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**Anti-Defamation League
Foundation**

President

Glen S. Lewy



Thursday, March 16, 2017

Dear Senator:

The Anti-Defamation League (“ADL”) was founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment to all. To strive towards these goals, ADL has fought to ensure the preservation of constitutional rights, including the First Amendment’s guarantee of strict separation between government and religion as well as its protection of religious liberty. Another priority for ADL has been to eliminate discriminatory barriers that have denied equal opportunity to individuals, while at the same time advocating for free speech rights and other individual rights that must be protected to maintain a pluralistic and democratic nation.

In anticipation of the upcoming hearings on the nomination of Judge Neil Gorsuch as an Associate Justice of the United States Supreme Court, we write to urge you and your colleagues on the Judiciary Committee (the “Committee”) to examine his judicial philosophy on these topics. Without asking Judge Gorsuch to comment on any pending cases, the Committee can and should seek his views on the Supreme Court’s role in interpreting the United States Constitution and laws that protect fundamental rights and liberties.

We believe there are several areas that deserve the Committee’s special attention. These areas, which the nominee should be invited to address, include the contemporary parameters of (1) Judge Gorsuch’s judicial philosophy, (2) the religion clauses of the First Amendment, (3) federal civil rights, (4) immigration law, (5) free speech rights, (6) privacy rights, and (7) gun safety laws.

Judicial Philosophy

ADL respectfully requests that the Committee explore Judge Gorsuch’s judicial philosophy. It is well known that Judge Gorsuch holds high regard for Justice Scalia’s adherence to the philosophies of both textualism and originalism. Indeed, Judge Gorsuch wrote celebrating the legacy of Justice Scalia, “That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.”¹

¹ Honorable Neil M. Gorsuch, 2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case W. Res. L. Rev. 905 (2016) Available at: <http://scholarlycommons.law.case.edu/caselrev/vol66/iss4/3>.

The judicial philosophies of originalism and textualism have significant consequences in civil rights jurisprudence. A U.S. Supreme Court justice's very role is to interpret the Constitution and its Amendments, documents intended to not only establish our government but to set out safeguards for individual liberty and protections of the rights of the minority from the tyranny of the majority. As our country grows, and as we strive to become a more perfect version of what our nation was founded on, new issues of civil rights and liberties emerge. An originalist approach—thinking backward rather than forward—will often run counter to protecting civil rights as we think of them today.

Further, we are concerned by statements Judge Gorsuch made in 2005 prior to his becoming a judge, when he decried what he saw as liberal activism from the courts: "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."²

It is striking that the Judge mentions activism only with concern to what is typically seen as the liberal agenda, leaving unspoken the areas where more traditional conservatives have sought action in the courts to block particular legislation, such as gun control, campaign finance, and voting rights, to name a few. This may betray a particular political agenda in approaching important issues. Second, and moreover, in our system of checks and balances, 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. Such cases are necessarily brought for constitutional interpretation for this very reason.

The Committee should ask Judge Gorsuch:

- ***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?***
- ***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"?***

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, and both continue to generate considerable controversy. We think it is of the utmost importance for the Committee to gain clarity as to the Judge's perspective on each of these subjects.

² Gorsuch, Neil. "Liberals and Lawsuits". National Review. February 7, 2005. Available at: <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>.

The Establishment Clause

ADL has long believed that strict separation of church and state is necessary to protect the religious rights of all. ADL is concerned about various aspects of Establishment Clause jurisprudence, including the judicial standard employed when interpreting the First Amendment, to what extent religious symbols can be displayed on public lands, and the appropriateness of prayer in a government setting. ADL has long supported the standard for analyzing Establishment Clause claims set forth in *Lemon v. Kurtzman* (1971), which has proven to be a reliable constitutional barometer that generally yields decisions upholding the interests of religious minorities.

ADL is concerned that Judge Gorsuch has questioned the *Lemon* test and the application of the Endorsement test in a number of 10th Circuit cases. In his dissent from denial of en banc rehearing in *Green v. Haskell County Board of Commissioners* (2009), a case which involved a Ten Commandments display on the lawn of an Oklahoma county courthouse, Judge Gorsuch first criticized the Court's application of the *Lemon* test. He went on to find fault with reasonable observer standard the Court used to determine whether the government is endorsing religion. He contended that the Ten Commandments could be looked at not just as a symbol conveying a religious message, but also as one sending a secular moral and historical message. Another 10th Circuit case, *American Atheists Inc. v. Davenport* (2010), challenged memorializing fallen Utah Highway Patrol officers by erecting, on the side of state highways, 12-foot-tall crosses bearing the Highway Patrol's symbol. The court found that the crosses were unconstitutional as they have the effect of endorsing religion. In his dissent from denial of en banc rehearing in that case, Judge Gorsuch stated "But whether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear."

In 2007, the 10th Circuit held in *Sumnum v. Pleasant Grove* that the City could not display a gift of a Ten Commandments monument if it would not also display gifts of other religions. Judge Gorsuch joined a dissent from denial of rehearing en banc which argued that displaying a religious monument did not obligate the government to display other offered monuments. In 2009, the U.S. Supreme Court agreed with that dissent and overturned the 10th Circuit.

It is also appropriate to ask Judge Gorsuch about prayer in a public setting. Whether it be a non-denominational religious prayer at graduation, an invocation at the start of school board meeting, prayer circles with sports coaches before or after team events, or a cheerleader's banner containing religious symbols, ADL strongly believes these activities are unconstitutional as they constitute government advancement, endorsement, and coercion of religion. School settings raise particular issues, as students are in a particular position to be coerced by a school official.

The Committee should ask Judge Gorsuch:

- *What is your view on the validity of the Lemon Test?*
- *What is your view on the validity of the Endorsement Test? What standard is appropriate to interpret the reasonable observer?*
- *What is your view on what constitutes religious coercion under the Constitution?*
- *To what extent is it appropriate for a religious display to be placed on public grounds?*
- *What is your view on the appropriateness of prayer at an official public event?*
- *What is your view of the inclusion of prayer at an official event involving students in a public school?*

The Free Exercise Clause

It is equally important for the Committee to explore the nominee's view of the Court's role in preserving and protecting religious liberty and religious free exercise. We welcome Judge Gorsuch's frequent support for the free exercise rights of individuals, in particular with concern to the Religious Land Use and Institutionalized Persons Act (RLUIPA). In *Yellowbear v. Lampert* (2014), Judge Gorsuch wrote for a 10th Circuit panel that prison officials violated the religious rights of a prisoner of Native American descent by preventing him access to the sweat lodge, which is critical to his faith. In *Abdulhaseeb v. Calbone* (2010), the Judge was on the unanimous panel supporting a Muslim prisoner who claimed his RLUIPA rights were violated when he was denied halal meals. The Judge wrote a concurrence stressing the prisoner's position here; being "forced to choose between violating his religious beliefs and starving to death" is at the heart of RLUIPA.

However, in reviewing an individual's free exercise rights, 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. Thankfully, courts have mostly rejected this use of religion as a sword when people have claimed their religious tenets prevent them from serving African Americans at the lunch counter, allowing blacks and whites to marry, and allowing unmarried people to cohabit.

In 2013, Judge Gorsuch joined the opinion in a highly publicized 10th Circuit case, *Hobby Lobby v. Sebelius*, involving the contraceptive coverage mandate of the Affordable Care Act. The 10th Circuit contended, and the U.S. Supreme Court upheld, that requiring a business to provide insurance that includes contraceptive coverage for women burdened that corporation's religious rights under the Religious Freedom Restoration Act (RFRA). However, Judge Gorsuch's concurrence in the case appears to exceed the U.S. Supreme Court's broad interpretation of RFRA by allowing a plaintiff to meet his or her evidentiary burden under the statute by the mere subjective assertion that a federal law creates a "substantial burden" on religious exercise rather than requiring an objective judicial determination, a standard which other courts apply.

In a subsequent case, *Little Sisters of the Poor Home for the Aged v. Burwell* (2015), the 10th Circuit held that the accommodation granted to the organization refusing to cover contraception did not substantially burden their religious beliefs. Judge Gorsuch dissented from a decision not to rehear that ruling, arguing that requiring the group to complete a form knowing it would ultimately lead to government coverage of contraception did burden the group's religious beliefs. ADL was deeply disappointed by the Judge's rationale in these cases. We support free exercise rights for individuals, but not when such practices violate the rights of others.

The Committee should ask Judge Gorsuch:

- ***What are the limitations on RFRA?***
- ***Under what circumstances can a person refuse to follow a law that violates their religious beliefs?***
- ***What is the legal balance between the right to free exercise of one party and the constitutional rights of another? Should free exercise rights always prevail, even if such practice violates the rights of others?***
- ***How do you foresee the decision in *Hobby Lobby v. Sebelius* affecting the rights of Jews and other religious minorities?***

Civil Rights

Civil rights issues continue to reach 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 their prohibition against discrimination on the basis of race, ethnicity, religion, national origin, gender, sexual orientation, and gender identity.

LGBTQ Rights

One of the most significant civil rights issues of our day is the protections afforded members of the LGBTQ community. In 2016's *Obergefell v. Hodges* (2015), the U.S. Supreme Court ruled that a state ban on same-sex marriage is unconstitutional, holding that the right to marry is a fundamental liberty. ADL welcomed that decision as one historic step on the journey for justice and fair treatment for all. ADL also welcomed rulings protecting LGBTQ workers from discrimination in the workplace 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. And ADL supported the Departments of Justice and Education when, in 2016, they made clear to school districts that transgender students are protected under Title IX, an existing federal civil rights law that protects students from discrimination based on sex. We were, of course, disappointed that in 2017 the new Administration rescinded that guidance. ADL decried that decision as "cruel, tinged with prejudice and unnecessary."

ADL is concerned with a number of Judge Gorsuch's rulings as they relate to LGBTQ rights. In 2009, when sitting with the 9th Circuit in the case *Kastl v. Maricopa County Community College District*, the Judge joined a panel opinion in favor of an employer who banned a transgender woman from using the women's restroom until she could prove that she had undergone sex reassignment surgery, and then declined to renew her teaching contract. The opinion concluded that the college's stated reasoning for the ban of "safety reasons" sufficed. And in the 2015 10th Circuit case *Druley v. Patton*, the Judge joined a unanimous opinion rejecting a claim by a transgender woman incarcerated in Oklahoma who alleged that her constitutional rights were violated when she was denied medically necessary hormone treatment. Finally, ADL is troubled about the effect of the above-referenced *Hobby Lobby v. Sebelius* case. Specifically, we are concerned that this decision can turn religious beliefs into a sword that can be used to discriminate and undermine civil rights law.

The Committee should ask Judge Gorsuch:

- ***Do you agree with the decision in *Obergefell v. Hodges* that the right to marry is a fundamental liberty?***
- ***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?***
- ***How do you foresee the decision in *Hobby Lobby v. Sebelius* affecting the rights of the LGBTQ community?***

Voting Rights

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 passed. The VRA helped to secure the right to vote for millions of Americans. In its June 2013 *Shelby County v. Holder*, decision, the U.S. 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, after which Congress voted almost unanimously to reauthorize the VRA for another 25 years. Since this Court's decision, voters have been faced with increasing voting restrictions, from laws requiring voters to show identification at the voting booth—which threaten to disenfranchise African Americans, Latinos, students, and elderly voters—to early voting and onerous requirements for voter registration. ADL has opposed these restrictive laws, which restrict our most core privilege as citizens, as discriminatory in intent and effect.

The Committee should ask Judge Gorsuch:

- ***What is the role of Congress and the Judiciary in the context of interpreting the relevancy of the Voting Rights Act?***
- ***Was the Court correct in 2013 to substitute its views for Congress's with regard to the Voting Rights Act?***
- ***What is the role of the states in setting limitations on voting? Can it ever be appropriate to set limitations on voting that have the intent and/or the effect of disenfranchising minority voters?***

Race-based decision making

Recent U.S. Supreme Court decisions have held that racial diversity is a compelling interest in public education. In 2016, the U.S. Supreme Court in *Fisher v. University of Texas* upheld the affirmative action 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 the 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, its consideration of race as only one factor in a holistic review of each application is a proper means to achieve a diverse student body.

The Committee should ask Judge Gorsuch:

- ***What is your understanding of race-based decision making in the education context?***
- ***Do you see a compelling state interest in diversity in education?***

Immigration

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

Lately, there has been much debate about whether states or localities can enact laws related to an individual's citizenship status. It has been a long-held policy and principle of our nation that if you are born in the United States, you are a United States citizen. The 14th Amendment, the Immigration and Nationality Act, and U.S. Supreme Court jurisprudence are all clear in guaranteeing this right. Yet, efforts still arise to reinterpret the Constitution when it comes to American-born children of undocumented immigrants.

ADL is also concerned about the recent movement among states and cities to engage in formal agreements with the federal government to cooperate with the detainment and ultimate deportation of undocumented persons in their custody. ADL, an organization that has worked closely with local law enforcement on a

variety of issues including fighting hate and extremism, strongly opposes these arrangements. We believe that they compromise the entire community's safety by driving a wedge between law enforcement and the community they seek to protect, creating a situation in which individuals fear the police and fail to report crimes or come forward as witnesses. Some states and cities have fought this movement by declaring themselves "sanctuary cities."

The Committee should ask Judge Gorsuch:

- ***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 immigration laws?***

Finally, the recent executive actions related to immigrants generally and refugees particularly are deeply concerning to ADL. It is ADL's view that our democratic ideals need not be sacrificed to ensure our physical security. It is also the view of ADL that one branch of government should not be able to make decisions in these areas unilaterally, where checks and balances are established and in place to protect against abuses.

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 enjoined by multiple courts and subsequently found unlawful on multiple counts. The Order was ultimately revoked and replaced with another Order that, among other things, temporarily blocks visitors from certain countries from entering the United States. ADL vehemently opposed these efforts as discriminatory in intent, and antithetical to the immigrant-rich history of our nation.

The Committee should ask Judge Gorsuch:

- ***Can an exclusion of immigrants' based on religion ever be constitutional or otherwise legally permissible?***
- ***To what extent is it appropriate to consider statements made 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 on the role of the Executive, the Legislature, and the Judiciary in dealing with issues of national security?***

Online Speech

As e-mails, text messages, and social networking sites have become the communities in which our nation's students socialize, issues involving youth use of the internet have exploded. Cyberbullying has become increasingly prevalent over the past several years as students harass or bully their fellow students over e-

mail, social media, and the internet. Schools across the country are concerned about how to discipline students who bully over the internet, particularly when the messages are sent from the perpetrator's home computer. ADL has developed a model law for states to adopt that requires school districts to implement an anti-bullying policy in their schools that gives schools the resources they need to combat and respond to cyberbullying. The bill requires that a school anti-bullying policy include electronic bullying originated off school property if a reasonable person should know that the act will cause substantial interference with the orderly operation of the school.

The Committee should ask Judge Gorsuch:

- ***What is your interpretation of the balance of a student's free speech rights and a school's obligation to provide a safe learning environment, particularly with concern to electronic expression?***

Reproductive Rights/Right to Privacy

Without a doubt, the issue of reproductive choice is a constant source of tension in this country. Since the seminal case of *Roe vs. Wade* set forth the fundamental right to privacy in this area, there have been numerous legal battles analyzing how close government laws can creep towards regulating that fundamental right without violating it. It has been the long-standing position of ADL that women should be permitted to make decisions regarding their health, including reproductive choices, in accordance with their own conscience and their own faith, and without governmental interference.

Legal battles in the reproductive choice arena have moved beyond the topic of the right to have an abortion procedure to issues of control over reproductive health generally. In June, 2016, ADL hailed a decision by the U.S. Supreme Court in *Whole Women's Health v. Hellerstedt* that struck down a Texas anti-abortion law that would have effectively barred many women from exercising their constitutional right to abortion by creating substantial obstacles to accessing abortion.

Although Judge Gorsuch has not issued a decision directly on the viability of *Roe v. Wade*, he has issued decisions related to women's access to reproductive health. In the 10th Circuit case, *Planned Parenthood Association of Utah v. Herbert* (2016), a divided court granted Planned Parenthood a temporary injunction after a Utah Governor directed state agencies to stop passing federal funds to the group following the release of controversial videos. Judge Gorsuch wanted the 10th Circuit to rehear the case, issuing a strong dissent to denial for rehearing en banc.

Judge Gorsuch was also part of the *Hobby Lobby v. Sebelius* decision mentioned above. Again, in that case, the court allowed a company to challenge the contraceptive coverage mandate in the Affordable Care Act, thus finding in favor of the company's religious claims even when they interfered with their employees' rights. Indeed, Judge Gorsuch wrote separately in a concurrence to make clear that he would have allowed not just corporations, but the individual owners, to challenge the ACA mandate.

The Committee should ask the Judge:

- *What importance do you place on the precedential value of Roe v. Wade? Do you think that case was properly decided?*
- *What is your view on the issue of a constitutional right to privacy, generally?*
- *Do you see the right to choose an abortion as a constitutional right? What are the limitations on governmental regulation of that right?*
- *What are your views on the balance between the right to privacy in the context of abortion and other reproductive health choices, and the right to free exercise?*

Gun Safety

In 2008, the U.S. Supreme Court issued a decision in *District of Columbia v. Heller*, holding, for the first time, that the Second Amendment guarantees an individual right to have a gun for private use. Soon after, in *McDonald v. Chicago* (2010), the Court extended that right to the States as well. ADL strongly believes that cities and states must retain latitude to keep guns out of the hands of extremists and domestic terrorists. While we disagreed with the Court in these decisions, we continue to believe that though these cases have protected the right for individuals to own guns, they have left room for limitations on that right.

The Committee should ask Judge Gorsuch:

- *Do you agree with the interpretations of the majority in the Heller and McDonald decisions?*
- *Do you agree that limitations set by the U.S. Supreme Court in these cases allow for reasonable gun regulations?*

In ADL's view, the Senate's role in the nomination process is equally as important as the President's responsibility to nominate. We hope this submission of issues of concern to us will be of assistance to the Committee as it undertakes its evaluation of Judge Neil Gorsuch and wish you good luck as you move forward with the hearing.

Sincerely,



Marvin D. Nathan
National Chair



Jonathan A. Greenblatt
CEO