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On behalf of the Union for Reform Judaism, whose nearly 900 congregations across North America encompass 1.8 million Reform Jews, and the Central Conference of American Rabbis, which represents over 2,000 Reform rabbis, we submit these questions regarding the nomination of Judge Neil Gorsuch as Associate Justice of the U.S. Supreme Court Justice. We urge Committee Members to make use of them during the nomination hearing.

The Reform Movement is the largest denomination in American Jewish life and we are steadfastly committed to a full and functional Supreme Court and federal judiciary. This commitment stems from our tradition, which emphasizes the need for a court system that will “judge the people at all seasons” (Exodus 18:22). The responsibility to mete out justice cannot be done without a Supreme Court that is both full and also functional, with its functionality resting on the inherent qualities of its justices. We are inspired by the words of the Torah, which remind us that judges should be “men [and women] of substance, God fearers, people of truth,” (18:23) whose high moral character allows them to administer justice.

Since the Religious Action Center’s founding in Washington, D.C. more than five decades ago, a commitment to social justice issues has served as our foundation. Groundbreaking legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were partially drafted at the Religious Action Center, even as Reform Jewish leaders were participating in marches and sit-ins throughout the country for racial justice. The Reform Movement’s dedication to civil and human rights also includes a profound commitment to equality and reproductive rights for women, an immigration system that is both secure and compassionate, full equality for LGBTQ people and those living with disabilities, and robust religious freedom and church-state separation. We are driven by the teaching from the prophet Amos, who proclaims, “let justice roll down like water, and righteousness like a mighty stream” (Amos 5:24).

### **General Jurisprudence**

1. As a jurist who uses the originalist and textualist theories when examining issues, how do you handle issues that could not in any way have been expected by our countries Founders?
2. How do you view the role of the judiciary in ensuring the equal balance of power among the three branches of government? How do you view the judiciary’s role in



*The Religious Action Center pursues social justice and religious liberty by mobilizing the Reform Jewish community and serving as its advocate in Washington, D.C. The Center is led by the Commission on Social Action of the Central Conference of American Rabbis and the Union for Reform Judaism (and its affiliates) and is supported by the congregations of the Union.*



maintaining "checks and balances" with respect to the executive or legislative branches of government?

### **Campaign Finance Reform**

3. The Supreme Court's 2010 ruling in *Citizens United v. Federal Elections Commission* has figured broadly in campaigns and political discourse, with strong opinions being taken on both sides. Do you agree with the decision in *Citizens United*? Do you believe that money is equivalent to speech in regards to political campaigns? Do you think that the *Citizens United* decision should be extended beyond its initial scope to other campaign contributions? What if any are the limits to the infusion of money as speech in political campaigns?

### **Capital Punishment**

4. Increasingly, the application of capital punishment is recognized as fraught with racial bias, the growing prominence of cases where the defendant has a mental disability, and recognition of the prisoner's extreme suffering during the application of the death sentence. In your view, is the application of capital punishment consistent with Constitutional principles, particularly those outlined in the Eighth and Fourteenth Amendments?

### **Civil Liberties**

5. In *Boumediene v. Bush* (2008), the Supreme Court ruled that non-citizen detainees at Guantanamo Bay, Cuba are afforded the protection of the Geneva Conventions and of the Fifth Amendment right not to be deprived of liberty without due process of law. Do you believe that the right of habeas corpus extends to non-citizen detainees held at Guantanamo? Do you believe United States federal courts have jurisdiction to consider legal appeals filed on behalf of foreign citizens held by the United States military in Guantanamo Bay, Cuba?

### **Civil Rights and Criminal Justice Reform**

6. Over the past couple of years, protests throughout the United States have brought increased attention to the continuing challenge posed by racial bias in policing. In recent years, the federal government has used its power to investigate police departments and in some cases enter into court-imposed "consent decrees." Consent decrees can mandate policies in police departments that aim to change patterns of bias and ensure that law enforcement protects public safety in a manner consistent with the Constitution. What constitutional principles should inform both the practices of

law enforcement agencies and the federal government's role in promoting policing that respects the rights of all people?

### **Church-State Separation and Religious Freedom**

7. How do you interpret the concept of separation between church and state as applied to direct government funding to houses of worship and pervasively sectarian organizations?
8. The Reform Jewish Movement has long held that private school vouchers are both bad education policy and threaten the separation of church and state and religious freedom. Do you agree with the Supreme Court's decision in *Zelman v. Simmons-Harris* (2002) regarding the constitutionality of private school vouchers? If so, what is your understanding of the proper relationship between tax dollars and their use by sectarian institutions?
9. How do you interpret *Van Orden v. Perry* (2005) in the context of religious iconography on public property? While serving on the Tenth Circuit, you dissented from the denials of rehearing *Green v. Haskell* (2009) and *American Atheists, Inc. v. Duncan* (2010) en banc. Do you believe that displays of religious iconography on public property violate the Establishment Clause? How would you evaluate such cases?
10. The Supreme Court has ruled in *Engel v. Vitale* (1962) and *Santa Fe Independent School District v. Doe* (2000) that school-sponsored prayer, even if student-led, is unconstitutional. Do you agree with these decisions? How do you approach issues of prayer in school in the context of both the Establishment Clause and the Free Exercise Clause?
11. One of the central reasons why school-sponsored prayer and religious education are not permitted during school hours with students is because students are a "captive audience," and religious instruction can have a coercive effect on them. How will you approach cases that deal with the teaching of creationism in public schools?
12. In your view, how and where does one draw the line between one person's right to express their religious beliefs through their behavior in public life (i.e. as an employer or business owner), and another person's right to access public services without impediment from others' personal religious views (i.e. to access public accommodations or healthcare needs)? In what way does the Establishment Clause relate to these situations?

13. In *Hobby Lobby Stores, Inc. v. Sebelius* (2013) (later *Burwell v. Hobby Lobby Stores, Inc.* (2014)), you joined the majority opinion that extended the Religious Freedom Restoration Act (RFRA) to cover closely held for-profit entities. Do you believe that such for-profit entities are functionally similar to houses of worship or other types of religious non-profits? The contraception rule was crafted in recognition of the unique status of houses of worship as distinguished from religious non-profits, and these two types of entities from all other organizations. This rule was established to strike the delicate balance between religious freedom and reproductive rights, and before *Hobby Lobby* only religious non-profits had been recognized as being qualified to bring RFRA claims. Do you see a distinction between an individual's, a religious non-profit's or closely held for-profit entities' sincerely-held religious belief and their claim that such beliefs are substantially burdened by a neutral law of general applicability? Analysis in *Hobby Lobby* and in *Little Sisters of the Poor v. Burwell* when it came before the Tenth Circuit seems to suggest that you do not interpret RFRA to separate "substantial burden" from "sincerely-held religious belief."
14. The Religious Land Use and Institutionalized Persons Act (RLUIPA) was adopted to ensure religious freedom protections in the unique circumstances regarding zoning laws and in prisons. Several mosques have faced challenges at the local level in getting the land use documentation needed to build their structures. If such a case were to come before the Supreme Court, how would you interpret the rigorous standards of RLUIPA to ensuring that religious discrimination in zoning laws does not occur? How do you interpret RLUIPA in regards to institutionalized persons? Do you agree with the Supreme Court's decision in *Holt v. Hobbs* (2015), which upheld the right of a Muslim inmate to have a religious exemption to grow a short beard in accordance with his religious beliefs?
15. President Trump has said he would "totally destroy"<sup>1</sup> the prohibition on partisan campaign intervention for non-profits. How would you respond to questions about the constitutionality of such a plan?

## Disability Rights

16. Under the Individuals with Disabilities in Education Act (IDEA) and the Americans with Disabilities Act (ADA), students with disabilities are afforded certain rights when obtaining education, including "free appropriate public education" (FAPE). In *Thompson R2-J School District v. Luke P.* (2008), you ruled that this mandate only required schools to provide "access and opportunity, not substantive outcomes." Under your interpretation of IDEA and the ADA, what obligation do schools have to

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<sup>1</sup> <https://www.nytimes.com/2017/02/02/us/politics/johnson-amendment-trump.html? r=0>

ensure that students with disabilities receive an education that advances their skills, knowledge, or readiness for life outside school?

17. In *Couture v. Board of Education of Albuquerque Public Schools* (2008), you ruled in favor of a school's right to hold a student with mental health disabilities in a time out up for almost two hours, despite the student urinating and throwing up on himself during that time. The decision concluded that the discipline did not constitute an unreasonable seizure under the Fourth Amendment. What protections do you believe the Fourth Amendment offers for students held against their will, particularly those students with a disability?

## Environment

18. *West Virginia et al v. Environmental Protection Agency*, which is currently at the Circuit Court of the District of Columbia, could be taken up by the Supreme Court. This case challenges the Obama administration's clean power rule.<sup>2</sup> What is the Environmental Protection Agency's authority to regulate carbon emissions from power plants under the Clean Air Act?
19. In your concurring opinion in *Gutierrez-Brizuela v. Lynch* (2016), you called for the abolition of *Chevron* deference to administrative agencies, reasoning that it is an unconstitutional abrogation of the separation of powers. In the case of the Clean Power Plan, how would you defer to an administrative agency's interpretation of the statute?

## Immigration

20. Since the death of Justice Antonin Scalia in February 2016, there have been several Supreme Court cases resulting in an equally divided court, challenging the ability of the Supreme Court to resolve circuit splits and set precedent on a national scale on key legal issues. In the 2016 court case, *United States v. Texas*, the Court was split on whether President Obama's 2014 immigration accountability executive orders could be implemented. These programs, the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of U.S. Citizens and Lawful Permanent Residents (DAPA), proposed allowing undocumented immigrants who met certain criteria to avoid deportations and either obtain work permits or attend school. By reaching a 4-4 decision, the Supreme Court maintained the lower court's ruling blocking the executive orders, but did not set precedent because the vote was tied.<sup>3</sup>

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<sup>2</sup> <https://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants>

<sup>3</sup> <http://www.scotusblog.com/case-files/cases/united-states-v-texas/>

How would you approach executive power in regards to implementing immigration laws adopted by Congress?

### **Gun Violence Prevention**

21. Laws pertaining to firearm possession have been proposed and passed to prevent and reduce gun violence in the United States. The Second Amendment has continuously been invoked to support the claim that all Americans should be permitted uninhibited access to firearms. However, laws that mandate background checks prevent dangerous people from owning guns and harming other people, and the implementation of smart gun technology can preclude accidental shootings from occurring, while still allowing law-abiding citizens to own guns:
- a. Currently, certain people are considered prohibited purchasers, and are disqualified from purchasing or owning guns. These include felons, people convicted of misdemeanor domestic violence, and individuals adjudicated as a mental defective or committed to a mental institution, among other reasons. What are the constitutional allowances for the prohibition of individuals accessing guns as determined through thorough, comprehensive background checks and review of the individual's criminal background?
  - b. Do you believe that the required implementation of gun violence prevention measures, like smart gun technology, would violate constitutional principles, such as those granted in the Second Amendment?

### **Hate Crimes**

22. In *Wisconsin v. Mitchell* (1993), the Supreme Court unanimously upheld a Wisconsin hate crime penalty-enhancement statute, which affirms a state government's right to increase the penalties for criminal activity in which the victim is targeted because of his/her race, religion, sexual orientation, gender, ethnicity, or disability. Do you agree with this decision? How do approach the government's role in preventing and prosecuting hate crimes?

### **LGBTQ Equality**

23. If cases regarding LGBTQ equality come before the Supreme Court during your tenure, how would you view the precedential weight of the decisions *Obergefell v. Hodges* (2015), *United States v. Windsor* (2013) and *Lawrence v. Texas* (2003)?
24. Over the past decade, transgender equality has expanded across the United States. The reality remains, however, that many states lack legislation that explicitly and comprehensively prohibits discrimination in employment, housing and public

- accommodations (and numerous other areas of law) based on gender identity. In the 2006 court case, *Kastl v Maricopa County Community College District*, you joined the opinion that ruled against a transgender woman’s claim alleging employment discrimination under Title VII of the Civil Rights Act of 1964 because she was unable to prove that she was a biological female and member of a protected class when the discrimination occurred.<sup>4</sup> Do you believe that individuals who are members of the LGBTQ community ought to be recognized as protected classes (sexual orientation and gender identity)? What level of scrutiny do you think discrimination against the LGBTQ community ought to be evaluated?
25. In the 2015 court case, *Druley v. Patton*, you joined the majority opinion, which did not acknowledge the brutality faced by a transgender woman who was incarcerated, refused basic health care and placed in an all-male housing facility.<sup>5</sup> Do you believe that transgender Americans should be placed in prisons in accordance with their gender identity, as the DOJ instructs? In addition, do you believe that transgender Americans should be considered a protected class, as the Department of Education instructed under the Obama administration?
26. In May 2016, the U.S. Departments of Justice and Education released a joint guidance stating that anatomy at birth should not be the only factor considered when placing transgender inmates into men’s or women’s units.<sup>6</sup> The guidance also stated that schools receiving federal funding may not discriminate based on a student’s sex, including transgender students under Title IX of the Education Amendments of 1972.<sup>7</sup> The Supreme Court granted the petition of certiorari in *Gloucester County School Board v. G.G.* to address these issues. However, in light of the Trump administration’s rescinding of these guidelines, the case was vacated and remanded to the Fourth Circuit on March 6, 2017. This case is likely to come back to the Supreme Court. Do you interpret Title IX of the Education Amendments of 1972 to ensure that trans students do not face discrimination in school?

## Reproductive Rights

27. The *Roe v. Wade* (1973) decision upheld a woman’s constitutional right to access safe, legal abortion. Many states have since passed laws that test the limits of the *Roe v. Wade* decision by creating barriers for women to access safe and affordable

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<sup>4</sup> <https://casetext.com/case/kastl-v-maricopa-county-community-college-district>

<sup>5</sup> <http://law.justia.com/cases/federal/appellate-courts/ca10/14-6114/14-6114-2015-02-03.html>

<sup>6</sup> <https://www.theguardian.com/us-news/2016/mar/24/transgender-prison-gender-identity-anatomy-doj-rules>

<sup>7</sup> <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students>

abortions. These restrictions include but are not limited to mandatory ultrasounds, waiting periods, bans after specific periods of time of gestation, and fetal burial requirements. In the 1992 *Planned Parenthood v. Casey* decision, the Supreme Court determined that barriers to abortion cannot be put into place solely to prevent the abortion, but instead must have a legitimate purpose that protects the woman's health. Otherwise, these barriers serve as an "undue burden." However, many states continue to pass and maintain these types of laws by using minimal evidence that shows that the barriers in some way enhance women's health, thus suggesting that the benefits of the law outweigh the harm. The Supreme Court just struck down such restrictive laws in *Whole Woman's Health v. Hellerstedt* (2015).

- a. Can the government constitutionally uphold laws that restrict access to abortion for reasons other than protecting the woman's health?
- b. What is your interpretation of the constitutional principles that determine whether a restrictive law's suggested benefits outweigh the law imposing an undue burden on women?

### **Voting Rights**

28. After the Supreme Court's 2013 decision in *Shelby v. Holder* invalidated Section 4(b) of the Voting Rights Act, many states proceeded to change election laws in ways that have been shown to have a discriminatory impact on racial minorities, poor voters, elderly voters and young voters. What is your view on the constitutionality of preclearance, as outlined in Section 5 of the Voting Rights Act, and what criteria would you use to evaluate any changes to Section 4(b) of the Voting Rights Act? What constitutional principles should inform federal action to protect voters from state and local laws that could obstruct their access to the ballot?

### **Worker Rights**

29. In your dissent in *TransAm Trucking v. Administrative Review Board* (2016), you disagreed with the Tenth Circuit's decision that sided with a worker who disobeyed company policy by abandoning cargo by unhitching his trailer and driving away. This came after the truck's breaks failed and the worker was stranded in the cold, causing his torso to freeze, and the worker took steps to protect his safety. You ruled "that statute only forbids employers from firing employees who 'refuse[] to operate a vehicle' out of safety concerns." In your view, do worker protections intended to ensure the safety of a worker allow workers to take measures that may stray from expressed company policy but ultimately protect the worker's health and safety?



30. In the Supreme Court's decision for *Friedrichs v. California Teachers Association* (2016), the Court issued a *per curiam* 4-4 ruling. The decision did not create new precedent and many believe the questions at stake in *Friedrichs* could re-emerge when the Court has nine justices. The Ninth Circuit's decision, which the Supreme Court upheld by the tied vote, relied on 1977 Supreme Court precedent determining that public sector unions can continue to collect fees from employees they represent in collective bargaining activities. Do you believe that public sector unions are entitled to collect these fees, as has been upheld for the past 40 years, if the fees are not used for any political activity?