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Rob Keithan
Director

September 1, 2005

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Leahy and Specter,

I write on behalf of over 1000 congregations that make up the Unitarian Universalist Association in regards to your consideration of the judicial record of Judge John Roberts.

We are extremely concerned that Mr. Roberts' judicial philosophy and expressed beliefs threaten civil liberties, civil rights, women's rights, worker rights and the rights of people with disabilities. From the materials available about Mr. Roberts, he clearly has a record of being in the forefront of advocating out-of-the-mainstream conservative causes, as well as for restricting important rights and legal remedies. The American people deserve a Supreme Court Justice committed to upholding the rights and liberties of *all* people, regardless of their class, gender, sexual orientation, religious beliefs or race.

Therefore, as a denomination committed to protecting the worth and dignity of all people, we ask that the Senate Judiciary Committee be resolute in its examination of the record and the judicial philosophy of Judge John Roberts.

The American people deserve to know the truth about who John Roberts is and how he views the Constitution and laws of the land. The Bush administration's withholding of documents is not only disruptive to the confirmation process, it is also disrespectful to the American public.

We ask that you persist in your efforts urging the White House to be forthcoming with the American public by cooperating with the constitutional process and releasing all documents requested by the Senate Judiciary Committee in a timely manner.

As a Supreme Court Justice, Judge Roberts primary responsibility would be upholding the Constitution. Certain constitutional principles—and in particular the First Amendment—have permitted Americans to believe in and practice the religion they choose without governmental interference or penalty. Our Founders' vision of a free and just society guaranteed religious liberty for Americans of all faiths, as well as for those who affirm no faith. Respect for religious freedom has enabled the United States to become the most religiously pluralistic society the world has ever known, and it should continue.

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Recent public debate has focused on the appropriateness of asking questions concerning religion during the confirmation hearings next week. However, questions about the intersection of religion and the Constitution have been asked without controversy in past confirmation hearings, with senators of both parties asking nominees how their deeply held religious or philosophical beliefs would affect their understanding and interpretation of the Constitution. Senators have also asked nominees how their view of the Constitution would affect religious freedom in our country.

We ask that you continue this type of respectful, thorough and rigorous questioning with Judge Roberts. Questions should probe the nominee's willingness and ability to be bound by the Constitution as the "supreme law of the land" and not his personal faith. We have attached a list of questions compiled and approved by trusted colleagues. We ask that these questions be thoroughly covered in next week's hearings.

Again, we are concerned that Mr. Roberts record suggests a judicial philosophy consistent with those who would overturn established legal protections. We believe that America's vision of justice includes respect for the equality of all people, regardless of race, religion, or political perspective. As people of faith, we are called to witness for justice so that one day this vision will be a reality.

We urge you to continue your efforts to conduct an open, fair, and thorough confirmation process. We ask that you hold Judge Roberts to the highest standard of justice, thoroughly investigating his views of the values and laws Americans hold dear.

I am available to discuss this letter and any other inquiries. Thank you for your consideration.

In Faith,

Robert C. Keithan, Director

cc:

Senator Joseph R. Biden, Jr.
Senator Sam Brownback
Senator Tom Coburn
Senator John Cornyn
Senator Mike DeWine
Senator Richard J. Durbin
Senator Russ Feingold
Senator Dianne Feinstein
Senator Lindsey O. Graham
Senator Charles E. Grassley
Senator Orrin G. Hatch
Senator Edward M. Kennedy
Senator Herbert H. Kohl
Senator Jon L. Kyl
Senator Charles E. Schumer
Senator Jeff Sessions
President George W. Bush

Critical Questions Concerning Religious Liberty

1. *The First Amendment states that "Congress shall make no law respecting an establishment of religion." In interpreting this clause, Justice Scalia has written that "there is nothing unconstitutional in a State's favoring religion generally." Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring).*

- Does the Establishment Clause prohibit the government from favoring religion generally, or just from favoring a particular religion over others? Does the Establishment Clause prohibit the favoring of religious beliefs over non-religious beliefs?

2. *Originally the Bill of Rights only limited actions by the federal government, but over time most, if not all, of the provisions of the Bill of Rights were "incorporated" to limit the ability of the states to intrude on the rights of the people.*

- Has the Establishment Clause been properly incorporated, or are individual states free to establish a religion if they so choose?

3. *Some Justices have stated that, for the Framers, "establishment" involved "actual legal coercion."* Van Orden v. Perry, *125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring); see also,* Lee v. Weisman, *505 U.S. 577, 640 (1992) (Scalia, J., dissenting).*

- Please explain what, in your view, constitutes "legal coercion" that would violate the Establishment Clause.

- Do you believe the Framers understood "establishment" as necessarily involving "actual legal coercion"? If legal coercion is not necessary to violate the prohibition against an "establishment of religion," what is necessary for such a violation?

4. *The brief you filed in Board of Education v. Mergens while you were in the Solicitor General's Office criticizes the Lemon test by arguing that:*

> *"Especially when the Lemon test is divorced from the context in which it was spawned — financial aid to highly sectarian institutions — it sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people."*

In both Lee and Mergens, therefore, you argued that, instead of applying the Lemon test, courts should "draw inferences from long-established traditions to approve practices in contemporary settings." Your briefs argued that longstanding governmental expressions of religion are constitutional, and even new categories of governmental expression of faith or support for religion should be viewed as constitutional at least if they are generally analogous to longstanding practices.

- Can you explain how the fact that a practice has occurred for a long period of time renders it constitutional?
- In your view, does the fact that a practice dates to the founding of the Constitution render it permissible?

5. *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.*

In Renzi v. Connelly School, 224 F.3d 283 (4th Cir. 2000), a case involving an exemption for parochial schools from various zoning requirements, you took the position on behalf of a client that "efforts to accommodate religion are invariably constitutional when the State simply chooses to relieve religious institutions" of legal obligations.

- Does your view that exemptions are "invariably" constitutional extend to publicly-funded positions? That is, 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"?

- 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 actually constitutionally entitled – under the Free Exercise Clause or otherwise – to an exemption from generally applicable anti-discrimination statutes?

- If a state program that provides financial assistance to private schools in that State 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?

6. *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: Would you come to a different 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?