed., 2010).
[6] *Id*.
[7] *Id*.
[8] *Id*.

Similarly, he noted that "various courts of appeals have reached the same conclusion on similar facts" and "our own leading precedent on government speech confirms these holdings." (*Summum v. Pleasant Grove City,* 449 F. 3d at 1175-76 (McConnell, J. dissenting)).

The dissents authored by Judge McConnell, contending that the monuments in the Park constitute government speech, and Judge Lucero, arguing that the Park was not a traditional forum for purposes of displaying monuments, were largely vindicated by a unanimous Supreme Court (J. Breyer concurring in the judgment). Conceding that none of its prior decisions had addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, (*Pleasant Grove City v. Summum,* 555 U. S. 466-67), the Supreme Court concluded that the Free Speech Clause restricts government regulation of private speech but it does not regulate government speech. (*Id*. at 457). It follows that the fundamental question to be resolved in this case is whether the acceptance by the city park at issue constituted government expressive conduct or, alternatively, did such conduct constitute a forum for private speech? (*Id*. at 457). As it turns out, "it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech." *Id*. at 1134. Hence, the Supreme Court concluded that traditional "public forum principles" were out of place. Accordingly, the city

> 'is entitled to say what it wishes,' *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and to select the views that it wants to express, see *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *National Endowment for Arts v. Finley,* 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (Scalia, J., concurring in judgment) (*Id*. at 467-68).

The Supreme Court's decision confirmed the wisdom of Judge McConnell's dissent regarding the ability of government institutions to accept religiously themed monuments. Judge Gorsuch's participation in Judge McConnell's dissenting opinion, in addition to being vindicated by the Court, also implicated the late Justice Scalia's understanding of the role of government speech in our constitutional republic. Judge Gorsuch's participation in Judge McConnell's dissenting opinion further supports his conservative credentials and his understanding of the Constitution.

Planned Parenthood Association of Utah v. Herbert
839 F. 3d 1301 (10th Cir., 2016)
(motion for rehearing en banc).

Judge Gorsuch's participation in this case is limited to writing a dissenting opinion regarding the majority's decision to deny a rehearing en banc. Judge Tymkovich, Judge Hartz and Judge Holmes joined Judge Gorsuch's dissent regarding the panel's decision to deny a rehearing en banc. Judge Gorsuch's understanding of the facts of this case and his legal reasoning provide a window on his perspective within the arena of funding abortion-rights organizations. They also provide a perspective on his understanding of the capacity of state officials to respond to the public release of videos allegedly showing Planned Parenthood officials negotiating the sale of fetal tissue and the appropriate standard of review for granting a preliminary injunction. (*Id*. at 1307). In this, it seems he supports the side of transparency and accountability for abortion

clinics that often use the poorly constructed jurisprudence of *Roe* and *Casey* to protect themselves instead of the interests of women and children.

The facts triggering this litigation claim are largely undisputed. (*Id*). Apparently, "after the public release of videos allegedly showing Planned Parenthood officials negotiating the sale of fetal tissue, the Governor of Utah announced his belief that the conduct was illegal and warranted the suspension of public funding for four programs run by Planned Parenthood of Utah (PPAU), the local Planned Parenthood affiliate." (*Id*.) Provoked by his action, PPAU sought "a preliminary injunction to force the State's continued funding of the four programs in question." (*Id*.). Judge Gorsuch summarized the facts and legal issues thusly:

> As litigated by the parties, the preliminary injunction motion turned in significant measure on the question whether the organization could show that it was likely to succeed at trial on its unconstitutional conditions claim. And even on that claim the parties' dispute proved pretty narrow, for everyone agreed on the law. If the Governor discontinued funding because of the group's affiliation with those accused of illegally selling fetal tissue—as he said, he did—the parties agreed that no constitutional violation had taken place. *But if the Governor discontinued funding for a different and secret reason—in retaliation for the group's advocacy of lawful abortions—both sides accepted that a constitutional violation had occurred.* (*Id*.) (emphasis added).

Given this description, the unconstitutional conditions issue, as a basis for deciding whether preliminary relief is warranted, pivoted on a question of fact. To wit, "what was the Governor's intention in suspending funding?" (*Id*.). Ascertaining human motives is a vexed enterprise, but Judge Gorsuch observed that "[o]n the preliminary evidentiary record before it, the district court found that the Governor's stated intention appeared to be his true intention and that PPAU hadn't shown otherwise at trial." (*Id*.). Notwithstanding the district court's finding, a panel of the 10th Circuit disagreed and substituted its own fact-finding and therefore ordered the Governor to fund PPAU. (*Id*.). This conduct brought a sharp rebuke from Judge Gorsuch. He noted that the panel did not act consistent with the 10th Circuit's previously uniform view when it comes to questions concerning the appropriate standard of review and the burden of proof required for issuance of preliminary injunctive relief. (*Id*. at 1307-08).

Judge Gorsuch amplified his analysis in several ways. Examining first the question of the appropriate standard of review, the record shows district court determinations of a factual dispute command deference on appeal. Thus, the appellate court, as a rule, will not challenge the district's court's evaluation unless it finds no support in the record or follows from a plainly irrational, implausible or erroneous reading of the record thus justifying the conclusion that the district court has abused its discretion. (*Id*. at 1308). Judge Gorsuch found that the 10th Circuit panel opinion departed from these well-established rules of review. He pointed out that both Judge Bacharach's panel dissent and his concurrence in the current decision denying a rehearing en banc found "that the panel employed a 'more searching' standard of review than our precedents 'permit.'" (*Id*. at 1308). It is manifestly clear that the 10th Circuit panel engaged in *de novo* review. (*Id*.)

Second, in considering the burden of proof, Judge Gorsuch opined that even assuming *arguendo* that the 10th Circuit panel could properly engage in *de novo* review, "a preliminary injunction still remained an 'extraordinary remedy' and it fell to PPAU as the movant to show its 'right to relief clear[ly] and unequivocal]ly].'" (*Id*. at 1310). Although the 10th Circuit has once suggested "that the plaintiff's burden on the likelihood of success factor may be relaxed when the other preliminary injunction factors are satisfied," the Supreme Court has cast doubt on this contention. (*Id*.). Notwithstanding such contrary contentions, the 10th Circuit panel "[n]ot only conducted its own *de novo* review of the record, it relaxed PPAU's burden of proof and even assumed to reverse it." (*Id*.). Judge Gorsuch's analysis showed that, for

> PPAU to prevail in the case as litigated, everyone acknowledges, it had to show that the Governor's real reason for his decision was something secret and different than he now contends it to be. Yet, it is undisputed that when the Governor announced his decision to discontinue funding, he contemporaneously explained that his decision came in direct response to the videos. And it is undisputed too, that the Governor was free as matter of law to suspend the funding in question for this reason. (*Id*.).

Properly appreciated, Judge Gorsuch's dissent clearly exposed the flaws in the 10th Circuit panel's decision to deny a rehearing en banc. The opinion is flawed in two ways: as a matter of fact, and as a matter of law. First, the 10th Circuit disregarded incontrovertible facts bearing on the Governor's motive in suspending funding, facts that lean in a direction opposite from the conclusion reached by the 10th Circuit. Second, the panel engaged in *de novo* review contrary to its own legal rules and precedent and in addition, bent (relaxed) the burden of proof to sustain its preferences. These preferences are not moored to the legal rules for issuing a preliminary injunction in order to establish PPAU's likelihood of establishing success on the merits of its claim. On the contrary, such a move, was and is, inconsistent with judicial restraint and the clear teaching of the legal rules that were thought to bind the 10th Circuit. Judge Gorsuch's analysis exposed the 10th Circuit approach as hollow and unsustainable, particularly so in a constitutional republic committed to the rule and law. As a consequence, Judge Gorsuch's dissent does not cast any doubt on his conservative jurisprudential credentials.

American Atheists v. Davenport,
637 F. 3d 1095 (10th Cir. 2010)
(petition for rehearing with suggestions for rehearing en banc).

An atheist organization and individual atheists brought a § 1983 action against several Utah state officials. They alleged the defendants violated the Establishment Clause and the Utah Constitution by permitting a private highway patrol association to erect 12-foot tall memorial crosses on public roadsides designed to commemorate fallen police officers. The private association intervened. The District Court granted defendants motion for summary judgment and the plaintiffs appealed. On appeal, the 10th Circuit reversed. This was followed by a petition for rehearing with suggestion for rehearing en banc.

The 10th Circuit issued a new panel order but denied the petition for rehearing with suggestion for rehearing en banc. Judges Kelly, O'Brien, Tymkovich and Gorsuch would grant a rehearing

en banc. Judges Kelly and Gorsuch wrote separately. Judge Kelly was joined by Judges O'Brien, Tymkovich and Gorsuch and Judge Gorsuch was joined by Judge Kelly.

Before considering Judge Gorsuch's separate dissent in this case, Judge Kelly's opinion commands attention. First, Judge Kelly noted that the 10th Circuit's decision in this case continues a troubling development in the Circuit's Establishment Clause jurisprudence—the use of a "reasonable observer" who is increasingly hostile to religious symbols in the public sphere. (*American Atheist, Inc., v. Davenport,* 637 F. 3d 1095 (Kelly, J. dissenting)). Because of such hostility, the court's "reasonable observer" appears to be intent on doing something that Supreme Court precedents do not intend: the purgation from the public sphere of all religious imagery. (*Id*. at 1101). Judge Kelly explained how that the 10th Circuit erred in several respects.

First, the court presumed that religious symbols on public property are unconstitutional despite the absence of precedent. Second, the court's reasonable observer failed to sufficiently acknowledge the totality of the memorial crosses' physical appearance, context and history. This perception led to the conclusion that the Utah Highway Patrol "(UHP) is a sort of 'Christian police' that favors Christians over non-Christian," when there was not a factual basis for this claim. Third the court equated "the religious nature of the cross with a message of endorsement." By contrast, the facts, after being properly contextualized, indicated the crosses at issue were largely designed to memorialize rather than endorse. (*Id*. at 1102).

The 10th Circuit decision to purge from the public sphere white crosses placed near the locations of the deaths of UHP officers was grounded largely in Justice O'Connor's endorsement test for Establishment Clause violations. "Under that framework, governmental action violates the Establishment Clause if as viewed by a 'reasonable observer,' it has the 'effect of communicating a message of government endorsement or disapproval of religion.'" (*Lynch v. Donnelly* 465 U.S. 668 (1984) (O'Connor, J., concurring)). Judge Kelly explained his disagreement with the 10th Circuit's application of Justice O'Connor's test by noting that the 10th Circuit Court (1) effectively imposed a presumption of unconstitutionality on religious symbols in the public sphere; (2) employed a "reasonable observer' who ignored certain facts of the case and (3) incorrectly focused on the religious nature of the crosses themselves rather than the message they convey when all facts are considered. (*Id*. at 1102).

To be sure, the Latin cross is a symbol of the Christian faith. But the 10th Circuit went further by essentially asserting, because the crosses are religious symbols standing alone, that they can only be allowed to surface in the public square even if their context and history avoid the conveyance of a message of governmental endorsement of religion. Based on this view, the court ignored the fact that each cross included biographical information about the fallen officer. They also ignored other facts that contextualize the crosses as memorials rather than as government endorsements. The 10th Circuit's approach was formulated in contradistinction to *Lynch v. Donnelly*'s approach wherein the Supreme Court considered all relevant factors before deciding whether statues of Mary, Joseph and Jesus (quintessential religious symbols) conveyed a message of endorsement or not.

Consistent with his skepticism of the 10th Circuit's approach—which presumed that religious symbols convey public endorsement—Judge Kelly noted that the Supreme Court in *County of*

Allegheny rejected Justice Stevens's view that religious symbols on public property are presumptively unconstitutional. (*Id*. at 1103).

Judge Kelly stated that, "the mere presence of the memorial crosses which are undoubtedly the 'preeminent symbol of Christianity' . . . tells us next to nothing." (*Id.*). The mere presence of Christian symbols without an examination of relevant factors disclosed virtually nothing at all. To presume otherwise evinced hostility to religion, which the First Amendment unquestionably precludes. (*Id*.). Judge Kelly's skepticism is fortified because the defendants were not required to take affirmative steps to secularize the message of the memorial crosses because the plaintiffs, consistent with the prevailing case law, bore the initial burden of proof. Thus, the plaintiffs must show that the memorial crosses had the purpose and effect of endorsing religion. (*Id*.).

Next, Judge Kelly demonstrated that the panel majority's conception of the "reasonable observer" must comply with the following test: "whether a fully informed, intelligent, and judicious "reasonable observer" would conclude that the display effectively sends a message that the government 'prefer[s] one religion over another.'" (*Id*. at 1104). Instead of conceiving the reasonable observer as one in possession of vast knowledge, the 10th Circuit offered a crabbed conception. Their ideal conception is an observer who fails to notice the name and badge number painted on the crossbar in large black letters, the officer's picture, and the biographical plaque. In addition, the 10th Circuit's unreasonable observer failed to notice obvious facts such as the location of the crosses erected near the location of the officer's death. The observer also failed to note that the crosses were erected by a private organization with the cooperation of the officer's family. (*Id*. at 1104-05). Moreover, the 10th Circuit failed to observe that the secular meaning associated with the crosses could, upon reflection, be divorced from their religious significance. (*Id*. at 1106-07).

Taken together, Judge Kelly's analysis demonstrated a thorough understanding of precedent and religious liberty and exposed as shallow the 10th Circuit "reasonable observer," analysis. He also explicated the court's failure to seriously consider whether crosses erected in commemoration could be divorced from their religious significance. Judge Gorsuch's decision to join with Judge Kelly's dissent reinforces his conservative credentials. But of course, there is more.

I turn now to Judge Gorsuch's dissent. In his dissent, he observed that the 10th Circuit has repeatedly misapplied the "reasonable observer" test. Misapplication gives rise to the inference that the court has flown the bounds of precedent. Judge Gorsuch remarked that Justice O'Connor has instructed courts that the "reasonable observer should not be seen as 'any ordinary individual, who might occasionally do unreasonable things, but . . .. rather [as] a personification of a community ideal of reasonable behavior.'" (*Id*. at 1107-08 (Gorsuch, J. dissenting)(citing Justice O'Connor)). Judge Gorsuch found evidence that the 10th Circuit's conception of the "reasonable observer" was flawed because its observer had fallen prey to bias that blinds him to the context. Judge Gorsuch also noted that the Supreme Court has "held that "[a] cross by the side of a public highway marking, for instance, the place where a trooper perished need not be taken as a statement of governmental support for sectarian beliefs." (*Id*.) (citing *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010)). This signifies that the 10th Circuit's analysis is deficient in two ways. First the court is prepared to remain blind to the context of the religious symbols at issue and second, it has failed to see Supreme Court precedents that are obvious. Judge

Gorsuch's analysis exposed the 10th Circuit's feeble eyesight. His analysis, in combination with his agreement with Judge Kelly's dissent does not cast any doubt on his conservative credentials.

CONCLUSION

Although, it is clear beyond heuristic cavil that Judge Neil Gorsuch's judicial record is consistent with the tenets of conservative jurisprudence, some observers such as pro-life activist, Andy Schlafly,[9] question Judge Gorsuch's conservative credentials. Implying that Judge Gorsuch would decline to support limits on abortion, Schlafly suggests that Judge Gorsuch has disqualified himself by "using the terminology of the pro-abortion side" to write about abortion. But, as Ed Whelan explains, this attack is ill-advised.[10]

My analysis confirms Mr. Whelan's intuition. Reconsider the following. Judge Gorsuch's dissent in *Planned Parenthood v. Utah* demolished the pro-abortion preferences of the 10th Circuit's panel majority and laid bare the court's implicit pre-commitment to funding America's leading abortion provider. Apparently, this pre-commitment led the court to engage in analysis that appears to be riddled with errors of fact and law. In order to emphasize the flaws in the 10th Circuit Court decision denying a rehearing en banc and to emphasize Judge Gorsuch well-reasoned rebuttal, I quote, at length, from my review of his dissenting opinion in this case:

> The [*Planned Parenthood v. Utah*] opinion is flawed in two ways: as a matter of fact, and as a matter of law. First, the 10th Circuit disregarded incontrovertible facts bearing on the Governor's motive in suspending funding, facts that lean in a direction opposite from the conclusion reached by the 10th Circuit. Second, the panel engaged in *de novo* review contrary to its own legal rules and precedent and in addition, bent (relaxed) the burden of proof to sustain its preferences. These preferences are not moored to the legal rules for issuing a preliminary injunction in order to establish PPAU's likelihood of establishing success on the merits of its claim.

While Judge Gorsuch's analysis in *Planned Parenthood*, standing alone, is sufficient to refute Mr. Schlafly's contentions, there is more. As Ed Whelan shows, Schlafly fails to mention Judge Gorsuch's courageous book, the FUTURE OF ASSISTED SUICIDE AND EUTHANASIA, which "builds a nuanced, novel and powerful moral and legal argument against legalization [of assisted suicide and euthanasia]."[11] In other words, the book proffers a firmly pro-life argument. The combination of Ed Whelan's nuanced understanding of Judge Gorsuch's book and Judge Gorsuch's dissent in *Planned Parenthood v. Utah* sustain the inference that Mr. Schlafly's attack on his conservative credentials is untenable. It is doubtful that any reasonable observer, who carefully considers Judge Gorsuch's entire record, can agree with Mr. Schlafly.

---

[9] *See e.g.* Andy Schlafly (Nov. 28, 2016) email claiming Neil Gorsuch probably would not be pro-life available at https://s3.amazonaws.com/eppc/wp-content/uploads/2016/11/29093236/vetothese-sup.-ct.-nominees.pdf (questioning Judge Gorsuch's conservative credential).-

[10] Whelan, *supra* note 1.

[11] *Id*.

Consistent with such a view, this memorandum's examination of all of the above-referenced cases drawn from highly contested areas of law—including unconstitutional conditions alleged by Planned Parenthood, religious liberty for for-profit and non-profit employers and Establishment Clause disputes regarding alleged government endorsement of religion—establishes that doubts regarding Judge Gorsuch's conservative bona fides are unwarranted. Instead this analysis yields to one unvarnished conclusion: Judge Gorsuch's participation in these cases demonstrates that he is a serious conservative who justifiably deserves the respect of constitutional conservatives.