FREEDOM FROM RELIGION *foundation*

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October 16, 2018

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

Re: Opposition to the confirmation of Allison Rushing, nominee to the U.S. Fourth Circuit Court of Appeals

Dear Chairman Grassley and Senate Judiciary Committee Members:

On behalf of various secular groups committed to upholding the constitutional separation between church and state, we are writing to oppose the confirmation of Allison Rushing, nominee to a lifetime appointment on the U.S. Court of Appeals for the Fourth Circuit.

Other organizations have focused on Rushing's lack of ties to North Carolina, her inexperience, her hostility to civil rights, and other problems. Notably, Ms. Rushing does not meet the minimum requirements the American Bar Association sets out for judges, which Senator Graham recently noted was the "gold standard" for determining a judge's qualifications: 12 years of practicing law. Rushing has practiced law for eight years and clerked for another three.

We write to draw your attention to her extreme views on religious freedom and the importance of state-church separation. Two primary concerns leap off Rushing's CV.

First, a 2005 article for *Engage*, The Federalist Society's journal, entitled "Nothing to Stand On: 'Offended Observers' and the Ten Commandments."

Second, Rushing penned this article with a senior counsel for the Alliance Defense Fund, now the Alliance Defending Freedom, a group designated as a hate group by the Southern Poverty Law Center. Disturbingly, Ms. Rushing worked for a summer during law school with ADF, though she continues to align herself with that group's hateful, anti-LGBTQ agenda.[1]

The Ten Commandments article itself suggests a deeply flawed view of the Constitution, religion, and religious freedom. In it, Rushing argued that "offended observers" should never be allowed a day in court to challenge governmental actions as violating the Establishment Clause.[2] This leaves citizens totally unable to hold the government accountable even for clear Establishment

[1] *See* Allison Jones, "'Enemies of Mankind': Religion and Morality in the Supreme Court's Same-Sex Marriage Jurisprudence" (Oct. 30, 2013).
[2] Jordan Lorence and Allison Jones, "Nothing To Stand On: 'Offended Observer' and the Ten Commandments," ENGAGE, Vol. 6 Issue 2 (2005). All subsequent quotes are from this article.

Clause violations, such as a large display on City Hall that says, "This is a Muslim city committed to the glory of Allah. Christians are not welcome!" Under Rushing's view, nobody could demonstrate what she calls "real, concrete harm" from such a display.

Rushing has demonstrated hostility toward secular Americans.

Rushing's article is openly hostile to those she pejoratively labeled "village secularists" who could "charge into court with the ACLU" to challenge government Establishment Clause violations (overall, 23% Americans identify as nonreligious, a rather sizeable portion of the country to be so callously pushing to the side[3]). She wrote that they had "eggshell sensitivities" because they were offended by large religious monuments on government land. She cannot be trusted to give secularists, the ACLU, or other groups like the ACLU, including all the undersigned, a fair hearing in any Establishment Clause case.

This is not the only instance where Rushing labeled plaintiffs who she disfavors as merely "offended." Rushing mentioned a challenge to the prayer at the 2005 Presidential Inauguration, stating that the plaintiff lacked standing because he merely wanted to attend, but said that "a Secret Service agent who is an atheist and is ordered to guard the President during that event would have standing to challenge the prayers. The Secret Service agent would have concrete harm for standing purposes." In addition to misunderstanding standing doctrine, this incomprehensible invention conflicts with the rest of her paper. The hypothetical agent was not physically forced to pray any more than plaintiffs who were required to come in close contact with a Ten Commandments monument on government land. All were forced into contact with the government preaching religion in the course of interacting with their government, and all should be allowed to challenge the practice in court. But Rushing openly asserts that real-life plaintiffs lack standing, while offering similarly situated fantasy plaintiffs as a counter-example to mask her hostility toward secularism.

Rushing reverse-engineers results that privilege religion and violate the Constitution.

In a revealing moment, Rushing lamented that allowing Establishment Clause plaintiffs into court would allow "their opinions [to] override those of the rest of the population, including our duly elected representatives in the government." She conveniently failed to mention that this would only be the case when plaintiffs *win* on the merits of their challenges, which is to say, only when the duly elected representatives' actions actually violated the Constitution. Rather than objecting to a "heckler's veto," as she claimed, Rushing is openly fighting for the idea that flagrant Establishment Clause violations—or at least those violations she approves of—should be unreviewable by the courts.

And that is the crux of her argument. She is reverse-engineering a solution to what she sees as a problem, but what is actually enforcing the First Amendment of the U.S. Constitution. In other words, for Rushing it's not about applying the law or a fair process, it's about reaching her desired outcome. This is not appropriate for a federal appellate judge.

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

Rushing fails to grasp the difference between speech and religion.

In a wildly miscalculated leap, Rushing conflates government establishments of religion with free speech:

> One of these First Amendment values, indeed its "bedrock," is that the expression of an idea cannot be prohibited solely because it may offend. The First Amendment fully expects that citizens will confront disagreeable ideas and that a robust democracy will refuse to insulate its citizens from views that they disagree with or even find inflammatory.

In fact, a bedrock principle of our First Amendment is that the government cannot take a stance on religion. Further, First Amendment rights belong to persons, not to the government. To claim that the government has a free speech right to take a stance of religion is doubly wrong and turns the First Amendment against itself.

Rushing fails to address or present precedent squarely against her position.

Rushing argued that the Ten Commandment plaintiffs were just "offended observers," nothing more. Citing the complaint[4] and one line from an early decision in the cases[5], she wrote of their "weak" standing:

> Note how weak the plaintiffs' standing is in these cases. In the Kentucky case, the American Civil Liberties Union filed suit on its own behalf and on behalf of its anonymous members in Kentucky who go to the courthouse to "transact civic business" such as obtaining licenses, paying taxes and registering to vote. While at the courthouse, they "have occasion to view" the Ten Commandments display and, since they "perceive" it as an unconstitutional establishment of religion, they are "offended." In the Texas case, a lawyer with an expired license brought suit because he would routinely walk past a Ten Commandments monument (surrounded by sixteen other nonreligious monuments) on his way to the state law library, and seeing it offended him, he testified, "in that he is not religious."

This cursory text-proofing is alarming because the District Court in the case issued an entire decision (May 2000) on standing before issuing a decision more than a year later on the merits (June 2006). *See Am. Civil Liberties Union of Kentucky v. McCreary Cty.*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000); *Am. Civil Liberties Union of Kentucky v. McCreary Cty.*, 145 F. Supp. 2d 845, 846 (E.D. Ky. 2001), *aff'd*, 354 F.3d 438 (6th Cir. 2003), *aff'd sub nom. McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005).

This decision favoring plaintiffs' standing doesn't rate a mention in Rushing's article on why plaintiffs in the case don't have standing. In that standing decision, the District Court explained:

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[4] *ACLU v. McCreary Cty.*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Complaint ¶ 15, Case No. 99-507); *ACLU v. Pulaski Cty.*, 96 F.Supp. 2d 691 (E.D. Ky. 2000) (Complaint ¶ 15 Case No. 99-509).

[5] *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002).

> The defendants contend that the plaintiffs lack standing to bring these actions because they have not alleged 'injuries in fact.' The injury-in-fact component of standing requires a plaintiff to have a personal stake in the matter to be adjudicated. The defendants correctly note that abstract or hypothetical injuries are insufficient. The plaintiffs in this lawsuit, however, have suffered and are under the threat of suffering concrete injuries.

Am. Civil Liberties Union of Kentucky v. McCreary Cty., 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) (citations omitted).

To fail to squarely address a precedent that is on point—let alone one that is in the very same case one is arguing—is not just poor lawyering, it would violate an ethical duty if done in court.

Thank you for your service on the Senate Committee on the Judiciary and for ensuring that our nation's federal courts are staffed by judges who recognize and are willing to uphold our country's long-established constitutional principle of separating religion and government. We respectfully urge the Committee to vote against the confirmation of Allison Rushing to the U.S. Court of Appeals for the Fourth Circuit.

Sincerely,

Freedom From Religion Foundation
Secular Coalition of America
Center For Inquiry
American Atheists