March 18, 2022

The Honorable Dick Durbin
Chairperson
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chairperson Durbin and Ranking Member Grassley:

ADL (the Anti-Defamation League) was founded in 1913 with a timeless mission: to stop the defamation of the Jewish people and to secure justice and fair treatment to all. In striving to achieve these goals, ADL has maintained a core set of principles for more than 100 years — prioritizing fighting antisemitism and all forms of bias and hate while opposing discriminatory barriers that deny equal opportunities to individuals based on their race, religion, gender, gender identity, national origin, sexual orientation, and other protected characteristics. We also have worked to build a just and inclusive society by ensuring the preservation of individual rights, including the Constitutional guarantees of freedom of religion and expression that must be protected to maintain a pluralistic and democratic nation.

In anticipation of the upcoming hearings on the nomination of Judge Ketanji Brown Jackson as an Associate Justice of the United States Supreme Court, we write to urge the Judiciary Committee (the "Committee") to examine her judicial philosophy on several important topics. Without asking Judge Jackson to comment on any pending cases, the Committee can and should seek her views on the Supreme Court's role in interpreting the United States Constitution and laws that protect fundamental rights and liberties. In particular, we urge the Committee to invite Judge Jackson to elucidate her views on the contemporary parameters of the following issues: (1) countering violent extremism while safeguarding civil liberties; (2) voting rights; (3) immigration; (4) the Establishment Clause and free exercise of religion; (5) race-based decisionmaking; (6) LGBTQ+ rights; and (7) judicial philosophy.

1. <u>Countering Violent Extremism While Safeguarding Civil Liberties</u>

For decades, one of the most important ways in which ADL has fought against bigotry and antisemitism has been by investigating extremist threats across the ideological spectrum – including white supremacists and other far-right violent extremists – producing research to inform the public of the scope of the threat, and working with law enforcement, educators, the tech industry, and

elected leaders to promote best practices that can effectively address and counter these threats. Through our Center for Technology and Society and our Center on Extremism, ADL helps communities, policymakers, and law enforcement agencies alike combat extremism, terrorism, and hate online and off.

Without a doubt, right-wing extremist violence is currently the greatest domestic terrorism threat to everyone in this country. It is of the utmost importance that, while our nation is addressing issues of war and terrorism at home and abroad, our government make use of all available tools to effectively combat all incoming dangers while safeguarding civil liberties. It is ADL's view that our democratic ideals do not need to be sacrificed in order to ensure our security. It is also our view that one branch of government should not be able to unilaterally make decisions in these areas, where checks and balances are established and in place to protect against abuses.

In light of our increasing concern about the threat posed by domestic extremism, particularly from white supremacists and right-wing extremists, ADL would encourage the Committee to explore Judge Jackson's views with respect to domestic extremism and the importance of carefully balancing security interests with protecting civil liberties when analyzing issues related to extremism and domestic terrorism. ADL suggests the following questions to explore these issues:

- What civil rights and civil liberties concerns are or could be implicated in state and/or federal domestic terrorism laws, and how do these concerns differ when it comes to investigating domestic extremists as compared to foreign actors?
- Are there any constitutional obstacles to designating domestic extremist groups with no foreign ties as domestic terrorist organizations?

2. Voting Rights

Voting rights are the cornerstone of our democracy, and ADL considers the Voting Rights Act of 1965 (VRA) to be one of the most important and effective pieces of civil rights legislation ever enacted.[1] ADL has supported passage of the VRA and its extensions over the last 50 years, filed amicus briefs urging the Supreme Court to uphold the law, and encouraged the Department of Justice to use the VRA to protect voting rights for all.

In its June 2013 *Shelby County v. Holder* decision, the United States Supreme Court struck down a key provision of the VRA, essentially gutting the heart of the law.[2] In so doing, the Court substituted its views for Congress's own conclusions after extensive hearings and findings conducted in 2006, when Congress voted almost unanimously to reauthorize the VRA for another 25 years. As the late honorable Justice Ruth Bader Ginsberg stated in her dissent in *Shelby County*, "[V]olumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[3]

[1] VOTING RIGHTS ACT, PL 89-110 (1965).
[2] *Shelby County v. Holder*, 570 U.S. 529 (2013).
[3] *Id*. at 590.

In recent years, voters have faced and continue to face increasing restrictions on voting, from laws requiring them to show identification at the voting booth (which threaten to disproportionately disenfranchise Black, Indigenous, Latin American, low-income, elderly, student, and other marginalized voters), to restrictions on early voting and onerous requirements for voter registration. There are numerous pending and prospective legal challenges to these restrictive voting laws, some of which may end up before the Supreme Court. ADL suggests that the Committee assess Judge Jackson's perspective on key voting issues through the following questions:

- What is the role of Congress and the Judiciary in interpreting the relevancy of the Voting Rights Act?
- Was the Court correct in its 2013 *Shelby County v. Holder* ruling, to substitute its views for Congress's regarding the ongoing need for the preclearance requirement of Section 5 of the Voting Rights Act?
- How should the Court balance the constitutional right of individuals to vote freely without discriminatory restrictions against the general right of states to enact laws governing their elections?

3. Immigration

ADL has advocated for fair and humane immigration policies since the organization's founding. As an anti-hate organization rooted in the Jewish community, many of us, our families, and our ancestors have been refugees and immigrants living in constant anxiety and uncertainty, up to and including the current refugee crisis in Ukraine. ADL has always called for responsible policies that honor America's ideal as a nation welcoming of immigrants and refugees.

For years, we have criticized the same types of anti-immigrant hate that so viciously targeted Jews in earlier decades, and which have been a fixture of the recent immigration debate. More recently, we have also expressed deep concern about border vigilantes – anti-immigration extremist groups that take immigration law into their own hands, conducting self-styled missions to prevent migrants from crossing the border. Historically, many people associated with border vigilante groups hold white supremacist and anti-government extremist views, often harassing minorities and taking up arms against suspected border crossers.

ADL was deeply troubled by the previous Administration's anti-immigrant executive actions and policies such as family separations at the border and efforts to end Deferred Action for Childhood Arrivals ("DACA"),[4] as well as the Migrant Protection Protocols (MPP) and use of Title 42 that have been continued by the current Administration. Under MPP, the government requires individuals with asylum claims to remain in squalid, unsafe conditions in Mexico while awaiting asylum hearings in the United States.[5] Under Title 42, the Administration is using the pretext of public health to deport people of all ages at the border without allowing them to seek asylum – against the admonitions of countless public health experts.[6] Many of these and other immigration

[4] 8 C.F.R. 274 (2012).
[5] 8 U.S.C. § 235(b)(2)(C) (1952).
[6] 42 U.S. Code §§ 265, 268; U.S. Department of Health and Human Services Centers for Disease Control and Prevention, "Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease

policies are subject to ongoing litigation and may be the subject of future cases brought before the Supreme Court. As a result, it is imperative to assess Judge Jackson's perspective on these issues through the following questions:

- What is your view on the constitutionality of sanctuary jurisdictions whose laws prevent local law enforcement from cooperating with federal immigration enforcement?
- What is your view on the constitutionality of local jurisdictions either actively working with or looking the other way at the activities of vigilante groups at the border?
- What is your view on the Constitutional due process rights of undocumented persons apprehended at the border?
- What is your view on the Constitutional due process rights of undocumented persons within the United States?
- Is there an appropriate role for states to play in enforcing federal immigration laws?
- Do you believe that *Trump v. Hawaii*[7] was correctly decided?
- In your view, what is the scope of the Executive's authority in the immigration realm?

4. Establishment Clause / Free Exercise

ADL respectfully requests that the Committee explore Judge Jackson's views on the two religion clauses of the First Amendment. Both the Establishment Clause and Free Exercise Clause are vital to the preservation and protection of religious freedom in this country, and both continue to generate considerable controversy. We think it is of the utmost importance for the Committee to gain clarity as to the Judge's perspective on each of these subjects.

The Establishment Clause

ADL has long believed that strict separation of church and state is necessary to protect the religious rights of all. ADL is concerned about various aspects of Establishment Clause jurisprudence, particularly in light of recent Supreme Court decisions that undermine longstanding precedent ensuring robust protections for church-state separation. ADL was disappointed in the Court's 2020 decision in *Espinoza v. Montana Dept. of Revenue*, which reinstituted a program previously struck down by the Montana Supreme Court that indirectly uses taxpayer dollars to fund private K-12 schools with "scholarships" that parents could use for tuition at any participating school – including religious schools that indoctrinate faith or discriminate against students on the basis of religion, sexual orientation, gender identity or other protected categories.[8] ADL is concerned with the implications of the *Espinoza* decision on the continued viability of state laws that seek to maintain strict separation of church and state, particularly in the context of public education.

ADL is also concerned about the Court's recent Establishment Clause jurisprudence as related to the display of religious symbols on public lands. ADL was troubled by the Supreme Court's 2019

Exists," March 20, 2020, available at https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

[7] *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

[8] *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246 (2020).

decision in *American Legion v. American Humanist Association*, which held that the display of a 40-foot Latin cross on a veterans' memorial did not violate the Establishment Clause.[9]

The Court recently granted *certiorari* in a number of cases raising Establishment Clause questions, making this a crucial area of inquiry for the Committee. ADL encourages the Committee to ask Judge Jackson to elucidate her views on the Establishment Clause through the following questions:

- When is it acceptable for taxpayer funding to benefit religious organizations? Do you believe *Espinoza v. Montana Dept. of Revenue*[10] was correctly decided?
- Can state constitutions provide for stricter separation of government and religion than the Establishment Clause?
- When does display of religious symbols on public lands violate the Establishment Clause? Do you believe that *American Legion v. American Humanist Association*[11] was correctly decided?
- What is your view of the current viability of the Establishment Clause and its ability to prevent one group's religious preferences from being imposed on others?

Free Exercise

It is equally important for the Committee to explore Judge Jackson's view of the Court's role in preserving and protecting religious liberty and religious free exercise. It is ADL's firm belief that one's right to free exercise of religion, while significant, must not interfere with the rights of others. Today, we see many examples of those who seek to convert the shield of religious freedom into a sword to discriminate against LGBTQ+ communities, women, and religious minorities. Notably, both longstanding Supreme Court precedent and growing public consensus have increasingly and properly rejected the idea that religion can be used as a justification for discrimination in this manner. Yet this is not reflected in recent Supreme Court jurisprudence, where cases including *Fulton v. Philadelphia,*[12] *Tandon v. Newsom,*[13] and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[14] reflect a willingness to chip away at the civil rights of marginalized people and communities without explicitly ruling that the Free Exercise Clause grants a right to discriminate.

ADL encourages the Committee to ask Judge Jackson the following questions to assess her perspective on the free exercise of religion:

- What is the legal balance between the religious liberty rights of one party and the right to be free from discrimination for another?
- What is the intent of the Religious Freedom Restoration Act (RFRA) and what are its limitations?

[9] *American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019).
[10] *Espinoza*, 140 S.Ct. 2246 (2020).
[11] *American Legion*, 139 S.Ct. 2067 (2019).
[12] *Fulton v. Philadelphia*, 141 S.Ct. 1868, (2021).
[13] *Tandon v. Newsom*, 141 S.Ct. 1294, (2021).
[14] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018).

- Under what circumstances can a person refuse to follow a law that violates their religious beliefs? Conversely, when must an individual follow the law, even if they believe it compromises their religious beliefs?

5. Race-Based Decision-Making

In *Fisher v. University of Texas* the United States Supreme Court upheld the admissions policy of the University of Texas at Austin, finding that the use of race as one element in a holistic undergraduate admissions process was constitutional.[15] ADL agreed with the Court that such a policy does not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. Rather, as the Court observed, the consideration of race as one factor in a holistic review of each application is a proper means for a university to achieve a diverse student body. Most recently, ADL filed an amicus brief in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard*, urging the First Circuit Court of Appeals to uphold Harvard College's race-conscious admissions practices, which permit race to be considered as one factor among many in a holistic evaluation of each individual applicant.[16] A central component of ADL's brief was rejecting any argument that Harvard's discriminatory admissions practices of the past — which were clearly motivated by antisemitism and explicitly designed to decrease Jewish enrollment — are remotely comparable to its race-conscious admission practices today. Recently, after Harvard prevailed in the lower courts, the Supreme Court granted *certiorari* to consider this case along with another case raising related issues during the next term.

The question of the use of race as a factor in decisionmaking with a goal of improving diversity is one that is often at issue before the Court. Without asking about any specific pending cases, the Committee should ask Judge Jackson the following questions related to this issue:

- What is your understanding of how race can be considered in college admissions?
- Do you believe that colleges and universities have a compelling interest to seek and maintain racially diverse student bodies?

6. LGBTQ+ Rights

ADL has long supported LGBTQ+ rights as fundamental human rights. The landmark civil rights victory in *Obergefell v. Hodges*, which held that the Constitution grants the right to marriage irrespective of sexual orientation gave profound hope to same-sex couples across the nation.[17] Our amicus brief in the *Obergefell* case contributed to this historic step on the journey towards justice and fair treatment for all.[18] Through our advocacy work, ADL has not only advocated for inclusive anti-discrimination laws such as the Employment Non-Discrimination Act, but also for an inclusive interpretation and enforcement of existing federal anti-discrimination laws, such as Title IX of the

[15] *Fisher v. University of Texas*, 579 U.S. 365 (2016).
[16] Students for Fair Admissions, Inc. v. President and Fellows of Harvard (U.S.C.A. 1st Circuit, 2020), https://www.adl.org/education/references/amicus-briefs/students-for-fair-admissions-inc-v-harvard.
[17] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[18] *Obergefell v. Hodges* (U.S. Supreme Court, 2015), *Tanco v. Haslam* (U.S. Supreme Court, 2015), *Deboer v. Snyder* (U.S. Supreme Court, 2015), *Bourke v. Beshear* (U.S. Supreme Court, 2015), https://www.adl.org/education/references/amicus-briefs/obergefell-v-hodges-us-supreme-court-2015-tanco-v-haslam-us.

Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964. ADL also welcomed EEOC findings and judicial decisions protecting LGBTQ+ workers under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of sex, race, color, national origin, and religion. Further, ADL supported the Departments of Justice and Education when, in 2016, they made clear to school districts that transgender students are covered by Title IX, a most important federal civil rights law that protects students from discrimination based on sex. We were, of course, deeply disappointed when the prior Administration rescinded that guidance — decrying it as "cruel, tinged with prejudice and unnecessary" — and were relieved when the current Administration reversed course to reinstate Title IX protections for transgender students.

Despite these positive steps, there is a long way left to go. LGBTQ+ people, particularly transgender youth, continue to be targeted by pernicious state legislative and executive efforts. For example, in February 2022, Texas Attorney General Ken Paxton issued an advisory opinion finding that the use of gender-affirming care for transgender children could constitute child abuse under state law. Governor Greg Abbott then directed state agencies to investigate the use of gender-affirming care for transgender children as child abuse on the basis of this advisory. This was ill-advised, because gender-affirming care is necessary medical care that saves young lives. The harm of even proposing laws that target transgender people is not hypothetical – a poll conducted by the Trevor Project in Fall 2021 found that 85% of transgender and nonbinary youth say that recent debates around these bills have negatively impacted their mental health.[19]

In light of the persistent attacks on the LGBTQ+ community in many states, it is likely that the Court will once again be presented with cases seeking to ascertain the scope of protections for LGBTQ+ people. The Committee should therefore ascertain Judge Jackson's perspective on the following questions:

- How do the decisions in *Fulton v. City of Philadelphia,*[20] *Burwell v. Hobby Lobby,*[21] and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[22] affect the rights of LGBTQ+ people?
- What is your interpretation of Title VII, as it relates to discrimination based on sexual orientation and gender identity? Was *Bostock v. Clayton County*[23] correctly decided?
- What is your interpretation of Title IX as it relates to discrimination based on sexual orientation and gender identity?
- Do you think that non-discrimination laws apply to transgender and non-gender-conforming people seeking healthcare?
- Do you think that non-discrimination laws apply to transgender and non-gender-conforming people seeking to participate in sports in alignment with their gender identity?
- Do you think *Fulton v. City of Philadelphia*[24] was correctly decided?

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[19] ISSUES IMPACTING LGBTQ YOUTH, The Trevor Project, https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProject_Public1.pdf (last visited Mar. 10. 2022).
[20] *Fulton*, 141 S.Ct. 1868 (2021).
[21] *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).
[22] *Masterpiece Cakeshop*, 138 S.Ct. 1719 (2018).
[23] *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).
[24] *Fulton*, 141 S.Ct. 1868 (2021).

7. Judicial Philosophy

We respectfully urge the Committee to explore whether the nominee subscribes to any particular canon of construction when interpreting the Constitution. ADL suggests asking Judge Jackson the following questions to explore her general judicial philosophy:

- How would you describe your judicial philosophy?
- What is your view of judicial activism versus judicial restraint?
- What is your view of stare decisis: as a general matter do you read precedent narrowly or broadly? Under what circumstances would you vote to overturn precedent with which you disagree?

Conclusion

In ADL's view, the Senate's role in the nomination process is equally as important as the President's responsibility to nominate. We hope this submission of issues of concern to us will be of assistance to the Committee as it undertakes its evaluation of Judge Jackson and wish you good luck as you move forward with the hearing

Sincerely,

/s/ Ben Sax

Jonathan A. Greenblatt
CEO and National Director

Ben Sax
Chair, Board of Directors