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Glen S. Lewy



August 30, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

ADL (the Anti-Defamation League) was founded in 1913 with a simple but timeless mission: to stop the defamation of the Jewish people and to secure justice and fair treatment to all. To strive towards these goals, ADL has maintained a core set of principles for more than 100 years—fighting anti-Semitism and all forms of bias and hate, as well as eliminating discriminatory barriers that deny equal opportunities to individuals based on their race, religion, gender, national origin, sexual orientation or other immutable characteristics. We have also worked to ensure the preservation of individual rights, including the Constitution’s guarantees of freedom of religion and expression and other rights that must be protected to maintain a pluralistic and democratic nation.

We write to you in anticipation of the upcoming hearings on the nomination of Judge Brett Kavanaugh to serve as an Associate Justice of the United States Supreme Court. By all accounts, he is a person who has demonstrated integrity and care for his community and the country. Judge Kavanaugh’s academic pedigree, work in the legal counsel’s office at the White House, and twelve years as a federal appellate court judge have earned him the respect due to someone who has a long track record of public service at the highest levels.

While we appreciate Judge Kavanaugh’s qualifications and deeply respect his service, it is critical for the Judiciary Committee (the “Committee”) to examine his judicial philosophy and views on a wide range of topics. The American people need to know his views on the Supreme Court’s role in interpreting the United States Constitution and laws that protect fundamental civil rights and liberties. This can be accomplished without asking for commentary on any pending cases.

The Supreme Court has spoken clearly and emphatically on some issues core to ADL’s agenda, for example, by unanimously affirming the constitutionality of hate crimes laws 25 years ago. However, there are several areas relevant to our core equities regarding the promotion of equality and the elimination of discrimination that are likely to come before the Court in the coming years. We believe these areas deserve the Committee’s special attention and would urge you and your colleagues to probe them in the upcoming hearings. In this context, topics of particular interest to us that Judge Kavanaugh should be invited to address include: (1) First Amendment religion clauses, (2) civil rights, (3) immigration, and (4) his judicial philosophy.

Consistent with recommendations that ADL has made to this Committee for the past three decades, here we present a series of potential questions to help the Committee to ascertain Judge Kavanaugh’s views on these critical topics:

1. First Amendment Religion Clauses

The two religion clauses of the First Amendment—the Establishment Clause and Free Exercise Clause—are vital to the preservation and protection of religious freedom in this country. The interpretation of both clauses, however, continues to generate considerable controversy. We think it is of the utmost importance for the Committee to gain clarity regarding Judge Kavanaugh’s perspective on both clauses.

a. **The Establishment Clause**

ADL has long believed that strict separation of church and state is necessary to protect the religious rights of all. We are concerned about various aspects of Establishment Clause jurisprudence, including the judicial standard employed when interpreting the First Amendment, the extent to which religious symbols can be displayed on public lands, the appropriateness of prayer in a government setting, and public funding of religious institutions or activity.

Judge Kavanaugh’s record in demonstrating appreciation for the unique First Amendment promise that government will not promote or support religion gives rise to concerns. In a lecture he gave on the jurisprudence of Chief Justice William Rehnquist, Judge Kavanaugh commended the former Chief Justice for “persuasively criticiz[ing]” the metaphor of “a strict wall of separation between church and state” and disparaged the metaphor as being “based on bad history,” “useless as a guide to judging,” and “wrong as a matter of law and history.”¹

During his time in private practice, Judge Kavanaugh advocated before the courts for positions that we believe disregard necessary protections of the Establishment Clause. For example, in *Good News Club v. Milford Central School* (2001), Judge Kavanaugh filed an *amicus* brief in support of allowing a religious group that proselytizes elementary school children to organize and participate in meetings on public school grounds. He also filed an *amicus* brief in *Santa Fe Independent School District v. Doe* (2000), on behalf of two members of Congress, defending a school policy authorizing and sanctioning student-led prayers before a captive audience at school football games. The brief contended that these religious practices were constitutional because they are “deeply rooted in our history and tradition,” even if they “favor or promote religion over non-religion.” Judge Kavanaugh carried his misguided interpretation of the Establishment Clause to his service on the District of Columbia Circuit. In *Newdow v. Roberts* (2010), he wrote a concurring opinion affirming the constitutionality of sectarian prayers at the presidential

¹ Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, THE WALTER BERNES CONSTITUTION DAY LECTURE SERIES, <http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf> (last visited Jul 19, 2018).

inauguration, stating that “stripping government ceremonies of any references to God or religious expression . . . would, in effect, ‘establish’ atheism.”

It is appropriate to ask Judge Kavanaugh about his position on organized prayer in a public setting. Whether it be a non-denominational religious prayer at graduation, an invocation at the start of school board meetings, prayer circles with sports coaches before or after team events, or a cheerleader’s banner containing religious symbols, ADL strongly believes these activities demonstrate unconstitutional government advancement, endorsement, and coercion of religion. Church-state matters in school settings raise particularly serious issues, because students are inherently vulnerable to coercion by school officials.

Senators should ask Judge Kavanaugh:

- *What do you believe constitutes religious coercion under the Constitution?*
- *To what extent is it appropriate for a religious display to be located on public grounds?*
- *What is your view on the inclusion of prayer at an official public event?*
- *What is your view on the inclusion of prayer at an official event involving students in a public school?*
- *When, if at all, is it appropriate for a religious group to use public school facilities?*
- *When is it acceptable for tax-payer funding to benefit religious organizations?*
- *Do you think when a majority seeks to impose its religious views on contraception, adoption, marriage equality or abortion, it constitutes impermissible coercion under the Establishment Clause?*

b. The Free Exercise Clause

It is equally important for the Committee to explore Judge Kavanaugh’s view of the Court’s role in preserving and protecting religious liberty and religious free exercise. It is ADL’s firm belief that the right to free exercise must be supported only to the extent that such practice does not interfere with the rights of others. Today, we see many examples of those who seek to convert the shield of religious freedom into a sword to discriminate against LGBTQ communities, women, and religious minorities. Notably, both longstanding Supreme Court precedent and growing public consensus have increasingly and properly rejected the idea that religion can be used as a justification for discrimination in the marketplace.

Again, in this regard, Judge Kavanaugh’s record gives cause for concern. In his dissent in *Priests for Life v. U.S. Department of Health and Human Services* (2015), Judge Kavanaugh would have upheld a Religious Freedom Restoration Act (“RFRA”) challenge to the process by

which the Affordable Care Act (“ACA”) grants religious exemptions to its contraceptive mandate. He argued that requiring agencies to notify their insurance companies of their decision to voluntarily opt out (a right explicitly provided to them) placed a substantial burden on religious employers’ beliefs. With this argument, Judge Kavanaugh suggests that he would permit the government to grant religious exemptions in future cases even if they result in discrimination against innocent third parties. That suggestion has implications for all employees—not just women. It could, for example, make it difficult for employees to obtain needed blood transfusions or vaccinations that are contrary to an employer’s religious beliefs. ADL firmly believes that the free exercise of religion in America is a foundational civil right and one of our nation’s greatest strengths. Free exercise of religion, however, should not infringe on the rights of others: it must be balanced with equality, fairness, and other civil rights.

Senators should ask Judge Kavanaugh:

- *What is the intent of RFRA and what are its limitations?*
- *Under what circumstances can a person refuse to follow a law that violates their religious beliefs?*
- *When must an individual follow the law, even if they believe it compromises their religious beliefs?*
- *What is the legal balance between the religious liberty rights of one party and the right to be free from discrimination for another? Should free exercise rights always prevail, even if such practice violates the rights of others?*
- *How does the decision in *Burwell v. Hobby Lobby (2014)* affect the rights of Jews and other religious minorities?*

2. Civil Rights

Civil rights issues continue to come before the Court on a regular basis. ADL has long sought to eradicate discrimination in employment, education, and housing, as well as in other areas of American life. ADL supports a broad interpretation of the Constitution’s equal protection guarantees, and its prohibition against discrimination on the basis of race, ethnicity, religion, national origin, gender, sexual orientation, and gender identity.

a. Voting Rights

Judge Kavanaugh’s record presents concerns about his positions on voting restrictions and a lack of sensitivity to the disproportionate and discriminatory impact of such restrictions on Black and Latino voters. Voting rights are the cornerstone of our democracy and ADL considers the Voting Rights Act of 1965 (“VRA”) one of the most important and effective pieces of civil rights legislation ever enacted.

The VRA helped to secure the right to vote for millions of Americans. In its June 2013 *Shelby County v. Holder* decision, the United States Supreme Court struck down part of the VRA, essentially gutting the heart of the law. In so doing, the Court substituted its views for Congress's own conclusions after very extensive hearings and findings conducted in 2006, where Congress voted almost unanimously to reauthorize the VRA for another 25 years. Since this Court ruling, voters have been faced with increasing restrictions, from laws requiring them to show identification at the voting booth—which threaten to disproportionately disenfranchise African Americans, the elderly, students, and Latino voters—to restricting early voting and imposing onerous requirements for voter registration.

Before *Shelby County v. Holder*, Judge Kavanaugh wrote the opinion in *State of South Carolina v. The United States of America* (2012), approving South Carolina's voter ID law for future elections despite Department of Justice's ("DOJ") strong objections that the law was based in part on evidence of discriminatory intent. At the time, more than 80,000 minority-registered voters in South Carolina lacked DMV-issued identification. African Americans were 20 percent more likely than white residents to lack such ID. Judge Kavanaugh wrote that the law "does not have a discriminatory retrogressive effect" and "was not enacted for a discriminatory purpose." ADL has opposed these restrictive laws, which constrain our most core privilege as Americans, as discriminatory in intent and effect.

Senators should ask Judge Kavanaugh:

- ***What is the role of Congress and the Judiciary in interpreting the relevancy of the Voting Rights Act?***
- ***Was the Court correct in its 2013 *Shelby County v. Holder* ruling, to substitute its views for Congress's regarding the Voting Rights Act?***
- ***What is the role of the states in considering limitations on voting that could disenfranchise minority voters?***

b. Race-Based Decision-Making

Recent United States Supreme Court decisions have held that racial diversity is a compelling interest in public education. In *Fisher v. University of Texas* (2016), the United States Supreme Court upheld the admissions policy of the University of Texas at Austin, finding that the use of race as one element in a holistic undergraduate admissions process was constitutional. ADL agreed with the Court that such a policy does not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. Rather, we agreed with the Court that the consideration of race as one factor in a holistic review of each application is a proper means for a public university to achieve a diverse student body.

Judge Kavanaugh has not decided any cases regarding the use of race in college admissions. Relatedly, however, before becoming a judge, he co-authored an *amicus* brief in *Rice v. Cayetano* (2000), where he argued that it was illegal for the state of Hawaii to consider the race

of voters in determining their eligibility to participate in the election of the trustees of the agency that administered benefits. Judge Kavanaugh’s participation in co-authoring this brief, which includes statements that conflict with *Fisher v. University of Texas*, adds concern that his view of our Constitution ignores historic racial inequities and the benefits of diversity in education.

Senators should ask Judge Kavanaugh:

- ***What is your understanding of race-based decision-making in college admissions?***
- ***Do you agree that public universities have a compelling interest to seek and maintain racially diverse student bodies?***

c. Employment Discrimination

Our nation’s employment laws protect against policies or practices that discriminate against employees or potential employees on the basis of age, race, religion, gender, and national origin. These laws are critically important, because each time an employer engages in discrimination, it not only violates the rights of the individual victim but establishes an unwelcoming and hostile environment in both the workplace and adjacent social communities. ADL has identified a number of employment discrimination cases that have come before Judge Kavanaugh that raise concerns and merit further inquiry. In *Miller v. Clinton* (2012), for example, Judge Kavanaugh dissented from the majority’s decision to allow a sixty-five-year-old State Department employee who was fired because of his age to seek redress. The nominee argued that the Age Discrimination in Employment Act (“ADEA”) does not apply to the State Department abroad. Judge Kavanaugh likewise dissented in *Howard v. Office of the Chief Admin. Officer of the United States House of Representatives* (2013), where he would have prohibited a congressional employee from bringing a racial discrimination claim under the Speech and Debate Clause of the Constitution—an argument that the majority deemed irrelevant because the circumstances of the employee’s termination did not implicate legislative matters. Because the aforementioned cases raise questions about Judge Kavanaugh’s views on the breadth of employee workplace protections, it is appropriate to ask about his commitment to justice and fair treatment for all in the employment context.

Senators should ask Judge Kavanaugh:

- ***Can discrimination on the basis of age, race, religion, gender, or national origin ever be constitutional or otherwise legally permissible?***
- ***Should federal employees be protected by employment discrimination laws?***
- ***What should an employee have to demonstrate to succeed on a discrimination claim?***

d. Gender Equality

It has been the long-standing position of ADL that individuals should be permitted to make decisions regarding their personal health, including reproductive choices, in accordance with their own conscience and their own faith, and without governmental interference. This principle is core to religious freedom and liberty, and to the right to be free from sex discrimination. Since the seminal case *Roe v. Wade* (1973) set forth the fundamental right to privacy in this area, there have been numerous legal battles analyzing how closely government laws can creep towards regulating that fundamental right without violating it. In *Planned Parenthood v. Casey* (1992), a case that could have dismantled the fundamental right to privacy in reproductive healthcare, Justice Kennedy proved to be the decisive vote to uphold and support gender equality in this area.

With Justice Kennedy's retirement, many have expressed significant concern about the potential for the Supreme Court to undermine gender equality in healthcare. In his 2006 confirmation hearing for his nomination to the District of Columbia Circuit, Judge Kavanaugh declined to provide his own opinion on the merits of *Roe v. Wade*, stating he would follow it as binding United States Supreme Court precedent. As a nominee for the United States Supreme Court, Judge Kavanaugh should now be pressed to address whether he recognizes the constitutional right to an abortion.

In *Garza v. Hargan* (2017), when the federal government prevented an undocumented immigrant teen from obtaining an abortion, Judge Kavanaugh wrote a panel decision upholding the government's course of action. An *en banc* majority of the District of Columbia Circuit reversed Judge Kavanaugh's decision on the grounds that the government's actions constituted an undue burden on the abortion procedure. Judge Kavanaugh disagreed, writing a fiery dissent asserting that the decision was "based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."

Judge Kavanaugh's record provides a clear basis for a skeptical evaluation of whether he is committed to gender equality and the principles set forth in *Roe v. Wade*.

Senators should ask Judge Kavanaugh:

- ***What is your general view on the issue of a constitutional right to privacy?***
- ***What are the limitations on governmental regulation of individuals' decisions?***

e. LGBTQ Rights

Across the nation, same-sex couples found profound hope in the words of Justice Anthony Kennedy: "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were . . . The Constitution grants them that right." These words

come from Justice Kennedy’s opinion for the Supreme Court in the landmark civil rights victory *Obergefell v. Hodges* (2015), which held that the Constitution grants the right to marriage irrespective of sexual orientation. ADL applauded the decision as one historic step on the journey towards justice and fair treatment for all. ADL also welcomed EEOC findings and judicial decisions protecting LGBTQ workers under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of sex, race, color, national origin, and religion. Further, ADL supported the Departments of Justice and Education when, in 2016, it made clear to school districts that transgender students are covered by Title IX, a most important federal civil rights law that protects students from discrimination based on sex. We were, of course, deeply disappointed when the current Administration rescinded that guidance. ADL decried that decision as “cruel, tinged with prejudice and unnecessary.”

It is particularly important that the Committee probe Judge Kavanaugh’s approach to cases implicating LGBTQ rights. As recently as last term, the Supreme Court heard *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2017), a case in which a Colorado baker refused to bake a wedding cake for a gay couple. The Supreme Court issued a narrow ruling, failing to address the underlying question of whether religious beliefs could be used as a justification for blatant discrimination against the LGBTQ community. Thus, the next Justice appointed to the Court could be called upon to address this very issue and would likely cast the deciding vote.

Judge Kavanaugh has not directly ruled on issues specific to the LGBTQ community. However, the Family Research Council, which strongly and actively opposes equal rights for LGBTQ individuals, enthusiastically supported his nomination to the District of Columbia Circuit. As a result of this connection, Judge Kavanaugh’s dissent in *Priest for Life v. U.S. Department of Health and Human Services* (2015) should be examined closely for insight on how he approaches conflicts between religious liberty rights and the right to be free from discrimination. That dissent highlights his deference to a business that sought to discriminate against women by raising a religious objection to a non-intrusive insurance notification. In light of this dissent, it is important to thoroughly probe whether Judge Kavanaugh would allow store owners, public officials, or employers to use claims of religious freedom as a sword to discriminate against members of the LGBTQ community.

Senators should ask Judge Kavanaugh:

- ***Do you agree with the decision in *Obergefell v. Hodges* that the right to marry is a fundamental liberty? Do you believe it is settled law?***
- ***Is it your view that the Constitution protects against discrimination based on sexual orientation and gender identity?***
- ***What is your interpretation of Title VII, as it relates to discrimination based on sexual orientation and gender identity?***

- *What is your interpretation of Title IX, as it relates to discrimination based on sexual orientation and gender identity?*
- *Does RFRA or the Free Exercise Clause permit those with religious objections to refuse to sell goods and services to or fire or refuse to hire members from the LGBTQ communities?*
- *Do you think being transgender should be a “pre-existing condition” under the ACA?*
- *How do the decisions in *Burwell v. Hobby Lobby* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* affect the rights of the LGBTQ community?*

3. Immigration

ADL has advocated for fair and humane immigration policies since the organization’s founding. For years, we have exposed the same anti-immigrant hate that has been a fixture of the recent immigration debate and have always called for responsible policies that honor America’s history as a nation welcoming of immigrants and refugees.

ADL has been deeply troubled by the Administration’s anti-immigrant executive actions and policies, including the odious and impactful Muslim Travel Ban, family separations at the border, reported abuse at immigration detention facilities, efforts to end Deferred Action for Childhood Arrivals (“DACA”), punishment of so-called “sanctuary” cities, and increased immigration arrests in “sensitive locations,” such as courthouses and schools. Detention and deportations have been increasingly targeting immigrants with no criminal history. Consequently, ADL is concerned about a number of related cases gradually making their way through the federal court system.

a. DACA

On September 5, 2017, President Trump rescinded the DACA program, ignoring the impact his action would have on the health of the economy and on DACA recipients’ investments resulting from their reliance on the government’s commitments. This decision left the lives of 800,000 young immigrants and their families in limbo, causing multiple federal courts to step in and hold that rescinding DACA was unnecessary, arbitrary, and unlawful.

b. Immigration Enforcement

ADL is also troubled by recent executive actions that condition the receipt of federal public safety grants on local immigration enforcement. As an organization that has worked closely with local law enforcement on a variety of issues, including fighting hate and extremism, ADL strongly opposes these actions. We believe these steps compromise the entire community’s safety by driving a wedge between local law enforcement agencies and the communities they serve, where individuals often fear the police, fail to report crimes, and are unwilling to come

forward as witnesses. ADL supports so-called “sanctuary” states and cities in their recent efforts to challenge this executive action.

Likewise, ADL fervently opposes the DOJ and Department of Homeland Security’s “zero-tolerance immigration policy” for migrant families seeking to cross the border. Such policy has resulted in the criminal prosecution of undocumented immigrants seeking to cross the border, and the subsequent separation of thousands of migrant children from their parents. The Administration’s “zero tolerance” policy resulted in a humanitarian crisis at the border. Hundreds of children are still separated from their parents—even after a federal court-ordered deadline—as a direct result of this policy.

Also, deeply concerning to ADL are attempts by DOJ to use its broad authority over the immigration court system to decide that domestic violence and gang violence are no longer grounds for asylum in most cases. DOJ’s actions have resulted in additional barriers for vulnerable asylum-seekers fleeing profound violence, making it extremely difficult for these victims to gain refugee status in the United States. Recently, President Trump went so far as to suggest that undocumented immigrants should be deported without a court hearing. It is ADL’s view that our basic democratic ideals need not be sacrificed to ensure our nation’s physical security.

ADL strongly believes that one branch of government should not be able to make unilateral decisions about human rights policies. Checks and balances are a fundamental principle of our government’s policymaking process and were put in place for the primary purposes of protecting against any abuses. The next Associate Justice of the United States Supreme Court must protect the rights of all people and must be willing to intervene when the fundamental rights of individuals, including immigrants, are compromised.

Senators should ask Judge Kavanaugh:

- *What is your view on a state’s capacity to enact laws related to the citizenship and/or immigration status of persons within its jurisdiction?*
- *What is your view on the due process rights for undocumented persons under the Constitution?*
- *Is there an appropriate role for states to play in enforcing federal immigration laws?*

c. Muslim Travel Ban

ADL is deeply concerned by the recent Supreme Court decision *Trump v. Hawaii* (2018), which upheld the President’s executive order barring travel to the United States for individuals from some majority Muslim nations. While campaigning, now-President Trump proposed a “total and complete shutdown of Muslims” entering the country. In his first week in office, his Administration caused chaos in airports across the country, and in many parts of the world, by issuing an Executive Order temporarily banning immigrants from several Muslim-majority

countries. That original Order was initially enjoined by multiple courts and subsequently found unlawful on multiple counts. The original Order was ultimately revoked and replaced with another Order that, among other things, temporarily blocked visitors from certain countries from entering the United States.

ADL filed an *amicus* brief in support of the state of Hawaii’s challenge to the Order, because we vehemently opposed both Orders’ purposes, as discriminatory in intent and antithetical to the immigrant-rich history of our nation. It is in this moment that we are reminded of other grave historical injustices stemming from the exclusion of groups of people from our shores, including the Chinese Exclusion Act, the forced relocation and incarceration of Japanese-Americans in World War II, and the tragedy of the USS St. Louis, in which Jews fleeing Nazi Germany were denied entry to the United States and sent back to Europe.

For these reasons, ADL believes Judge Kavanaugh’s judicial record on immigration must be strictly scrutinized. In his dissent in *Agri Processor Co. v. National Labor Relations Board* (2008), Judge Kavanaugh made it clear that he believes undocumented immigrant workers do not qualify as “employees” under the National Labor Relations Act and should not be allowed to vote in union elections. In *International Internship Program v. Napolitano* (2013), Judge Kavanaugh essentially invalidated unpaid internship opportunities by requiring organizations that sponsor cultural exchange visas to pay “wages” to foreign citizens obtaining visas. Further, Judge Kavanaugh dissented against granting special knowledge visas to Brazilian chefs to cook Brazilian food in *Fogo De Chao (Holdings) Inc. v. Department of Homeland Security* (2014).

Senators should ask Judge Kavanaugh:

- ***Can an exclusion of immigrants based on religion ever be constitutional or otherwise legally permissible?***
- ***Do you believe that Trump v. Hawaii was correctly decided?***
- ***To what extent is it appropriate to consider senior government officials’ statements related to Administrative policy when determining the constitutionality of an Administrative action?***
- ***In your view, what is the scope of the Executive’s authority in the immigration realm?***
- ***What is your view of the respective roles of the Executive, the Legislature, and the Judiciary in dealing with issues of national security?***

4. Judicial Philosophy

ADL respectfully requests that the Committee explore Judge Kavanaugh’s judicial philosophy. It is well known that Judge Kavanaugh adheres to the philosophies of both textualism and originalism for statutory and constitutional interpretation. This is demonstrated in his law review

article, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, where Judge Kavanaugh wrote, “Contemporary standards of what’s good or decent or efficient do not control; the precise text of the Constitution controls.”² Judge Kavanaugh’s adherence to textualism and originalism is also demonstrated throughout his judicial record. For example, in his dissent in *Miller v. Clinton* (2012), Judge Kavanaugh relied on textualist principles from Justice Antonin Scalia’s book *Reading Law: The Interpretation of Legal Texts* to justify the denial of redress to an employee who had been fired because of his age.

The judicial philosophies of originalism and textualism can present significant consequences in civil rights jurisprudence. A United States Supreme Court Justice’s very role is to interpret the Constitution and its Amendments, documents that were intended not only to establish our government, but also to safeguard individual liberty and protect the rights of the minority from the tyranny of the majority. As our country grows and becomes more diverse, and as we strive to embody the ideals of a more perfect version of the vision upon which our nation was founded, new issues of civil rights and liberties emerge. An originalist approach—looking backward rather than forward—will often run counter to protecting civil rights as we think of them today.

Past statements by Judge Kavanaugh reveal that, guided by a philosophy of textualism, he believes the role of judges in our government are defined and limited. In 2006, during his confirmation hearing to become a judge for the District of Columbia Circuit, Judge Kavanaugh stated: “I believe very much in interpreting text as it is written and not seeking to impose one’s own personal policy preferences into the text of the document. I believe very much in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy.” However, his past statements and decisions on issues such as workers’ rights and civil rights suggest otherwise. A July 2018 independent report on Judge Kavanaugh’s judicial record concluded that he is “an uncommonly partisan judge,” even compared to other federal appeals court judges.³ Importantly, the judicial branch must weigh in when the legislative and/or executive branches are abusing their power. This concept is explicitly set out in the Constitution and solidified by the Bill of Rights.

Senators should ask Judge Kavanaugh:

- ***In the past, you have shown a commitment to both the originalist and textualist canons of construction when interpreting the Constitution. Does this accurately reflect your current thinking? What do those judicial philosophies mean to you?***

² 89 NOTRE DAME L. REV. 1907, 1926 (2014).

³ Ash, Elliott, and Daniel L. Chen. “Research Note: Trump’s Supreme Court Picks.” Washington Post-Google Slides, 10 July 2018, docs.google.com/document/d/13f3K_K_fHqgB1p-S9wZCAMjFDUcEuOWoeTG9uw_Uw4I/edit.

- *What is your philosophy regarding stare decisis? Would you read precedent narrowly or broadly, and under what circumstances would you vote to overturn precedent with which you disagree?*
- *How do you define “judicial activism?”*

Conclusion

We hope this submission, highlighting issues of concern to ADL, will be of assistance to the Committee as it undertakes its evaluation of Judge Brett Kavanaugh. Again, we have considerable admiration for Judge Kavanaugh’s service in the Executive and Judicial branches and his dedication to his country. However, these facts do not diminish from the questions that must be probed in order to ascertain his views that relate to a series of core issues likely to come before the Court during his tenure, issues of concern to ADL and to communities across the country.

In ADL’s view, the Senate’s role in the nomination process is equally as important as the President’s responsibility to nominate. At a time when immigrants, religious minorities, and other targets of discrimination in our country are feeling particularly vulnerable, the role of the Court in protecting their rights is critical. We believe it is vitally important that Committee members determine whether Judge Kavanaugh will respect basic principles of equality, independence, church-state separation, and civil rights, as outlined above.

Sincerely,



Marvin D. Nathan
National Chair



Jonathan A. Greenblatt
CEO and National Director