

December 20, 2005

Dear Senator,

We, the undersigned organizations, represent people of faith and those who work to ensure religious freedom. We well understand the blessings of religious liberty; so too, we know that the rights and liberties allowing religious diversity to flourish in America are expressly protected and guaranteed in the halls of our nation's courts. The nomination of Judge Samuel Alito Jr. to serve as Associate Justice on the Supreme Court of the United States elicited a variety of responses from our respective organizations. Many of the undersigned groups do not have policies allowing them to take positions on judicial nominees; some do. Still, despite our differing responses and policies, we are all united in calling for the confirmation hearings to deeply probe the nominee's constitutional beliefs and judicial philosophy regarding issues of religious liberty, the Establishment Clause and the Separation of Church and State. Religious liberty remains a cornerstone of America's great history and continues to profoundly affect Americans today.

As such, we respectfully submit the following questions to be addressed during the Senate Judiciary Committee hearings of Judge Samuel Alito Jr.:

1. In 1802, Thomas Jefferson spoke of the First Amendment as creating a "wall of separation between church and state." In 1985 dissent to the case *Wallace v. Jaffree*, Chief Justice William H. Rehnquist called Jefferson's phrase "a metaphor based on bad history" and said it should be "frankly and explicitly abandoned." Which view more closely approximates your own view of the relationship between religion and government?
2. What is your view of where Establishment Clause jurisprudence stands today and what deficiencies, if any, do you see in the current church/state jurisprudence landscape? Do you believe that the test first stated in the *Lemon v. Kurtzman* decision is still viable, such that it should be applied to determine whether a particular government action violates the First Amendment's Establishment Clause? If not, what test do you believe should be applied to determine whether a particular government action violates the Establishment Clause?
3. Please explain what, in your view, would violate the Establishment Clause:
 - A. *What if a public school teacher is Christian and leads students in prayer to Jesus at voluntary school assemblies held during the school day? Would that be constitutional in your view?*
 - B. *What if a public school principal is a member of the Nation of Islam and recites a Muslim prayer over the school public-address system every morning, preceded by an announcement that objecting students are permitted to stand in the hallway while the prayer is said? Is that constitutional?*
 - C. *What if a public school teacher gives students the voluntary assignment of a daily reading from the Bible or the Koran? Is that constitutional?*
 - D. *What if a public school invites different clergy every morning to lead students in prayer, so that one day a Catholic priest leads the Lord's prayer; the next day a Methodist minister leads a prayer to Jesus; the day after that a rabbi leads a prayer*

to the God of Israel; the day after that an Imam leads a prayer to Allah; and the day after that a practitioner of Santeria comes to perform a ritual sacrifice for students? Is that rotating form of worship constitutional?

E. What if students at a public school take a vote and decide to have a student lead them in Christian prayer every day? Is that constitutional?

F. What if a public school sets aside five minutes at the start of every day and instructs students to use that time to pray silently? Is that constitutional?

4. As you know, religious institutions are exempted from Title VII's prohibition on religious discrimination. That exemption was upheld by the Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). In that case, however, the church did not receive public funds and the positions in question were not funded in whole or in part with tax dollars.

A. In your view, would it be constitutionally permissible for a religious institution that receives public funds to use those public dollars to fill positions reserved for "Christians only"?

B. What if a particular state wanted to condition the receipt of public funds on non-discrimination – would that, in your view, violate the Free Exercise or other rights of religious institutions? Is it your view that religious institutions are constitutionally entitled – under the Free Exercise Clause or otherwise – to an exemption from generally applicable anti-discrimination statutes?

C. Alan Yorker was refused a psychotherapy position in a church-run program that receives the majority of its funding from the State of Georgia – simply because he was Jewish. Was that constitutional? What are the constitutional limits to government-funded religious discrimination?

5. Let's imagine a church that runs a soup kitchen. While folks stand in line waiting for soup, and while they eat it, they are shown religious films and otherwise proselytized by church employees. Indeed, the church recognizes that homeless people are particularly vulnerable and in need of assistance, and views the soup kitchen as an opportunity to gain converts to the faith.

The church applies for a grant, pursuant to a state-wide program that funds programs that provide food for the homeless, to purchase the soup that it serves. The funds will not be used for the religious films or the other proselytizing, but the films and proselytizing will continue to occur while the soup is being doled out and consumed. Is it constitutionally permissible, in your view, for the public funds to be used in this way?

6. Let's imagine a state program that provides financial assistance to private schools in that state. The program makes funds available for building, maintaining, or restoring school buildings. In your view, would it be constitutional for those funds to be provided to church-operated schools? (*Another way to put this is: "Was Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), correctly decided?")

7. In *Edwards v. Aguillard* (1987), the Supreme Court struck down a Louisiana statute requiring public schools to give “equal time” to instruction in creationism if they teach the scientific theory of evolution. Do you think that *Edwards* was correctly decided? If so: What would be your conclusion if, in addition to teaching the scientific theory of evolution, public schools were to give “equal time” to criticizing evolution and teaching as an alternative the view that an “intelligent designer” is responsible for the origins of life or the complexity of organic structures in the natural world?

8. Several state universities have established anti-discrimination policies that include race, religion, gender, national origin, disability, and sexual orientation. In order to be eligible for certain university services -- such as student activities funds -- student organizations must comply with these policies.

Recently, self-described Christian student organizations have brought law suits seeking exemption from these policies, claiming that being forced to accept gay, lesbian, bisexual or transgender students -- even those who are Christian -- violates their religious beliefs, forces them to associate with students who do not subscribe to their beliefs, and thus violates their First Amendment rights. Assuming that no secular exceptions apply, do you believe that university non-discrimination policies that include sexual orientation may be enforced against religious groups? If not, may a university enforce its non-discrimination policies based on race, religion, national origin, or disability?

9. In *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001), you wrote that the plaintiffs did not have standing to challenge a holiday display outside a government building. You suggested that in order to have standing to challenge a display, one must have come across it “in the course of satisfying a civic obligation.”

Do you believe the Establishment Clause is not violated when public funds and public property are used for a public religious display?

10. In *ACLU-NJ v. Schundler*, 168 F.3d 92 (3d Cir. 1999), you wrote an opinion holding that a city had remedied an explicitly religious and unconstitutional holiday display by adding a Christmas tree, Frosty the Snowman, Santa Claus, Kwanzaa symbols and a sled. You stated, “the mere fact that Jersey City’s first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose.”

If the original display clearly had a religious purpose, how is it possible that the same display with some additions no longer has a religious purpose? If the intent behind the original display was religious in nature, then doesn’t it follow that the original intent of the modified display was religious?

11. In *ACLU-NJ v. Black Horse Pike*, 84 F.3d 1471 (3d Cir. 1996), in your dissent you found a graduation prayer to be constitutionally permissible because it was voted for by the majority of students and did not include the involvement of school employees. But the court ruled that the fact that a majority of students might support such a prayer does not make it constitutional because the prayer would take place on public property, at a public school-sponsored event.

If given the opportunity to reconsider this case today, would you still come to the same conclusion? In considering this case, did you take into account the impact on the individuals who are not part of the religious majority?

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We thank you for addressing these questions of great import to our community in the upcoming Senate Judiciary Committee hearings on the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States.

Sincerely,

African American Ministers in Action	Methodist Federation for Social Action
American Humanist Association	National Council of Jewish Women
Americans United for Separation of Church and State	Presbyterian Church (USA), Washington Office
Disciples Justice Action Network (Disciples of Christ)	Progressive Jewish Alliance
The Central Conference of American Rabbis	Religious Coalition for Reproductive Choice
The Cleveland Tikkun Community	Religious Institute on Sexual Morality, Justice, and Healing
The Faith Action Network of People For the American Way	The Shalom Center
Friends Committee on National Legislation	Union for Reform Judaism
General Board of Church & Society of the United Methodist Church	Unitarian Universalist Association
Jewish Alliance for Law and Social Action	United Church of Christ Justice and Witness Ministries
Jewish Community Action in Minnesota	United Synagogue of Conservative Judaism
Jewish Council for Public Affairs	Women of Reform Judaism