

June 17th, 2010

The Honorable Senator
Senate Judiciary Committee
226 Dirksen Senate Office Building
Washington, D.C. 20002

Dear Senator:

We write in anticipation of the upcoming hearing, scheduled to commence June 28th, on U.S. Solicitor General Elena Kagan's nomination to be an Associate Justice of the United States Supreme Court.

These hearings are an opportunity both to learn about the nominee's judicial philosophy and to highlight particular legal issues. Although our organizations hold differing views on the nomination of General Kagan and many do not take positions on judicial nominees, we are all committed to a strong separation of church and state and robust religious liberty for people of all faiths and none. To that end, we'd like to suggest some questions aimed at probing Solicitor General Kagan's views on the religion clauses of the First Amendment to the United States Constitution, the Establishment and Free Exercise Clauses.

As you know, the Supreme Court has the power to protect or erode the wall of separation between church and state, and each individual justice, confirmed to a lifetime appointment, can have a major impact on federal jurisprudence in this, and every, area of the law. If confirmed, General Kagan will surely contribute to the process of shaping the law under the Establishment and Free Exercise Clauses. The Court has already granted *certiorari* in two cases related to religious freedom for the October 2010 term, so her consideration of these issues would be almost immediate.

We encourage you to pose the following (or similar) questions to General Kagan when she appears before you at the hearings:

- 1) What are the aims of the Free Exercise and Establishment Clauses of the Constitution? What values do they seek to protect? How, and in what ways, has the Court's jurisprudence safeguarded or eroded these values?
- 2) In your testimony at your hearing for confirmation as Solicitor General, you stated that "religious organizations are different and that these differences are sometimes relevant for the purposes of government funding." How are religious organizations different from secular organizations for First Amendment purposes? What limits does the Establishment Clause place on government funding that flows to faith-based organizations? In what other ways does the special nature of religious institutions call for different treatment under the Constitution?
- 3) Traditionally, Free Exercise rights have been accorded both to individuals and to institutions. What do you believe is the scope of those rights? How does the Free Exercise Clause protect the practice of faith by individuals and institutions? To what extent, if any, do free exercise protections differ when cases involve institutions rather than individuals? And what additional protections, if any, does the doctrine of religious autonomy provide for religious institutions?

- 4) What is the authority of Congress to regulate state action in the interest of protecting individuals from violations of their Equal Protection rights under the 14th Amendment—please answer both generally but also particularly in regards to legislation designed to protect individual and institutional religious liberty?
- 5) The Court has historically recognized a special category of taxpayer standing in Establishment Clause challenges (*Flast v. Cohen*, 392 U.S. 83 (1968)). The Court has recently discussed this precedent in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007). Is it important to provide special leeway for taxpayers to bring Establishment Clause lawsuits? If so, why, and how should courts do so?

We look forward to a productive hearing and stand ready to serve as a resource as you craft questions related to these important issues.

Sincerely,

American Association of University Women
American Jewish Committee
American Jewish Congress
Americans United for Separation of Church and State
Baptist Joint Committee for Religious Liberty
B'nai B'rith International
Center for Inquiry
Council for Secular Humanism
Friends Committee on National Legislation
Hindu American Foundation
Human Rights Campaign
Interfaith Alliance
Jewish Council for Public Affairs
Jewish Reconstructionist Federation
National Council of Jewish Women
People for the American Way
Secular Coalition for America
Sikh Council on Religion and Education
Union for Reform Judaism
United Church of Christ, Justice and Witness Ministries
Women of Reform Judaism