

Freedom from Religion *foundation*

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March 17, 2017

SENT VIA FACSIMILE TO:
The Honorable Chuck Grassley 202-224-6020

Re: Establishment Clause questions for Judge Neil Gorsuch

Dear Chairman Grassley and Senate Judiciary Committee Members:

On behalf of the Freedom From Religion Foundation, we are writing to thank you for your diligence in scrutinizing the nomination of Judge Neil Gorsuch for the vacant seat on the U.S. Supreme Court. FFRF is a nationwide nonprofit organization representing more than 27,000 members across the country, including members in every state. Our purposes are to protect the constitutional principle of separation between religion and government, and to educate the public about nontheism.

Judge Gorsuch's record and stated positions will clearly affect the concerns of the growing number of Americans who identify as secular or nonreligious, today approaching nearly a quarter of the population.

We respectfully request that in order for our membership, the public, and the Committee to gain a better understanding of Judge Gorsuch's positions on the Establishment Clause, the following questions be posed to him:

Wall of Separation

Several cabinet nominees have denigrated what Thomas Jefferson dubbed "the wall of separation between church and state." The Supreme Court adopted this language in 1878 to explain the relationship the First Amendment lays out separating religion and government.

Question: Do you agree with our Founders that a government that has "no particle of spiritual jurisdiction," as Alexander Hamilton put it in the Federalist #69, offers the best protection for true religious freedom?

Standing

Standing doctrine has come under heavy criticism because it creates a barrier to access to the courts and can effectively render some federal laws and constitutional provisions unenforceable. Standing doctrine has primarily been used to disqualify plaintiffs in the areas of First Amendment law and environmental law, areas where the public at large has a lot to gain or lose, even if an individual plaintiff may not suffer what some judges consider an injury.

Question: As a judge, how will you ensure that laws meant to protect society at large are enforceable?

Religious exercise by corporations

The Supreme Court's 2014 decision in *Burwell v. Hobby Lobby* established for the first time that within the meaning of the Religious Freedom Restoration Act, a "person" includes a closely held for-profit corporation.

Question: Do you still believe the framers of our Constitution would support, or even contemplated, extending religious rights to for-profit corporations, closely-held or otherwise?

The notion of "complicity" in government action; "wrongdoing"

In your concurrence to the Tenth Circuit's ruling on the Hobby Lobby case, you wrote, "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others." Two-part question follows:

1. Some have argued that paying taxes makes them complicit in the government's actions. In your view, is there no limit to what actions an individual or a corporation can refuse to take in the name of their religious beliefs?
2. Do you truly believe that a female employee who uses common forms of contraception can be characterized as engaging in "wrongdoing"?

Constitutional supplements on religious freedom

Three-part question:

1. Do you believe that if properly enforced, the First Amendment's religion clauses, the Establishment Clause and the Free Exercise Clause, adequately protect Americans' religious rights?
2. If so, why do we need laws like the Religious Freedom Restoration Act?
3. Do you believe that the right to free exercise of religion includes the right to act in accordance with one's religious beliefs even when doing so would violate the law?

Physician assisted suicide, abortion, and the death penalty

You have written in your book, "The Future of Assisted Suicide and Euthanasia":

"All human beings are intrinsically valuable and the intentional taking of human life by private persons is always wrong."

1. Do you consider legal abortion as set forth within the parameters of *Roe v. Wade* to be the "intentional taking of human life" and that it is "always wrong"?
2. In your book, you write that the principle of "the inviolability of life" precludes private citizens from ending or helping to end the life of any person. Is a conceptus, embryo, or fetus a person?
3. President Trump vowed to appoint justices who will overturn *Roe v. Wade*. By nominating you, is he keeping his promise?
4. Does the right to privacy extend to the medical decisions of a pregnant woman and her doctor?
5. Do you support federal and state death penalties?
6. Do you draw any distinction between "assisted suicide," in which the patient requests help dying, and homicide?

Government and religion

Some federal judges have ruled that the phrase “In God We Trust” no longer has any “theological or ritualistic impact” and is “ceremonial deism.” The Supreme Court has upheld legislative prayers. Some lower courts have ruled in favor of “In God We Trust” as a motto or the words “One Nation Under God” in the Pledge of Allegiance, saying “any religious freight the words may have been meant to carry originally has long since been lost.”

1. Are courts an appropriate arbiter for determining if a phrase or action is religious? Is the frequency of use over time really a good measure of religious import or meaning? Would a court claim that John 3:16 or saying the rosary have lost religious significance because they are oft repeated?
2. Overall, 23% of Americans now identify as nonreligious.¹ That 8-point increase since 2007² and 15-point jump since 1990 makes the “nones” the fastest growing identification in America.³ Nationally, about 35% of millennials are nonreligious.⁴ The meaning of a phrase or action can change over time. Should shifting demographics play a role in determining whether a phrase or action is considered religious?

Conflict with religious beliefs

1. What is something that conflicts with your personal religious beliefs that is nevertheless legal?
2. As a Justice of the Supreme Court, will you commit to upholding the letter of the law even if doing so conflicts with your personal religious beliefs?

Thank you for your service on the Senate Committee on the Judiciary and for ensuring that our nation’s highest court is staffed by justices who recognize and are willing to uphold our country’s long-established constitutional principle of separating religion and government.

Very truly,



Dan Barker & Annie Laurie Gaylor
Co-Presidents
FREEDOM FROM RELIGION FOUNDATION

¹ *America’s Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

² *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>.

³ Barry Kosmin, *National Religious Identification Survey* 1989-1990.

⁴ *America’s Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.