



June 25, 2010

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
244 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

On May 10th, when President Obama announced his nomination of Solicitor General Elena Kagan to the Supreme Court of the United States, Lambda Legal expressed its approval of the administration's efforts to increase the representation of women on the Court and lauded Solicitor General's impressive legal career. Since that date, Lambda Legal staff, along with colleagues at the Human Rights Campaign, have reviewed the approximately 160,000 pages of documents produced from Solicitor General Kagan's service during the Clinton administration; her relevant writings as a U.S. Supreme Court clerk; her written answers to the Senate Judiciary Committee's questionnaire; and the record of her nomination hearings for the Solicitor General post in which she currently serves.

As the nation's oldest and largest national impact litigation organization committed to achieving the full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those living with HIV, Lambda Legal would like to draw your attention to the following issues of substantial importance to our organization and our constituents that may arise during the upcoming confirmation hearings that have emerged from our analysis of this vast record.

First, while Solicitor General Kagan was an associate counsel in the Office of Legal Counsel, she wrote a memorandum, dated August 6, 1996, about the California Supreme Court's decision in *Smith v. Fair Employment and Housing Comm'n*, 12 Cal. 4th 1143 (1996) ["*Smith*"]. In *Smith*, the state's high court held that, even under a strict scrutiny analysis, the landlord had to comply with the state's housing nondiscrimination law notwithstanding the landlord's religious objection to doing so. The plurality opinion in the case concluded that the state's nondiscrimination law did not impose a substantial burden on the landlord's religious freedom both because, if she did not want to comply with that law, she easily could move her investment in rental housing to other income-producing sources and because, unlike other cases, allowing the landlord an exemption to the state's nondiscrimination law would detrimentally affect the rights of third parties. *Id.* at 1170-76. In Solicitor General Kagan's memo, she stated that 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. Taken seriously, this kind of reasoning could strip RFRA [the Religious Freedom Restoration Act] of any real meaning."

The following year, the U.S. Supreme Court held RFRA largely unconstitutional, *City of Boerne v. Flores*, 521 U.S. 507 (1997) ["*Boerne*"], and confirmed that the federal Constitution requires only rational basis review when an individual claims that his or her religious free exercise rights

are burdened by a neutral state law of general applicability. *Id.* at 534-35 (discussing continuing controlling nature of *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990) [*“Employment Division”*]). *See also Gonzales v. O Centra Espirita*, 546 U.S. 418, 424 (2006) [*Gonzales*].

It is of great importance to Lambda Legal and our constituents that any individual who would be appointed to the Supreme Court be willing to follow the precedent set forth in *Employment Division, Boerne* and *Gonzales* that there is no exemption available to those with religious objections to compliance with generally-applicable, neutral laws, including laws prohibiting discrimination based on sexual orientation, gender identity or HIV in employment, housing or public accommodations. Such discrimination remains sadly prevalent throughout the United States,¹ and permitting those with religious objections to flout laws applicable to all others who enter the commercial sector unjustifiably would impose serious harms on workers, tenants and consumers; open dangerous loopholes to protections against discrimination; and contravene crucial state interests in assuring equality for all.

Second, during Solicitor General Kagan’s confirmation hearings last year, she stated: “There is no federal constitutional right to same-sex marriage.” Lambda Legal has led the struggle for same-sex couples to be able to marry in the United States,² and what we have fought for is the same constitutionally protected right to marry that different-sex couples enjoy, not some new and different right.³

¹ *See, e.g., M.V. LEE BADGETT ET AL., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* (June 2007), *available at* http://www.law.ucla.edu/williamsinstitute/publications/Bias_in_the_Workplace.pdf; LAMBDA LEGAL, *WHEN HEALTH CARE ISN’T CARING: LAMBDA LEGAL’S SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV* (2010), *available at* http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

² *See, e.g., Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (concluding that, under Iowa’s Constitution, same-sex couples cannot be barred from marriage); *In re Marriage Cases*, 43 Cal. 4th 757 (2008) (same under California’s Constitution, prior to its subsequent amendment); *Baehr v. Lewin*, 74 Haw. 530 (1993) (concluding that excluding same-sex couples from marriage constitutes sex discrimination).

³ *See In re Marriage Cases*, 43 Cal. 4th at 812 (plaintiffs “are not seeking to create a new constitutional right—the right to ‘same-sex marriage’—or to change, modify, or (as some have suggested) ‘deinstitutionalize’ the existing institution of marriage. Instead, plaintiffs contend that, properly interpreted, the state constitutional right to marry affords same-sex couples the same rights and benefits—accompanied by the same mutual responsibilities and obligations—as this constitutional right affords to opposite-sex couples. For this reason, in evaluating the constitutional issue before us, we consider it appropriate to direct our focus to the meaning and substance of the constitutional right to marry, and to avoid the potentially misleading implications inherent in analyzing the issue in terms of ‘same-sex marriage.’”).

The Supreme Court explained in *Lawrence v. Texas*, 539 U.S. 558 (2003) (Lambda Legal’s landmark victory striking down all sodomy laws in the United States), that lesbians, gay men and bisexuals enjoy the same constitutional rights as heterosexuals. In that case, the Supreme Court explained that it had erred 17 years earlier in conceiving the right at stake in an earlier case as a right to “homosexual sodomy,” and that instead what was at issue was the right all adults enjoy to engage in private sexual intimacy free from unwarranted government intrusion. So, now, same-sex couples seek not a right to “same-sex” marriage, but instead the right all people are entitled to of choice regarding whether and whom to marry.

Whether the federal Constitution bars states from denying same-sex couples the fundamental right to marry is a question currently being litigated in the federal courts. As a result, if she is confirmed, Solicitor General Kagan may need to decide cases involving that and related questions. We therefore recognize that it would be improper for Solicitor General Kagan to discuss how she might rule in such a case. Nonetheless, as we respectfully have emphasized in the past,⁴ Lambda Legal and our constituents are particularly concerned that every judicial nominee be committed to honoring and enforcing the core constitutional guarantees of equal protection, liberty and due process for all Americans, regardless of sexual orientation, gender identity or HIV status. In order for any nominee to receive the approval of your Committee, we believe it should be clear the nominee will respect these core constitutional principles and, in particular, is committed to following as binding legal precedent cases such as *Lawrence v. Texas*, *Romer v. Evans*, 517 U.S. 620 (1996), and *Roe v. Wade*, 410 U.S. 113 (1973).

Thank you for this opportunity to share our views on these important issues.

Very truly yours,



Jon W. Davidson
Legal Director

⁴ See, e.g., Lambda Legal’s letter to President Obama, dated January 15, 2009, *available at* http://data.lambdalegal.org/in-court/downloads/ltr_president_20090115_obama-judicial-nominations.pdf.