

August 22, 2018

On behalf of the Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; and ten Reform Jewish affiliate organizations, reflecting the breadth of our Movement, we submit these questions regarding the nomination of Judge Brett Kavanaugh as Associate Justice of the U.S. Supreme Court Justice.

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).

Since the Religious Action Center’s founding in Washington, D.C. more than six 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).

As a Movement rooted deeply in enduring Jewish values and committed to the principles of justice, equality, the rule of law and compassion, we urge you to make use of these questions during Judge Kavanaugh’s hearing, explore these issues of concern with Judge Kavanaugh if you meet with him, and call for full disclosure of Judge Kavanaugh’s records.

### **General Jurisprudence**

1. Upon the announcement of your nomination, you described your judicial philosophy as follows: “A judge must be independent and must interpret the law, not make the law. A judge must interpret statutes as written. And a judge must interpret the

Constitution as written, informed by history and tradition and precedent.”<sup>1</sup> How do you approach issues where the source text is vague? What role will judicial history and precedent play when, in your opinion, they conflict with the text as written?

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

### Separation of Church and State and Religious Liberty

3. You have stated that you support school vouchers.<sup>2</sup> In *Zelman v. Simmons-Harris* (2002), the Supreme Court decided that a voucher program in Ohio was constitutional because it did not directly disburse funds to parochial schools, but rather allowed parents to choose how to spend the voucher money they received. Private school vouchers are both bad education policy and threaten the separation of church and state and religious freedom. In practice, most vouchers are spent on religious schools and there is often little choice as to other private education that a family may choose for their child beyond the public school system. Given these realities, do you believe that *Zelman* was correctly decided? If so, what is your understanding of the proper relationship between tax dollars and their use by sectarian institutions?
4. You wrote in support of school prayer in public schools in an *amicus* brief to the Supreme Court on behalf of Congressmen Steve Largent and J.C. Watts in *Santa Fe Independent School District v. Jane Doe, et al.* (1999).<sup>3</sup> You argued that the case of a student praying on the school loudspeaker system before football games, as part of a school-sponsored process, was constitutional. The Supreme Court disagreed, finding student-led school prayer in public schools unconstitutional because the prayer was perceived “as stamped with [the] school’s seal of approval.”<sup>4</sup> In retrospect, do you feel this case was correctly decided? Would you adhere to the precedent the Court established in this case? How do you approach issues of prayer in school in the context of both the Establishment Clause and the Free Exercise Clause?
5. The Supreme Court recently sided with baker Jack Phillips in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), deciding on narrow grounds that a state-level adjudicatory body had exhibited hostility when examining the baker’s religious

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<sup>1</sup> [https://www.washingtonpost.com/video/politics/wirereuters/watch-brett-kavanaughs-full-acceptance-speech-after-trump-nomination/2018/07/09/33931e44-83e1-11e8-9e06-4db52ac42e05\\_video.html?utm\\_term=.8ed7d8526f25](https://www.washingtonpost.com/video/politics/wirereuters/watch-brett-kavanaughs-full-acceptance-speech-after-trump-nomination/2018/07/09/33931e44-83e1-11e8-9e06-4db52ac42e05_video.html?utm_term=.8ed7d8526f25)

<sup>2</sup> <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>.

<sup>3</sup> <https://www.findlawimages.com/efile/supreme/briefs/99-62/99-62fo8/brief.pdf>

<sup>4</sup> <https://www.law.cornell.edu/supct/html/99-62.ZO.html>.

beliefs. The Court did not address the broader question of whether it is unconstitutional to require a business governed by public accommodations law to serve clients protected by civil rights law if doing so violates a sincerely held religious belief. This has left room for the Court to decide on these broader questions in the future. What is your view of the Court's ruling in *Masterpiece Cakeshop*? 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 health care needs)? In what way does the Establishment Clause relate to these situations?

6. The Religious Freedom Restoration Act (RFRA) remains an important bill that protects the religious exercise of all Americans. In *Priests for Life v. HHS* (2015), you argued in your dissent that, under RFRA, the government may not require an organization to fill out a form and that requiring "organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties" substantially burdened their free exercise of religion.<sup>5</sup>
  - a. 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, and how does RFRA factor into these distinctions?
  - b. What do you believe constitutes a proper and an improper application of RFRA?
7. How would you respond to questions about the constitutionality of ending the prohibition on partisan campaign intervention for non-profit organizations, including houses of worship?

### Voting Rights

8. In *South Carolina v. Holder* (2012), you voted to uphold a South Carolina voter ID law, which had been blocked by the Justice Department for violating the Voting Rights Act. What evidence would you find satisfying to find a voting restriction to have a disproportionate impact people of color, young people, people with disabilities, and elderly people?

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<sup>5</sup><https://www.cadc.uscourts.gov/internet/opinions.nsf/425C0AE29F10AFD785257E4B00767BF5/%24file/13-5368.pdf>

## Civil Liberties

9. 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. In a concurring opinion in a different case, *Ghaleb Nassar al-Bihani v. Barack Obama* (2010), a case concerning a Guantanamo detainee, you wrote, "...a federal court lacks legitimate authority to interfere with the American war effort by ordering the President to comply with international-law principles that are not incorporated into statutes, regulations, or self-executing treaties."<sup>6</sup> 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?

## Reproductive Rights

10. 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 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 are 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 struck down such restrictive laws in *Whole Woman's Health v. Hellerstedt* (2015).
- If cases regarding access to abortion come before the Supreme Court during your tenure, how would you view the precedential weight of the above decisions?
  - Can the government constitutionally uphold laws that restrict access to abortion for reasons other than protecting the woman's health?
  - 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?

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<sup>6</sup><https://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/%24file/095051-1263353.pdf>.

## Health Care

11. In your 2009 decision in *Seven-Sky v. Holder*, you concluded that your court could not yet rule on the constitutionality of the Affordable Care Act's (ACA) individual mandate because of the Tax Anti-Injunction Act prohibition on ruling on tax-related cases when no person had yet been assessed the tax.<sup>7</sup> The individual mandate penalty has now been assessed on many people, but Congress has eliminated the penalty. Now, states are claiming that this invalidates the entirety of the ACA. Do you continue to believe that the mandate is valid when understood as a tax? Given that the Tax Anti-Injunction Act no longer applies, how would this impact your perspective on the broader legality of the ACA?
12. At the end of June, a federal judge ruled against the Trump Administration's approval of Kentucky's request to impose a work requirement on Medicaid. The judge found that Health and Human Services Secretary Alex Azar "never adequately considered whether Kentucky HEALTH would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid."<sup>8</sup> Do you agree that Medicaid waivers should be held to the standard of whether they would help furnish medical assistance?

## Environment

13. In your dissent in *Coalition for Responsible Regulation v. Environmental Protection Agency*, you wrote that you do not believe the EPA has the statutory authority under the Clean Air Act to regulate greenhouse gases under the Prevention of Significant Deterioration program. You read the phrase "any air pollutant" not as a reference to any air pollutant regulated under the Clean Air Act but rather as a specific reference to carbon monoxide, lead, ground-level ozone, nitrogen dioxide, particulate matter, and sulfur dioxide.<sup>9</sup> What is the EPA's authority to regulate greenhouse gases under the Clean Air Act?
14. In *Massachusetts v. Environmental Protection Agency*, the Supreme Court ruled that states had standing to bring a case against the EPA regarding the hazards of climate change, and that the Clean Air Act gives the EPA the authority to regulate tailpipe emissions of greenhouse gases. Do you agree with the Court's ruling in *Massachusetts v. Environmental Protection Agency*? If not, what parts of the ruling do you disagree with?
15. In *Rapanos v. United States* the Supreme Court found that waters with a "significant nexus" to navigable waterways fall within the jurisdiction of the Clean Water Act. Do

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<sup>7</sup> <https://caselaw.findlaw.com/us-dc-circuit/1585226.html>

<sup>8</sup> [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2018cv0152-74](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0152-74)

<sup>9</sup> [https://www.cadc.uscourts.gov/internet/opinions.nsf/7F9EC0498823671D85257ADA00540B48/\\$file/09-1322-1411145.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/7F9EC0498823671D85257ADA00540B48/$file/09-1322-1411145.pdf)

you agree with the Court's decision in *Rapanos*? What waters fall under the jurisdiction of the Clean Water Act?

### Campaign Finance Reform

16. 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 with regard to political campaigns? Do you think that the *Citizens United* decision should be extended beyond its initial scope to other campaign contributions? What are the limits, if any, to the infusion of money as speech in political campaigns?

### Disability Rights

17. *Doe ex. rel. Tarlow v. District of Columbia* (2007) concerned a D.C. statutory law that did not consider the medical preferences of individuals with intellectual disabilities who were deemed to lack "sufficient mental capacity to appreciate the nature and implications of a health-care decision." You ruled that this law did not violate the individuals with disabilities' Fifth Amendment rights.<sup>10</sup> What protections do you believe the Fifth Amendment offers for people with intellectual disabilities? How do they differ from the rights of people without disabilities? Do you believe there are other areas in which people with disabilities do not have the same constitutional rights as people without disabilities? If so, explain.

### Economic Justice

18. In *SeaWorld of Fla., LLC v. Perez* (2014), you dissented from a majority opinion upholding a safety citation against SeaWorld following the death of a trainer who was working with a killer whale. The majority deferred to the Occupational Safety and Health Review Commission's finding that SeaWorld had insufficiently limited the trainers' physical contact with the whales. You dissented, writing, "When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves...And most importantly for this case, who decides that the risk to participants is too high?"<sup>11</sup> In your view, what is an employer's responsibility to ensure the safety of their workers and workplace? Are all regulations requiring employers to meet certain safety standards "paternalistic"? If not, please describe how you differentiate between acceptable and paternalistic regulations.

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<sup>10</sup> <https://caselaw.findlaw.com/us-dc-circuit/1348102.html>

<sup>11</sup> <https://caselaw.findlaw.com/us-dc-circuit/1663286.html>

19. In *PHH Corporation v. Consumer Financial Protection Bureau* (2016), you held that the Consumer Financial Protection Bureau (CFPB) was unconstitutional because it was headed by a director who could not be removed by the President without cause. You wrote, “Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.” This decision was later reversed and remanded by the full DC Circuit court, which upheld the constitutionality of the provision of the law that outlines the 5-year term limits imposed on the director as well as the ability of the president to remove the director for “inefficiency, neglect of duty, or malfeasance in office.” In your dissent, you questioned *Humphrey’s Executor v. United States* (1935), the case that originally upheld the constitutionality of independent agencies.<sup>12</sup>
- a. Given this precedent, would you still rule that the CFPB is unconstitutional?
  - b. Do you think *Humphrey’s Executor v. United States* should be overturned?
20. In *American Fed. of Gov’t Employees, AFL-CIO v. Gates* (2007), you wrote the majority opinion for a DC Circuit panel that allowed the Department of Defense to temporarily abolish collective bargaining rights.<sup>13</sup> Do you believe the government should protect workers’ right to collective bargaining?

### Gun Violence Prevention

21. In *Heller v. District of Columbia* (2011), you wrote, “there is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles.” In that same decision, you wrote that the U.S. Supreme Court’s decision in *Heller* required judges to disregard compelling public safety justifications for gun regulations, claiming there is an “absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations.”<sup>14</sup> Do you believe that the required implementation of gun violence prevention measures, like assault weapons bans, comprehensive background checks, or smart gun technology, would violate constitutional principles, such as those granted in the Second Amendment?

### Immigration

22. The Deferred Action for Childhood Arrivals (DACA) program was enacted by White House executive order in 2012. Following DACA’s termination in September 2017,

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<sup>12</sup> [https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/\\$file/15-1177.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/$file/15-1177.pdf)

<sup>13</sup> <https://caselaw.findlaw.com/us-dc-circuit/1195458.html>

<sup>14</sup> [https://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/\\$file/10-7036-1333156.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/$file/10-7036-1333156.pdf)

lower courts ruled that DACA's termination is unconstitutional, ordering the Administration to reinstate the program as prior to its termination. How would you approach executive power in regard to implementing immigration laws adopted by Congress?

23. In *Garza v. Hargan* (2017), an unaccompanied pregnant undocumented teen in immigration custody wanted to obtain an abortion but was prevented by her government-imposed custodians from doing so.<sup>15</sup> You wrote a panel decision vacating a district court order that required the government to allow the teen to leave the detention facility to obtain the abortion. The panel also imposed an additional waiting period to give the government time to obtain a sponsor who could act as the teen's guardian and facilitate her obtaining an abortion. Your decision was reversed by the full court and you dissented, writing that the full court's ruling was "ultimately 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."<sup>16</sup> What do you see as the constitutional rights of non-citizens the United States in detention and what legal obligations does the U.S. government have to offer services to detainees? In your opinion, what rights can be waived for non-citizens in detention?
24. In *Trump v. Hawaii* (2018), the Supreme Court recently ruled 5-4 to uphold the travel ban barring entry to the United States for people from six Muslim-majority countries in addition to two additional countries. The decision stated that indefinitely banning people from particular countries was a lawful use of the president's power under the Immigration and Nationality Act, which allows the executive branch to suspend the entry of a "class" of people if the government "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." National security concerns were the grounds for suspension. Do you agree with the Court's decision to uphold a policy that restricts travel to those based on country or origin and religious affiliation?

### LGBTQ Equality

25. 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)?
26. In October 2017, the Department of Justice instructed its attorneys that Title VII's prohibition against sex-based discrimination in hiring or employment practices does

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<sup>15</sup> [www.cadc.uscourts.gov/internet/opinions.nsf/C81A5EDEADAE82F2852581C30068AF6E/\\$file/17-5236-1701167.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/C81A5EDEADAE82F2852581C30068AF6E/$file/17-5236-1701167.pdf)

<sup>16</sup> *ibid.*



- not protect transgender workers.<sup>17</sup> Several federal courts, however, have ruled that transgender employees are protected under Title VII.<sup>18</sup> Do you believe that transgender people should be considered a protected class? If not, how does being transgender differ from protected classes like gender or race?
27. In May 2016, the U.S. Departments of Justice and Education released joint guidance stating that schools receiving federal funding may not discriminate based on a student's gender identity, including transgender students under Title IX of the Education Amendments of 1972.<sup>19</sup> The Trump administration rescinded this guidance in February 2017.<sup>20</sup> Do you interpret Title IX of the Education Amendments of 1972 to ensure that transgender students do not face discrimination in school?

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<sup>17</sup> <https://assets.documentcloud.org/documents/4067437/Sessions-memo-reversing-gender-identity-civil.pdf>.

<sup>18</sup> <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>.

<sup>19</sup> <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>20</sup> <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.