

FREEDOM FROM RELIGION *foundation*

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March 17, 2022

SENT VIA FAX AND U.S. MAIL: (202) 228-0400

The Honorable Dick Durbin
711 Hart Senate Building
Washington, D.C. 20510

Re: Questions for Ketanji Brown Jackson, nominee to the U.S. Supreme Court

Dear Chairman Durbin and Senate Judiciary Committee Members:

On behalf of the Freedom From Religion Foundation, we are writing to thank you for your diligence in considering the nomination of Judge Ketanji Brown Jackson to be an associate justice on the U.S. Supreme Court. FFRF is a nationwide nonprofit organization representing more than 35,000 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.

FFRF celebrates the prospect of increasing diversity on the Supreme Court, which is sorely lacking. While Judge Brown Jackson's track record as a judge appears to be beyond reproach, and she is plainly well qualified to be a Supreme Court justice, her record on the intersection between religion and the law is sparse. The right to a secular government—the first fundamental right guaranteed under the First Amendment—is under serious threat due in large part to the current Supreme Court. It is essential that incoming justices demonstrate a deep understanding and respect for this crucial protection so that the current trend of bucking decades of well settled precedent does not continue.

We respectfully request that in order for our membership, the public, and the Committee to gain a better understanding of Judge Brown Jackson's stance on these crucial matters, the following questions be posed to her:

Conflict between personal religion and secular oath of office

During Justice Brennan's 1957 confirmation hearings, he was asked a question about keeping matters of faith separate from matters of law. Brennan gave an excellent answer — the only answer a federal official should give:

Senator, [I took my] oath just as unreservedly as I know you did...
And...there isn't any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the

Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.

Our most recently confirmed Supreme Court justice criticized this exemplary answer, stating that a judge’s religious beliefs might prohibit them from following their oath of office when doing so would in some way conflict with those religious beliefs.¹

We’d like you to answer the same question that Justice Brennan did. If your faith and our law disagree, “would you be able to follow the requirements of your oath or would you be bound by your religious obligations?”

Wall of Separation

Several prominent government officials have denigrated what Thomas Jefferson dubbed “the wall of separation between church and state” in recent years. Earlier this year, a Supreme Court justice even referred to the “so-called separation of church and state” during an oral argument.² 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?

Constitutional supplements on religious freedom

In recent years, there has been an attempt to redefine the nature of “religious liberty.” Cases on this topic have not come before you as a judge, but will if you are confirmed to the Supreme Court.

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, which exempts religious actors from some neutral, generally applicable laws?
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 or the rights of other citizens?

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

¹ John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQUETTE L. REV. 303, 347 (1998).

² *Shurtleff v. City of Boston*, No. 20-1800, oral arguments (Jan. 18, 2022), available at www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1800_9o6b.pdf at 77–78.

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 it be appropriate for a court to claim that the popular verse John 3:16, or saying the rosary, have lost religious significance because they are oft repeated?
2. Overall, more than one in four Americans now identify as nonreligious.³ This is a rapid increase in recent years, making the “nones” the fastest growing identification in America.⁴ Nationally, about 35% of millennials are nonreligious.⁵ 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?

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: What is your view on the standing doctrine? Do you think it’s a problem if certain government actions are immune from judicial review because a court has determined that no one has standing to challenge them?

In recent years, it seems the Supreme Court has used standing, and other related doctrines like mootness, as a tool to rule on some cases that it wants to reach the merits on, while passing on those it does not.

Question: Without commenting on any specific cases, do you agree that doctrines like standing and mootness should be applied neutrally, regardless of what the Court thinks about the underlying issue? Do you share the concern that these doctrines have not been applied neutrally, and would you commit to helping the Court do better in this regard?

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.

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

⁴ Barry Kosmin, *National Religious Identification Survey* 1989-1990.

⁵ *America’s Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

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

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,

Handwritten signature in blue ink, reading "Annie Laurie Gaylor Dan Barker". The signature is written in a cursive style.

Annie Laurie Gaylor & Dan Barker
Co-presidents
ALG/DB:rdj