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Religious Concerns Over Access to Care: A Closer Look at Neil Gorsuch, Likely Supreme Court Justice

On 31 January, 2017, President Trump [nominated](#) Judge Neil M. Gorsuch to the United States Supreme Court to fill the seat left empty by the late Justice Antonin Scalia upon his death in February 2016. The Senate will likely vote to confirm Gorsuch as a Supreme Court Justice at the end of this week, after Senate Republicans [eliminated the filibuster](#) to prevent Senate Democrats from stopping his confirmation. Gorsuch previously served on the Court of Appeals for the Tenth Circuit. As a judge, Gorsuch is a conservative, a [textualist](#) and a Constitutional [originalist](#). He has been praised for his intellectual prowess and his clear and entertaining writing style. However, his record on the bench, particularly as it relates to the protection of religious freedoms and executive deference, has sparked concern among healthcare advocates.

If the nomination is confirmed and Judge Gorsuch becomes a Justice of the Supreme Court, advocates should understand that he is likely to make decisions that may threaten the gains made in access to care since the introduction of the Affordable Care Act (ACA). Gorsuch has a clear history of voting to uphold individual religious freedoms, even where upholding these rights for some means denying access to care for many. Advocates should also understand that Gorsuch is likely to be very unsympathetic towards any attempt to promote civil liberties or social justice through litigation. He believes that any change to the existing legal paradigm must come from Congress. He has [argued](#) that “American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.”

Advocates should:

1. Be aware of pending and future litigation likely to come before the Supreme Court in the coming years and understand how these cases might impact access to care. For example, they should closely follow litigation around providing religiously controversial preventative care, such as contraceptive care, through employer based insurance. They should also closely follow litigation relating to the ACA's anti-discrimination provision, Section 1557. In both situations, Gorsuch is likely to err on the side of religious liberty for employers and providers rather than uphold broad access to care as required by the ACA.
2. Focus their efforts on advocating for legislative reform that would guarantee access to care, even in the face of individual religious objections.

Advocates can also listen to a discussion of Judge Gorsuch's potential impact on access to care by clicking [here](#) to access our SpeakUP! podcast with Professor [Abigail Moncrieff](#) of Harvard Law School and Boston University.

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Who is Neil Gorsuch?

Gorsuch hails from Denver, Colorado. He [attended](#) Columbia, Harvard, and Oxford. Before becoming a judge, he worked in private practice and at the Department of Justice. In 2006, President George W. Bush nominated Gorsuch to the Court of Appeals for the Tenth Circuit. He was [confirmed without opposition](#). At 49 years old, Gorsuch is the [youngest judge](#) to be nominated to the Supreme Court since Clarence Thomas in 1991. His relative youth means that he might influence the Court for decades. Senate Republicans are committed to ensuring that Gorsuch is confirmed to the Supreme Court. On April 6, 2017, Senate Republicans voted to eliminate the filibuster for Supreme Court nominations to prevent Senate Democrats from using it to block Gorsuch's nomination. Without the filibuster, only a simple majority in the Senate is needed to confirm a Supreme Court Justice. As a result, it is very likely he will be [confirmed](#) before the Easter recess.

Gorsuch is a [noted](#) conservative. Politically, he seems to fall [slightly to the right](#) of Justice Scalia, though they are very closely aligned in many respects. Because of this ideological alignment, [some say](#) that his appointment will not dramatically change the overall approach of the Court. However, others note that until Scalia's death, there were four strong conservative Justices (Thomas, Scalia, Alito and Roberts) and four strong liberals (Breyer, Kagan, Ginsburg and Sotomayor) on the Court. Justice Kennedy often casts the decisive swing vote on politically divisive issues, such as access to care or religious freedom. Kennedy generally sided with the conservatives but did not inevitably do so. [Some argue](#) that Gorsuch might sway Kennedy more often and more easily towards conservative decisions, for two reasons. First, Gorsuch has a strong, persuasive but polite and measured style that Kennedy might find more favorable than Scalia's often scathing rhetoric. Second, and perhaps more importantly, Gorsuch and Kennedy have a long relationship: Gorsuch clerked for Kennedy on the Supreme Court in 1993.

To understand the thinking behind Gorsuch's important decisions in the past, and to understand how he might decide cases in the future, advocates should understand a few things about Gorsuch's approach to judging. Gorsuch is noted for his commitment to judicial restraint and textualism. In other words, he [believes](#) in a clear separation between the role of the Courts and the role of Congress. In his view, Congress should review and reshape the law. Their job is to look forward and make the decisions that they believe will be best for America's future. He believes that judges, on the other hand, should strive to simply apply the law as it is. A judge should not [make decisions based on the](#) "intent" of the legislature, even if applying the "plain and obvious" meaning of the text seems to run against government policy. Gorsuch believes that judges should not deviate from these principles even if a blunt application of the law leads to a result that they strongly disagree with. He summarized his views in a [speech](#) after his nomination: "It is the role of judges to apply, not alter, the work of the people's representatives. A judge who likes every outcome he reaches is very likely a bad judge—stretching for results he prefers rather than those the law demands."

Gorsuch and the Future of the Supreme Court: A History of Preferring Religious Liberties Over Access to Care

The nomination of Judge Gorsuch has [raised serious concerns](#) and sparked [protests](#) among healthcare advocates and civil rights activists, as well [as sections of the Democratic party](#). A [study](#) on Trump's potential nominations concluded that Gorsuch would be a "reliable conservative, voting to limit gay rights, uphold restrictions on abortion, and invalidate affirmative action programs." Most immediately, healthcare advocates should be concerned about how Gorsuch's position on religious liberties and executive deference might impact access to care and discrimination against vulnerable minorities.

In a number of recent cases, plaintiffs have argued that the exercise of their religious beliefs has been "substantially burdened" by provisions of the ACA that promote access to care. Healthcare advocates should be aware that when the right to free exercise of religion and the right to access healthcare have clashed, Gorsuch has always voted in favor of religion. Healthcare advocates have been particularly concerned about Gorsuch's role in the [Burwell v. Hobby Lobby Stores Inc.](#) (2014) and [Zubik v. Burwell](#) (2016).

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Primer on the Religious Freedom Restoration Act

In order to understand *Hobby Lobby* and *Zubik*, advocates should understand the history and impact of the Religious Freedom Restoration Act (RFRA). RFRA was introduced as a reaction to the decision of the Supreme Court in [Employment Division v. Smith](#) (1990). There, the Court held that individuals do not have the right to an exemption from generally applicable laws (like criminal laws), even if those laws interfere with the practice of their religion. In the context of *Smith*, that meant that the plaintiff could not escape the legal consequences of using an illegal hallucinatory drug, even though the drug was an integral part of a ceremony in his religion. The case triggered a massive [bipartisan backlash](#) and Congress enacted RFRA in response. RFRA states that the Government cannot **substantially burden a person's exercise of religion** even if the law is not meant to target that exercise of religion. RFRA provides an exception if the law in question serves a **compelling governmental interest** and is the **least restrictive means** to furthering that interest. Exactly what kind of "person" can benefit from RFRA and exactly what constitutes a "substantial burden" on the practice of religion have been the main focus of debate in recent RFRA cases.

If the Courts find that a law does substantially burden a person's religious practice, then that person is entitled to an accommodation from that law. RFRA was meant to be a shield that would protect the fundamental rights of individuals and minorities to practice their religion. However, where religious objections have been raised against laws that promote access to care, RFRA has often been used more like a weapon.

Contraception and the ACA

The ACA has a contraceptive mandate, [requiring](#) all employer based health insurance plans to offer at least one form of contraception, without cost-sharing, from 18 Food and Drug Administration approved categories. The Department of Health and Human Services decided to create an accommodation for religious non-profit employers, such as churches or religious orders, who objected to providing coverage for religious reasons. These employers could notify the government of their objection and the contraceptives for their employees would be provided by the government or by third-party insurers. However, other employers began to seek similar accommodations.

Hobby Lobby and the Scope of Religious Freedoms

In *Hobby Lobby* the Supreme Court found that certain for-profit corporations were also entitled to the accommodation provided to religious non-profit employers. The plaintiffs, Hobby Lobby Stores, argued that four of the methods of contraception on the FDA list were abortifacients (*i.e.*, they acted after conception rather than preventing it) and that to provide coverage for them would be a substantial burden on the exercise of their religious beliefs. The provisions of RFRA discussed above meant that where a substantial burden was found, and the government could find another way of ensuring access to contraceptive care, Hobby Lobby had to have their beliefs accommodated. The Supreme Court pointed to the fact that the government already accommodated the religious beliefs of religious non-profit employers. Therefore, the Court extended the accommodation to closely-held for-profit corporations.

The case came to the Supreme Court on appeal from the [Court of Appeals for the Tenth Circuit](#), which covers appeals from federal district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Similar to the Supreme Court, the Tenth Circuit also [found in favor](#) of Hobby Lobby. Gorsuch was one of the three judges on the Tenth Circuit who heard the case. Advocates should understand the commitment Gorsuch showed to accommodating religious liberties in this case.

A key question for the Tenth Circuit in *Hobby Lobby* was whether a for-profit company was the kind of "legal person" that could hold religious beliefs and benefit from the protections of RFRA. The majority opinion of the Tenth Circuit held that Hobby Lobby was a legal person under RFRA and therefore was entitled to protection of its religious beliefs. Gorsuch not only voted with the majority, but also wrote a separate, concurring opinion, arguing that the protection that extended to

Health Care in Motion

Hobby Lobby as a legal person also extended to the people that own and operate the company. In other words, Gorsuch argued that even if the Court had found that Hobby Lobby, as a corporation, was not entitled to protection of its religious beliefs under RFRA, the owners of Hobby Lobby could not be compelled to order their company to provide insurance coverage for contraceptives, if to do so would be contrary to their religious convictions. This is an incredibly expansive vision of religious liberty. Gorsuch's position in *Hobby Lobby* would mean that individuals could be denied access to religiously controversial medical care such as blood transfusions, vaccinations, or contraceptive care because of the personal beliefs of the company directors.

Zubik and the Definition of a Substantial Burden

A major challenge for the Supreme Court and other, lower level courts, when applying RFRA, has been to determine what exactly a "burden" is and whether it is "substantial" enough to justify an exemption from an otherwise valid law. Although neither the Supreme Court nor the Tenth Circuit focused on this question in *Hobby Lobby*, both courts tried to answer this question in *Zubik v. Burwell* and its related cases.

As noted above, the Obama Administration introduced an accommodation for religious organizations that allowed them to sidestep the ACA's contraceptive mandate. *Hobby Lobby* extended this exemption to some for-profit companies. To take advantage of this accommodation, employers had to declare their objections and fill out paperwork that would grant the employees the right to have the contraceptive coverage paid for by their third party insurer or by the federal government. Many religious organizations, however, believed that the accommodation was not sufficient because filling out the paperwork made them complicit in the provision and use of contraceptives. This, they argued, was too substantial a burden and therefore triggered the protections of RFRA. Instead of having their beliefs "accommodated" by the law, they wanted a complete "exemption" from anything to do with the provision of contraceptives.

The Court of Appeals of the Tenth Circuit in [Little Sisters of the Poor Home for the Aged v. Burwell](#) (2015) denied the claim of these employers. The Tenth Circuit held that filling out a form was not enough to "substantially burden" the religious exercise of the Little Sisters of the Poor, the lead plaintiffs in this case. One of the judges on the Tenth Circuit anonymously called for a rehearing of the case *en banc* (i.e., with all of the judges currently active on the Tenth Circuit presiding instead of the more common panel of three judges). An *en banc* hearing is [highly unusual](#) and normally reserved for a rehearing of a decision that allegedly conflicts with a Supreme Court decision or a decision on a matter of exceptional importance. Seven of the twelve judges did not believe that the case should be reheard and the petition was denied. However, a [dissent from the denial of an en banc rehearing](#) was written, which Gorsuch joined. It pleaded the merits of the argument of the Little Sisters of the Poor. It emphasized that while a Court might assess the *sincerity* of a person's religious beliefs, the Court cannot question the *content*. As such, if the Little Sisters of the Poor *sincerely* believed that being forced to sign paperwork made them complicit in abortions and substantially burdened the exercise of their religion, the Court could not question the *rationality* of that belief. By joining the dissent, Gorsuch signaled that he firmly supports this interpretation of the law. Advocates should be aware that, where a plaintiff claims that providing access to care threatens a sincerely held religious belief, Gorsuch is likely to accept their belief as rational. Instead, if it appears that a belief is sincerely held, he will rule that the content of that belief is beyond the power of the Court to question.

Little Sisters of the Poor was appealed to the Supreme Court in 2016, where it was consolidated with six other, similar cases under the title [Zubik v. Burwell](#). Ultimately, the Supreme Court did not make a substantive determination on the issue. Instead, they found that both the petitioners and the government agreed that insurance companies could be mandated to provide coverage for employees of religious organizations without those organizations having to notify the insurers or otherwise engage in any objectionable activity. They did not address whether completing the paperwork constituted a "substantial burden." They sent the cases back to their respective originating jurisdictions, in the hope that the parties would settle. Many have [speculated](#) that the Supreme Court deliberately "punted" the case. The *Zubik* decision came before the Court after the death of Justice Scalia while his seat remained unfilled. With an even eight justices left to decide the case,

Health Care in Motion

and a 4-4 conservative-liberal ideological split, it seems that the Court did not want to risk a split decision.

Zubik Back Before the Supreme Court

As noted above, in *Zubik* the Supreme Court did not decide whether having to complete paperwork can rise to the level of a “substantial burden” on one’s exercise of religion. Advocates should be aware that it is not yet clear exactly how “substantial” a “burden” has to be before it can be used to ground an accommodation or an exemption from laws that provide access to care. It is entirely possible that the case will come for rehearing once the new, nine-member court is constituted. If it does, and Gorsuch is a presiding member of the Court, advocates should use *Little Sisters of the Poor* to understand what his impact is likely to be.

If Gorsuch is appointed to the Court and *Zubik* (or a similar case) comes back for a decision on that substantive issue, Gorsuch’s record suggests that he would find without hesitation that filing the paperwork constitutes a “substantial burden.” As noted above, Gorsuch found in *Hobby Lobby* that, under RFRA, neither a company nor the owners of a company can be forced to act against their beliefs. Furthermore, in his remarks in both cases before the Tenth Circuit, he emphasized that, while the Court can question the sincerity of a religious belief, they cannot question the content. In his *Hobby Lobby* concurring opinion, for example, he referred approvingly to [Thomas v. Review Board of the Indiana Employment Security Division](#). In that case, the plaintiff, a Jehovah’s Witness, “was willing to participate in manufacturing sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets.” The Supreme Court upheld the right of the plaintiff to draw that distinction because that was “the line he understood his faith to draw when it came to complicity.” Likewise, the plaintiffs in *Zubik* were sincere in their belief that filling out the paperwork made them complicit in abortions.

Gorsuch’s record suggests that he would absolutely uphold their right to draw that line and that he would find that the mandate substantially burdens the exercise of their religion. As a result, the *Zubik* plaintiffs would likely be exempt from either providing contraceptive coverage in their employee insurance package or facilitating this mandated benefit through a third-party insurer or a federal program. Preventive care is critically important to everyone’s health and contraceptive care is especially important to the health of women, whether from the point of view of preventing unintended pregnancies, stopping the spread of HIV and other STDs, or reducing the risk of cervical and breast cancer. It is not yet clear what kind of access women in such a situation would have to contraceptive care but getting access to appropriate care would likely be made exponentially more difficult. Similarly, other mandated services that can be religiously controversial, such as HIV or HCV testing, would be vulnerable to employer objections.

Another cause for concern is that where the decisions of Gorsuch are not decisive on a particular issue of healthcare rights or civil liberties, they may be [viewed as permissive](#) by judges on lower courts who want to push a conservative agenda. *Hobby Lobby* is itself an example of a permissive decision. While the Supreme Court in *Hobby Lobby* did not expressly [decide](#) that a religious organization could discriminate against women, LGBTQ people, adherents of other religions, etc., the decision gave [implicit permission to lower courts and legislatures](#) to move further and further towards that conclusion. Since the *Hobby Lobby* decision, a series of “religious freedom restoration acts” have [appeared on State legislative books](#). These have confirmed the ability of a wide range of individuals and organizations to refuse services from contraceptive insurance to cake-baking on the basis that to provide the service to women, LGBTQ people, and others, would conflict with their religious beliefs. The movement culminated in the [First Amendment Defense Act](#) (FADA), which, if passed by Congress, will allow landlords, employers, companies, hotels and even hospitals to refuse services to a person who is gay, HIV-positive, a woman or otherwise offends their beliefs or moral convictions. FADA was not passed by Congress when it was introduced in 2015. However, Senator Ted Cruz (R-TX) has [committed](#) to re-introducing FADA and President Trump has [given it his support](#). If FADA is re-introduced and passed by Congress, Gorsuch’s commitment to legislative deference, as discussed below, makes him unlikely to make any moves against it. Advocates should take action to fight any re-introduction of the First Amendment Defense Act.

Health Care in Motion

Franciscan Alliance, Governmental Agencies and Chevron Deference

In [Chevron U.S.A. v. Natural Resources Defense Council](#), (1984), the Supreme Court took the position that if the meaning of a statute is not clear and unambiguous, the Government agency responsible for applying it should be allowed to interpret it. Unless the agency's interpretation is clearly wrong or otherwise impermissible, the Supreme Court will uphold it. Gorsuch has argued strongly against *Chevron*. While Gorsuch is very deferential to the written will of the legislature, he does not always afford the same deference to the executive because he [believes](#) that legal change must come from Congress. In [Gutierrez-Brizuela v. Lynch](#) ([discussed here by SCOTUSblog](#)), Gorsuch expounded on his textualist approach. He argued that even broadly worded statutes have an objective meaning and that this meaning can be discerned from the text. Discerning the objective meaning of a statute is the job of the courts, not of Government agencies, in Gorsuch's opinion. He has gone as far as [suggesting](#) that the *Chevron* may be unconstitutional. Gorsuch's approach may become crucial if cases relating to an agency's interpretation of the ACA are brought before the Supreme Court.

Franciscan Alliance: Bringing Civil Rights Back to 1972

[Franciscan Alliance v. Burwell](#) was heard in late 2016 by Judge Reed O'Connor of the United States District Court for the Northern District of Texas. The case revolved around a regulation promulgated by the Department of Health and Human Services ("HHS") under Section 1557 of the ACA. Section 1557 incorporates a number of anti-discrimination laws into the ACA, including Title IX of the Education Amendments of 1972, and explicitly applies them to the provision of health care services. Title IX prohibits discrimination in a number of contexts, including discrimination based on sex. By incorporating it into the ACA, the Obama Administration hoped to ensure that health providers could not discriminate based on sex when providing any of the services they are mandated to provide under the ACA. The issue here was that HHS also introduced further regulations under Section 1557 that prohibit discrimination on the basis of gender stereotyping, gender identity or termination of pregnancy.

The plaintiffs in *Franciscan Alliance* included a Catholic hospital group, a Catholic medical group, a Christian medical association and eight States. The healthcare providers complained that the non-discrimination regulations forced them to provide gender transition services and abortions against their beliefs and their medical judgement. They also complained that the regulations forced them to provide coverage for abortions in their employee insurance plans. The States complained that the regulations forced them to provide coverage for gender transition services and also that the regulations interfered with the patient-physician relationship. The plaintiffs sought a preliminary injunction against the enforcement of the regulations. They argued, first, that the HHS regulations misinterpreted the Title IX prohibitions against sex discrimination and, second, that they were entitled to an exemption from the anti-discrimination provisions under RFRA. Without making a final determination on any of the issues, the district court found that the plaintiffs were likely to succeed on the merits of their case and that they faced a substantial threat of irreparable injury if the HHS regulations were enforced against them. Judge O'Connor took the significant step of granting a nationwide injunction, effectively barring any application of the HHS anti-discrimination provisions as they relate to gender identity and the termination of pregnancy.

Importantly, from the point of view of Gorsuch's nomination, the plaintiffs complained that HHS had exceeded its powers in writing the regulations. The plaintiffs argued that the Title IX provisions incorporated into the ACA were written at a time when gender was understood as a binary concept. That was the meaning of the word "sex" when the statute was enacted in 1972 and that was the meaning that was incorporated into the ACA in 2009. By extending the prohibition of discrimination to cover discrimination on the basis of gender identity, HHS had defined "sex" in a non-binary way and impermissibly expanded the reach of the non-discrimination provisions. HHS, on the other hand, argued that the meaning of "sex" in the ACA was ambiguous and that, under *Chevron*, the agency should be permitted to interpret it to include gender identity. Judge O'Connor rejected HHS's argument, finding that the statute was unambiguous in its binary definition of "sex" and that, therefore, *Chevron* did not apply. The nationwide injunction issued by Judge O'Connor has already caused outrage (see [here](#), [here](#) and comments of Whitehouse Spokeswoman, Katie Hill, [here](#)). Catholic hospitals like the Franciscan Alliance already treat [one in six Americans](#) each year and their rapid proliferation means that access to care will become [increasingly difficult](#)



Health Care in Motion

for anyone they find “objectionable.”

Gorsuch is highly likely to take the same approach in *Franciscan Alliance* or similar cases. As discussed above, Gorsuch is an ardent textualist, an originalist and strongly opposed to the *Chevron* doctrine. As such, he is likely to agree with Judge O’Connor. A textual analysis of the ACA confirms that the definition of “sex” is the binary one intended in the 1972 Title IX provisions. An originalist position holds that the 1972 definition is the one that should and must be enforced until Congress decides otherwise. A strong, anti-Chevron stance decidedly rejects the ability of HHS to engage in any interpretation of the rules that would adapt them to modern ideas of gender and of discrimination without explicit Congressional approval. Advocates should be aware that following this strict textual approach would hamstring the ability of government agencies to update the understanding of concepts like sex and gender identity without a full Congressional procedure. It means that attempts to modernize civil liberties and access to care for minorities will move at the glacial pace of the current Congress. It also means that healthcare rights fought for and granted on a federal level will be enforceable only to the extent that they are compatible with the politics and beliefs of specific states and healthcare providers.

Conclusion

In sum, what might Gorsuch’s appointment to the Supreme Court mean? In the most extreme scenario, that any religious organization will be able to successfully claim that almost any action, no matter how trivial, substantially burdens the exercise of their religion. It will be the dystopian vision painted by Justice Ginsburg in her *Hobby Lobby* dissent: anyone will be able to violate anti-discrimination laws with impunity, on the basis that to do otherwise would substantially burden their exercise of religion. In practical terms, this could mean that women will be refused coverage for contraceptive care and abortion services, that transgender individuals will be refused transition services and visitation rights and that people living with HIV will be refused preventive care. Gorsuch’s appointment might also mean that HHS, The Centers for Medicare and Medicaid Services (CMS), and other government agencies charged with interpreting the ACA and facilitating access to care will find themselves confined to a strict reading of their empowering statutes, unable to adapt to new healthcare challenges without a legislative change. With Congress firmly in the hands of Republicans, this may mean a dramatic stall or even reversal of some of the gains in access to health seen under the Obama Administration.

For another dive into Gorsuch’s jurisprudence, please see our *SpeakUP!* podcast with Professor [Abigail Moncrieff](#) of Harvard Law School and Boston University [here](#).

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