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*The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.*

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INSTITUTE FOR PUBLIC AFFAIRS

June 24, 2010

Hon. Patrick Leahy, Chair  
Hon. Jeff Sessions, Ranking Member  
& Members of the U.S. Senate Cmte. on the Judiciary  
Washington, DC 20510  
By Facsimile & Electronic Mail

Dear Senators,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America with regard to Judiciary Committee's consideration of the nomination of Elena Kagan to the United States Supreme Court. The Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization representing nearly 1,000 congregations nationwide, is a non-partisan, religious organization and it has been the UOJCA's longstanding policy neither to endorse nor oppose judicial nominees in the confirmation process. However, we feel compelled to inform you of our views on a key issue of import to our community with regard to Solicitor General Kagan's nomination.

We have reviewed Ms. Kagan's record on matters regarding the relationship between religion and state in our society, as framed by the Free Exercise and Establishment Clauses of the First Amendment. As members of a minority faith community within this great nation, it is in this area of constitutional law that the Supreme Court can dramatically impact the welfare of our lives. Thus, we examine the record of nominees to the Supreme Court very closely. We write to you to express our opinion that Ms. Kagan has demonstrated a reassuring appreciation for the rights guaranteed by the Free-Exercise clause and a growing respect for a balanced approach to the Establishment Clause which allows for appropriate government support for the work of religious organizations.

Our encouragement about Ms. Kagan's Establishment Clause views comes from her recent repudiation of a memo she wrote as a law clerk to Justice Thurgood Marshall when the high court considered *Bowen v. Kendrick*.<sup>1</sup> In a 5-4 decision, the Court allowed federal funds to be

<sup>1</sup> Memo to Thurgood Marshall on *Bowen v. Kendrick* (1987) (Reproduced from the Collections of the Manuscript Division, Library of Congress)

allocated to religious organizations offering counseling to pregnant teenagers. Justice Marshall was among the four dissenters, a position likely informed by Ms. Kagan's memo in which she suggested that faith-based groups should not receive government funding even for secular activities. Pregnancy care centers run by religious groups, she thought at the time, would be unable to offer counseling without injecting their religious beliefs into the program.

This memo was of particular concern to us and others in faith-based communities when it was released for Ms. Kagan's Solicitor General confirmation hearings. In our view, it reflected an extreme, dogmatic and outdated view of what the Establishment Clause requires. Despite this absolutist view being effectively overruled by of Supreme Court decisions rendered in the decades since *Bowen*,<sup>2</sup> it is still promoted by some activists and advocates. Thus, our concern over whether Ms. Kagan continued to embrace this "strict separation" approach.

However, our concerns were assuaged by Ms. Kagan's comments at her last confirmation hearing - where she unequivocally reversed her previous opinion. Ms. Kagan stated that "presuming a religious organization would use money in an impermissible manner was incorrect." Furthermore, Ms. Kagan went on to say that her comments in the memo in question were, "the dumbest thing I've ever read."<sup>3</sup> We are encouraged by this evolution of Ms. Kagan's views.

While it is difficult to glean from a White House counsel's memoranda a consistent personal view on judicial issues, there are two particular documents that seem to offer encouraging insight into Ms. Kagan's perspective on Free Exercise matters while in her position as a Deputy White House Counsel in the Clinton administration.

During this time, Ms. Kagan authored a memo supporting efforts to develop a presidential Executive Order protecting religious freedom in the federal workplace. In this memo, Ms. Kagan wrote that while "The order recognizes constraints on such expression imposed by the government's interests in workplace...the order tries to show that within these constraints, there is substantial room for discussion of religious matters."<sup>4</sup>

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<sup>2</sup> See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Harris*, 536 U.S. 639 (2002).

<sup>3</sup> Goldstein, Tom. "9750 Words on Elena Kagan." May 8, 2010. <http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/>

<sup>4</sup> Memo to Melanne Verveer, Bruce Reed, Rahm Emanuel, Flo McAfee, John Hart, Jack Quinn and Kathy Wallman. "Executive Order on Religious Expression." The White House, Washington, D.C. October 18, 1996.

Ms. Kagan again subscribed to an expansive interpretation of the First Amendment when she raised concerns over a plurality decision of the Supreme Court in the case of *Smith v. Fair Employment*. The memo strongly advised the administration to urge the court to “review and reverse” their decision ruling against a landlord’s rental policy rooted in religious belief.<sup>5</sup>

The Supreme Court ruled that the landlord’s free exercise was not infringed upon because she was in fact free to choose a different profession. In the aforementioned memo, Ms. Kagan responded emphatically against the court’s decision stating, “The plurality’s reasoning seems to me quite outrageous almost as if a court were to hold that a state law does not impose a substantial burden on religion because the complainant is free to move to another state...given the importance of this issue to the President and the danger this decision poses to the Religious Freedom Restoration Act’s guarantee of religious freedom in the State of California, I think there is an argument to be made for urging the Court to review and reverse the decision.”

Other documents, released to date,<sup>6</sup> from Ms. Kagan’s tenure in the Clinton Administration similarly reflect a vigorous view for expanding Free Exercise rights and pragmatic and balanced approach to Establishment Clause issues.

The Orthodox Jewish community, like so many other American faith communities, has benefited greatly from the religious liberty guaranteed by our Constitution and promoted by the opinions of individuals such as Elena Kagan. The Supreme Court’s rulings on these matters are those which impact our community most. We urge you to consider the jurisprudence and principles of religious liberty and the perspective a Justice Kagan would bring to these matters, if confirmed. We pray your committee’s deliberations will be fair and serve the nation well.

Sincerely,  
  
Mark Bane

  
Nathan J. Diamant

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<sup>5</sup> Memo to Jack Quinn and Kathy Wallman. “Smith v. Fair Employment (RFRA Case).” The White House, Washington, D.C. August 4, 1996.

<sup>6</sup> See <http://www.elenasinbox.com/search/?q=religion>