



**Written Statement of Hannah C. Smith
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*Before the Senate Committee on the Judiciary on the Nomination of the Honorable
Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*
March 23, 2017

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Chairman Grassley, Senator Feinstein, and distinguished Senators:

Thank you for the invitation to testify at today's hearing on the nomination of Judge Neil Gorsuch to the Supreme Court of the United States. My name is Hannah Smith, and I am Senior Counsel at Becket, a non-profit, public-interest law firm dedicated to protecting religious liberty for people of all faiths. At Becket, we have defended Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, Zoroastrians, and others in lawsuits around the country. This defense involves federal constitutional claims under the Free Exercise and Establishment Clauses as well as federal statutory claims under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In this decade, we have litigated several cases before the United States Supreme Court, all of which have resulted in favorable decisions: the Little Sisters of the Poor case *Zubik v. Burwell*,¹ *Holt v. Hobbs*,² *Wheaton College v. Burwell*,³ *Burwell v. Hobby Lobby*,⁴ *McCullen v. Coakley*,⁵ and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.⁶

When it comes to protecting the principle of religious liberty for all, we expect that Judge Gorsuch will be an excellent Associate Justice of the Supreme Court of the United States. In his words, religious liberty law “doesn’t just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation’s long-held aspiration to serve as a refuge of religious tolerance.”⁷ Judge Gorsuch’s track record in religious liberty cases holds true to this fundamental principle of our pluralistic American society.

¹ 136 S. Ct. 1557 (2016).

² 135 S. Ct. 853 (2015).

³ 134 S. Ct. 2806 (2014).

⁴ 134 S. Ct. 2751 (2014).

⁵ 134 S. Ct. 2518 (2014).

⁶ 565 U.S. 171 (2012).

⁷ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152-53 (10th Cir. 2013) (Gorsuch, J., concurring).

In preparation for this hearing and with the assistance of my colleagues, I have reviewed the religious liberty related cases in which Judge Gorsuch has been involved during his judicial service, either by writing an opinion or by casting a vote. This survey reveals that Judge Gorsuch approaches religious liberty cases by carefully considering the applicable statutory and constitutional provisions and the relevant governing precedents. His opinions are rigorous, meticulous, and well-reasoned. His record demonstrates an understanding of both the historical traditions and the legal imperatives that form the basis of our nation's religious liberty protections. Of the 10 cases that Judge Gorsuch himself identified to this Committee as the most significant among his 800 or so opinions,⁸ he chose two about religious liberty: *Yellowbear v. Lampert*⁹ and *Hobby Lobby Stores, Inc. v. Sebelius*.¹⁰

In his ten years of service on the U.S. Court of Appeals, Judge Gorsuch participated in 40 Tenth Circuit panels, *en banc* sittings, or votes for rehearing in cases involving religious liberty. None of his religious liberty decisions has ever been reversed by the Supreme Court. Every time the Supreme Court reached the merits in one of these cases, it vindicated Judge Gorsuch's position—even in the cases where he had dissented.¹¹ An examination of these cases reveals that Judge Gorsuch is also a remarkable consensus builder. When he sat together with judges who were appointed by a Democratic president, those judges unanimously agreed with him in 80% of those cases. Overall, he was part of a unanimous decision almost 90% of the time. When he actually authored the religious liberty decision for the court, he produced a unanimous decision every single time—100%. This is a striking record of coalition-building in an area of jurisprudence that can be quite contentious.

This analysis of his religious liberty jurisprudence is consistent with his broader caseload, which shows him to be a consensus builder and a mainstream jurist. An analysis by Jeff Harris, a partner at the law firm of Kirkland & Ellis, confirms this point: “Judge Gorsuch has written some 800 opinions since joining the Tenth Circuit Court of Appeals in 2006. Only 1.75% of those decisions (14 opinions) drew dissents from his colleagues.”¹² In other words, over 98% of his opinions on any topic have been unanimous, a fact more significant in a circuit where, of the 12 active judges, 7

⁸ See Judge Neil M. Gorsuch's U.S. Senate Committee of the Judiciary Questionnaire for Nominee to the Supreme Court at 25, 30-32, [https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJSQ%20\(Public\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJSQ%20(Public).pdf).

⁹ 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J., joined by Baldock, J. and Jackson, J., sitting by designation).

¹⁰ 723 F.3d 1114 (10th Cir. 2013); *id.* at 1152-53 (Gorsuch, J., concurring).

¹¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (affirming Tenth Circuit's decision in favor of Hobby Lobby); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (vacating Tenth Circuit's decision against Little Sisters of the Poor); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (adopting Judge McConnell and Judge Gorsuch's dissenting position).

¹² Editorial, *Gorsuch in the Mainstream*, Wall Street Journal, Feb. 9, 2017, <https://www.wsj.com/articles/gorsuch-in-the-mainstream-1486513094>

were appointed by Democratic presidents and 5 by Republican presidents.¹³ This is likely one reason why the American Bar Association has given Judge Gorsuch the highest rating on its scale for evaluating a Supreme Court nominee.¹⁴

I. Religious Liberty Decisions in the Prison and Criminal Context

Throughout his tenure on the federal bench, Judge Gorsuch has demonstrated repeatedly that he applies the law fairly to protect the religious liberty of all Americans, including religious minorities and incarcerated persons—some of the most politically powerless in our society. Judge Gorsuch has decided numerous cases under RLUIPA’s prisoner provisions, protecting Native Americans, Muslims, and Jews.

As this Committee well knows, RLUIPA passed the House and Senate by unanimous consent¹⁵ and was signed into law by President Bill Clinton.¹⁶ Congress enacted RLUIPA following nine hearings over three years that investigated state- and local-level burdens on religious liberty. In the prison setting, Congress observed “that ‘frivolous or arbitrary’ barriers impeded institutionalized persons’ religious exercise.”¹⁷ A joint statement of RLUIPA co-sponsors Senators Orrin Hatch (R-UT) and the late Edward Kennedy (D-MA) noted that “[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”¹⁸

Judge Gorsuch demonstrated his understanding of RLUIPA’s important protections for prisoners in *Yellowbear v. Lampert*¹⁹—a case where a Native American prisoner had requested access to a sweat lodge for religious purposes. Judge Gorsuch authored an eloquent opinion in which he affirmed the foundational principle underlying those provisions: “While those convicted of crime in our society

¹³ Current active Tenth Circuit judges appointed by Democratic presidents include: Judge Mary Beck Briscoe (Clinton); Judge Carlos F. Lucero (Clinton); Judge Scott M. Matheson, Jr. (Obama); Judge Robert E. Bacharach (Obama); Judge Gregory A. Phillips (Obama); Judge Carolyn B. McHugh (Obama); and Judge Nancy L. Moritz (Obama). Current active Tenth Circuit judges appointed by Republican presidents include: Chief Judge Timothy M. Tymkovich (George W. Bush); Judge Paul J. Kelly, Jr. (George H.W. Bush); Judge Harris L. Hartz (George W. Bush); Judge Neil M. Gorsuch (George W. Bush); and Judge Jerome A. Holmes (George W. Bush). See Judges of the Tenth Circuit Court of Appeals, <https://www.ca10.uscourts.gov/judges> (last visited Mar. 14, 2017).

¹⁴ Peter Hasson, *American Bar Association Gives Neil Gorsuch Highest Possible Rating for SCOTUS*, Daily Caller (Mar. 9, 2017, 7:06 PM), <http://dailycaller.com/2017/03/09/american-bar-association-gives-neil-gorsuch-highest-possible-rating-for-scotus/>.

¹⁵ See S.2869, Bill Summary and Status for 106th Congress (2000).

¹⁶ See Pub. L. No. 106-274, 114 Stat. 803 (2000).

¹⁷ *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)).

¹⁸ *Id.*

¹⁹ 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J., joined by Baldock, J. and Jackson, J., sitting by designation).

lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the sincere exercise of religion should not be among them—at least in the absence of a compelling reason.”²⁰ For a unanimous panel, he wrote that there was no such compelling reason for the government to prevent a member of the Northern Arapaho tribe from practicing his Native American religion during his life sentence.²¹ Judge Gorsuch recognized that, especially in the prison context, it is “easy for governmental officials with so much power over inmates’ lives to deny capriciously one more liberty to those who have already forfeited so many others.”²² Therefore, he cautioned that the compelling interest test—“the strictest form of judicial scrutiny known to American law”—cannot be satisfied “by fiat” or “the government’s bare say-so.”²³ On this point, Justice Sonia Sotomayor quoted Judge Gorsuch’s *Yellowbear* opinion in her concurring opinion in another RLUIPA prisoner case, *Holt v. Hobbs*.²⁴ There, a unanimous Supreme Court ruled in favor of a Becket client—a Muslim prisoner who sought to grow a religiously required beard. In two other RLUIPA prisoner cases, Judge Gorsuch has (1) voted in favor of a Muslim prisoner seeking access to religiously required meals,²⁵ and (2) reversed a lower court decision failing to adequately consider a *pro se* prisoner’s request for a kosher diet.²⁶

In the criminal context, Judge Gorsuch has demonstrated his understanding that religious liberty claims have reasonable limits. In a drug trafficking case, *United States v. Quaintance*,²⁷ for example, Judge Gorsuch declared that religious liberty laws do not “offer refuge to canny operators who seek through subterfuge to avoid laws they’d prefer to ignore[. . .]like those who set up ‘churches’ as cover for illegal drug distribution operations.”²⁸ There, a couple sought to raise money to make bail for her brother, who had been arrested for transporting marijuana.²⁹ They decided to make

²⁰ *Yellowbear*, 741 F.3d at 52.

²¹ *Id.* at 58.

²² *Id.* at 53.

²³ *Id.* at 59.

²⁴ 135 S. Ct. 853, 867 (2015) (Sotomayor, J., concurring) (quoting *Yellowbear* that the deference “extend[ed to] the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat” because prison policies based on speculation were what motivated Congress to pass RLUIPA in the first place).

²⁵ *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010) (Henry, J., joined by Ebel, J., and Gorsuch, J.); *id.* at 1324-26 (Gorsuch, J., concurring) (agreeing with majority that there is a substantial burden under RLUIPA where, as here, prisoner is faced with “Hobson’s choice” of being “forced to choose between violating his religious beliefs and starving to death” but writing separately to clarify that the court did not decide, among other things, whether being forced to “forgo an occasional meal” is a “substantial burden” proscribed by RLUIPA) (emphasis in original).

²⁶ *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Ctr.*, 492 F.3d 1158 (10th Cir. 2007) (Gorsuch, J., joined by Lucero, J., and Hartz, J.).

²⁷ 608 F.3d 717 (10th Cir. 2010) (Gorsuch, J., joined by Henry, J., and Ebel, J.).

²⁸ *Yellowbear*, 741 F.3d at 54 (citing *Quaintance*, 608 F.3d at 720-23).

²⁹ *Quaintance*, 608 F.3d at 719.

bail by selling marijuana themselves and establishing the “Church of Cognizance,” founded on the teaching that marijuana is both a deity and sacrament.³⁰ After the Border Patrol busted their “backpack runners” from Mexico, the couple argued that their drug-running was part of their church’s religious activities and thus legally protected by RFRA.³¹ Judge Gorsuch wrote a detailed opinion affirming the lower court’s decision that the couple’s religious beliefs were not sincere—a threshold determination in every religious liberty case—and that the “church” was a mere front for a drug operation.³² The *Quaintance* decision shows Judge Gorsuch’s understanding that insincere religious claims must be rejected if the law of religious liberty is to remain robust.

II. Religious Liberty Decisions Under the Religious Freedom Restoration Act

Two of Judge Gorsuch’s best known religious liberty cases—*Hobby Lobby*³³ and *Little Sisters of the Poor*³⁴—were decided under RFRA. This important federal statute was passed in the wake of the Supreme Court’s 1990 decision in *Employment Division v. Smith*,³⁵ which cut back traditional constitutional protections for religious liberty. In the wake of *Smith*, a bipartisan coalition of elected officials, scholars, and advocacy groups united to restore protections for religious liberty. When RFRA was passed in 1993, the bill “was supported by one of the broadest coalitions in recent political history,” with 66 religious and civil liberties groups, “including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations,” working

³⁰ *Id.*

³¹ *Id.*

³² In two other criminal cases, Judge Gorsuch addressed religious issues in different contexts. First, in *United States v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014), Judge Gorsuch dealt with the First Amendment ramifications of a law enforcement officer opining on religion in a criminal prosecution. *Id.* at 1108-09. The case involved whether an expert at trial could testify that a suspect’s religious prayer to a Mexican folk deity called Santa Muerte was “so connected with drug trafficking as to constitute evidence that the occupants of the vehicle were aware of the presence of [hidden] drugs.” *Id.* at 1095. The expert had testified that the suspect’s prayer sought “protection from law enforcement,” *id.* at 1099, and that the folk deity was not “recognized by the Catholic Church,” which painted the suspects as “heretics,” *id.* at 1109. The panel found the expert’s testimony to be unreliable, saying that: “A criminal trial is no place for a theological disputation on sainthood and the power of prayer.” *Id.* *Medina-Copete* demonstrates that Judge Gorsuch understands the government should not insert itself into theological disputes—such as whether Santa Muerte is heretical—because doing so would violate the principle that church and state should remain separate. Second, in *United States v. Olivares-Campos*, 276 Fed. App’x 816 (10th Cir. 2008), Judge Gorsuch went out of his way in an evidence suppression appeal to state that the mere presence of religious iconography (such as a picture of Jesus or a St. Christopher medallion) was insufficient to raise reasonable suspicion of gang activity and could just as easily have been attributable to “honest devotion.” *Id.* at 823.

³³ 723 F.3d 1114 (10th Cir. 2013).

³⁴ *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315 (10th Cir. 2015).

³⁵ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

together across ideological and religious lines.³⁶ RFRA was introduced in the House by then-Representative Charles Schumer (D-NY) and in the Senate by Senators Orrin Hatch (R-UT) and the late Edward Kennedy (D-MA). RFRA passed the House by a unanimous vote³⁷ and the Senate by a vote of 97-3.³⁸ In his signing remarks, President Clinton said: “What [RFRA] basically says is that the Government should be held to a very high level of proof before it interferes with someone’s free exercise of religion We believe strongly that we can never . . . be too vigilant in this work.”³⁹

In Becket’s *Hobby Lobby* case,⁴⁰ Judge Gorsuch voted in favor of the religious objectors against government coercion.⁴¹ The case involved the question whether RFRA prevented the government from imposing the Affordable Care Act’s regulatory contraception mandate on a closely held, family-owned business.⁴² The Green family objected on religious grounds to providing insurance coverage for a small subset of contraceptives covered by the mandate.⁴³ If they did not comply, their company would be fined \$475 million a year.⁴⁴ Judge Gorsuch joined the *en banc* court’s majority opinion, and wrote separately to emphasize the substantial burden on the Green family’s religious exercise.⁴⁵ He wrote that the Green family was forced to choose between “exercising their faith or saving their business.”⁴⁶ The Supreme Court agreed with the majority, holding that under RFRA, the HHS mandate imposed a substantial burden that was not the least restrictive means of accomplishing its goal.⁴⁷

In Becket’s *Little Sisters of the Poor* case,⁴⁸ Judge Gorsuch similarly voted in favor of the nuns in their challenge to the same HHS mandate as applied to nonprofit religious ministries.⁴⁹ When the original three-judge panel ruled against the Little Sisters of the Poor, the Tenth Circuit—in a *sua sponte* vote—decided to deny rehearing *en banc*. But Judge Gorsuch disagreed and joined a dissent from denial of

³⁶ Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210, 244 (1994).

³⁷ H.R. Rep. No. 103-88 (1993).

³⁸ S. Rep. No. 103-111 (1993).

³⁹ Statement by President on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993).

⁴⁰ 723 F.3d 1114.

⁴¹ *Id.* at 1121.

⁴² *Id.* at 1120.

⁴³ *Id.* at 1120-21.

⁴⁴ *Id.* at 1125.

⁴⁵ *Id.* at 1152-59 (Gorsuch, J., concurring, joined by Kelly, J., and Tymkovich, J.).

⁴⁶ *Id.* at 1152.

⁴⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁴⁸ 799 F.3d 1315 (10th Cir. 2015).

⁴⁹ *Id.* at 1316.

en banc review, a dissent which called the opinion of the panel majority “clearly and gravely wrong.”⁵⁰ Ultimately, Judge Gorsuch’s position was vindicated when the U.S. Supreme Court issued a *per curiam* decision vacating the panel opinion and forbidding the government from imposing any financial penalties on the nuns.⁵¹

Although some have tried to frame the HHS mandate cases as an irresolvable conflict between religious liberty and women’s rights, the government’s recent admissions before the Supreme Court belie that view. Specifically, in the Little Sisters’ case, the government conceded that, instead of forcing religious objectors to provide contraceptive services using their health plans, the government could still achieve its interest by allowing women to access contraceptive services on the government’s own exchanges, through another government program, or through other insurance plans.⁵² Second, the government admitted it could modify its scheme to avoid forcing religious organizations to execute documents authorizing the use of their health plans in ways that violate their religious faith.⁵³ These important concessions before the Supreme Court exposed the false conflict between contraceptive access and religious liberty. Thus, the Supreme Court reached unanimity in a case that was once predicted to end in division.

It is often true in high-profile litigation, like the HHS mandate cases, that the political pressure will be greatest on the government to abandon protecting unpopular religious practices in order to achieve a particular policy initiative. Especially in these cases, judges must do their job and make the government prove its case. As Judge Gorsuch put it, while religious liberty statutes like RFRA and RLUIPA “anticipate[] that [their] solicitude for religious exercise must sometimes yield to other competing state interests,”⁵⁴ the government must prove “the ‘compellingness’ of its interest in the context of ‘the burden on *that person*’”⁵⁵ and “must of course ‘refute . . . alternative schemes’ suggested by the [religious objector] to achieve that same interest and show why they are inadequate.”⁵⁶ As in the Little Sisters’ case, this burden on the government to explain itself will often reveal that win-win solutions are in fact readily available.

⁵⁰ *Id.*

⁵¹ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁵² Mark L. Rienzi, *Fool Me Twice: Zubik v. Burwell and the Perils of Judicial Faith in Government Claims*, *Cato Supreme Court Review*, 2015-2016; *see also* Brief for the Respondents at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418); *id.* at 14-15.

⁵³ *Id.*

⁵⁴ *Yellowbear*, 741 F.3d at 57.

⁵⁵ *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000cc-1(a)).

⁵⁶ *Id.* at 62. (quoting *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011)).

III. Religious Freedom Cases in the Establishment Clause Context

Judge Gorsuch’s Establishment Clause jurisprudence shows he understands that religion is an important part of cultural expression in our pluralistic society and has been since the founding. Given this history, it is no surprise—and certainly no violation of the Constitution—that religion sometimes manifests in public life. Some militant advocacy groups have worked to scrub religion entirely from the public square, relying on an array of subjective and unworkable tests that are untethered from any historical analysis and that would erase religion wherever it might cause offense to some.⁵⁷ Judge Gorsuch has rightly rejected this approach, focusing instead on how the historical understanding of the framers should guide Establishment Clause analysis. His approach has been vindicated by the Supreme Court in recent years as the Court has moved away from problematic subjective tests and embraced a view of the Establishment Clause focused on history.

In the past, the Supreme Court has employed anti-historical and abstract constitutional tests to interpret the Establishment Clause, including the subjective *Lemon* test. This test asks whether the government’s action (1) has a religious “purpose,” (2) has the “primary effect” of “advancing” or “endorsing” religion, and (3) fosters “excessive government entanglement with religion.”⁵⁸ This test has been heavily criticized by courts and commentators alike,⁵⁹ and has not been applied by the Supreme Court in a merits decision in over 12 years.⁶⁰ In fact, at least eight current or recent Justices have called for its rejection.⁶¹ Justice Scalia even went so

⁵⁷ See generally Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, *Cato Supreme Court Review*, 2013-2014.

⁵⁸ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (describing *Lemon* test); *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O’Connor, J. concurring) (first articulating “no endorsement” test).

⁵⁹ See, e.g., *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbook, J. & Posner, J., dissenting from *en banc* decision) (calling *Lemon* and “no endorsement” test “hopelessly open-ended”); Gerard V. Bradley, *Protecting Religious Liberty*, 42 *DePaul L. Rev.* 253, 261 (1992); Richard W. Garnett, *Religion, Division, & the First Amendment*, 94 *Geo. L.J.* 1667 (2006); Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 *Colum. L. Rev.* 1373, 1380-88 (1981); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 *U. Chi. L. Rev.* 115, 118-20 (1992).

⁶⁰ *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

⁶¹ See, e.g., *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2535-36 (2012) (Alito, J., dissenting from denial of *certiorari*) (“Establishment Clause jurisprudence is undoubtedly in need of clarity”); *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14-15, 17, 19, 21-22 & n.3 (2011) (Thomas, J., dissenting from denial of *certiorari*) (“Establishment Clause jurisprudence [is] in shambles,” “nebulous,” “erratic,” “no principled basis,” “purgatory,” “impenetrable,” “ad hoc patchwork,” “limbo,” “incapable of consistent application,” “our mess,” “little more than intuition and a tape measure”) (quotations omitted); *Lamb’s Chapel*, 508 U.S. at 398 (Scalia, J., concurring); *Allegheny Cty. v. Am. Civil Liberties Union*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (O’Connor, J., concurring in judgment); *Wallace v. Jaffree*,

far as to compare the *Lemon* test to “some ghoul in a late-night horror movie that . . . stalks [the] Establishment Clause jurisprudence.”⁶² Even where the Court mentioned *Lemon* in passing, the Court has treated its factors as “no more than helpful sign-posts,” and many times did not apply them at all.⁶³

As it has turned away from subjective and abstract tests like *Lemon*, the Court’s modern trend has been to focus on the historical meaning of the Establishment Clause and the practices that have long been permitted under it.⁶⁴ Indeed, the Supreme Court recently admonished that “the Establishment Clause *must* be interpreted by reference to historical practices and understandings.”⁶⁵ Judge Gorsuch has correctly employed such historical analysis throughout his tenure as a judge.

For example, in *Green v. Haskell County Board of Commissioners*,⁶⁶ Judge Gorsuch relied on the historical and cultural significance of the Ten Commandments when he voted in favor of allowing such a monument on a courthouse lawn alongside other markers of our nation’s legal and cultural history.⁶⁷ In his dissent from a decision not to revisit the ruling that would remove this monument, Judge Gorsuch correctly explained that “public displays focusing on the ideals and history of a locality” do not violate the Establishment Clause merely because they include the Ten Commandments.⁶⁸ In fact, he pointed out that in inclusive displays on courthouse lawns, the Ten Commandments can convey a message about “the primacy and

472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting); *Comm. for Public Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

⁶² *Lamb’s Chapel*, 508 U.S. at 398 (Scalia, J., concurring).

⁶³ *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

⁶⁴ *Town of Greece*, 134 S. Ct. at 1823, 1825, 1819 (engaging in a thorough review of legislative prayer practices “[f]rom the earliest days of the Nation” that have “long endured,” and “become part of our heritage and tradition,” concluding that the “prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures”); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183-84 (2012) (examining the history of colonial “[c]ontroversies over the selection of ministers” to determine that “[t]he Establishment Clause prevents the Government from appointing ministers”); *Van Orden*, 545 U.S. at 686 (plurality of the Court upheld Texas’s Ten Commandments display, applying an analysis “driven both by the nature of the monument and by our Nation’s history”); *id.* at 699-700 (Breyer, J., concurring) (looking to “national traditions” and monument’s historical context); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding practice of state-paid chaplain’s legislative prayer because it was “deeply embedded in the history and tradition of this country”).

⁶⁵ *Town of Greece*, 134 S. Ct. at 1819 (emphasis added) (quotation marks omitted).

⁶⁶ 574 F.3d 1235 (10th Cir. 2009).

⁶⁷ *Id.* at 1243-49.

⁶⁸ *Id.* at 1248.

authority of law, as well as the ‘history and moral ideals’ of our society and legal tradition.”⁶⁹

Similarly, in *American Atheists, Inc. v. Davenport*,⁷⁰ Judge Gorsuch dissented from a decision to leave in place a ruling that memorial crosses displayed on the side of the highway to commemorate fallen troopers violated the Establishment Clause.⁷¹ Ultimately, the Supreme Court declined to hear that case, but Justice Clarence Thomas wrote a 19-page dissent from denial of *certiorari*, citing Judge Gorsuch’s dissent and lamenting that the court had rejected “an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles.”⁷²

Finally, in *Pleasant Grove City v. Summum*,⁷³ Judge Gorsuch joined then-Judge Michael W. McConnell’s dissent from the denial of rehearing *en banc*, taking the view that the government’s display of a donated Ten Commandments monument in a public park did not obligate the government to display every other monument someone might offer.⁷⁴ The Supreme Court unanimously reversed the 10th Circuit’s decision and sided with Judges McConnell and Gorsuch.⁷⁵ Consistent with Judge Gorsuch’s position, the Court made clear that it was permissible for government to recognize religious elements as an important contribution to a community’s values, culture, and history.⁷⁶

Government recognition of religious culture is not only historically justified, it is far preferable to the hyper-secular alternative of attempting to whitewash religious expression from our communities and our history. The Supreme Court’s jurisprudence correctly recognizes the important role that many religious traditions have played and continue to play in our pluralistic American society.

IV. Conclusion

In all of his rulings touching upon religious liberty issues, Judge Gorsuch has a consistent record of closely following the relevant statutes and constitutional provisions, without regard to preference for political party or ideological outcome. Judge Gorsuch’s jurisprudence demonstrates an even-handed application of the principle that religious liberty is fundamental to freedom and to human dignity, and that protecting the religious rights of others—even the rights of those with whom we may disagree—ultimately leads to greater protections for all of our rights. Thank you.

⁶⁹ *Id.* (quoting *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment)).

⁷⁰ 637 F.3d 1095 (10th Cir. 2010).

⁷¹ *Id.* at 1107-11.

⁷² *Utah Highway Patrol Ass’n*, 132 S. Ct. at 13 (Thomas, J., dissenting from denial of *certiorari*).

⁷³ 499 F.3d 1170 (10th Cir. 2007).

⁷⁴ *Id.* at 1174-78.

⁷⁵ *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

⁷⁶ *Id.* at 472.