

**Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Follow-up Questions of Senator Jeff Sessions**

1. **Sessions Question 2(a). In your response, you stated that you were “unable to provide an analysis of an issue that was not addressed substantively in the portion of the opinion that [you] joined or wrote” and that to do so would constitute “an advisory opinion on an issue not reached by the dissent.” I understand your hesitancy to provide what might be characterized as an “advisory opinion.” Please answer the following questions:**

- a. **In *Virginia College Building Authority v. Lynn*, 260 Va. 608 (Va. 2000), the dissent did not reach the question whether the bond program violated the Establishment Clause; however, the majority did reach the issue. Do you agree with the majority’s conclusion?**

Response: The dissent that I joined did not reach the Establishment Clause issue, because the case could be resolved under a statutory analysis that did not involve application of the Constitution. It is an established principle of law in Virginia that courts generally will not address a constitutional issue when a statute can be interpreted in a manner that avoids a constitutional question. See *Marshall v. Northern Virginia Transp. Auth.*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008); *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665 (2002). Because the opinion I joined did not address an Establishment Clause analysis, I do not believe that it is appropriate to do so here.

- b. **Do you agree with the majority’s reasoning?**

Response: For the reasons stated above, I do not believe that it is appropriate for me to comment on the majority’s reasoning.

- c. **If not, please describe the type of analysis you would conduct if confronted with that question and detail the factors you would have considered in your analysis.**

Response: If confronted with an Establishment Clause issue of this nature in a future case, I would apply United States Supreme Court precedent. A landmark case in Establishment Clause jurisprudence relating to governmental aid to religious institutions and programs is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). There, the Supreme Court articulated a three-part test to be applied in Establishment Clause cases: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive entanglement with religion.’” Id. at 612-13 (citations omitted). Later, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court reaffirmed this basic test and further stated that the primary consideration in such cases requires a

determination “whether the government acted with the purpose of advancing or inhibiting religion” and “whether the aid has the ‘effect’ of advancing or inhibiting religion.” Id. at 222-223. The Court stated that in conducting this analysis a court must consider the “character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” Id. at 232. The Court further explained that if a governmental aid program does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement, that governmental aid program is permissible. Id. at 234.

These cases provide the basic framework for an Establishment Clause analysis relating to governmental aid to religious institutions and programs. I would apply these and other Supreme Court precedent in conducting an Establishment Clause analysis. As the Supreme Court precedent illustrates, Establishment Clause cases of this nature are very fact-intensive. Accordingly, I would meticulously analyze the facts presented in the context of applicable Establishment Clause principles, and would apply existing Supreme Court precedent, and precedent of the United States Court of Appeals for the Fourth Circuit, guided solely by the rule of law.

2. Sessions Questions 2(b)(i) and (ii). In your responses, you again indicated that you were unable to provide an analysis of whether the statute at issue was “viewpoint discriminatory” because it might be construed as an “advisory opinion.” Please answer the following questions:

a. How would you define viewpoint discrimination?

Response: The United States Supreme Court has not provided a fixed definition of viewpoint discrimination but has held that the government is not permitted to regulate speech based on its substantive content or the message conveyed by that speech. Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 828 (1995). Thus, discrimination against speech because of its content is presumptively unconstitutional. Id. In Rosenberger, the Supreme Court held, in part, that the University engaged in viewpoint discrimination in violation of a student’s right of free speech by refusing to make payment from a student activities fund based on the content of a student organization’s publication. In another case involving viewpoint discrimination, Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), the Supreme Court held that a school district may not permit school property to be used for the presentation of views on family and the raising of children but refuse to allow presentation of viewpoints on those issues when expressed from a religious perspective. Id. at 393-394.

These two cases are among the leading Supreme Court decisions addressing the issue of viewpoint discrimination. In deciding an issue of viewpoint discrimination as an appellate judge, I would consider these and all other cases in

which the Supreme Court, and the United States Court of Appeals for the Fourth Circuit, have addressed this important issue.

- b. Please provide an example, if any, of a case in which you determined that a statute or law was “viewpoint discriminatory.”**

Response: I have never ruled on a question whether a statute or law was “viewpoint discriminatory.”

- c. If none, please describe the type of analysis you would conduct if confronted with a viewpoint discrimination claim in a case where a statute or law treated religious institutions less favorably than non-religious institutions.**

Response: As the decisions in Rosenberger and in Lamb’s Chapel illustrate, the Supreme Court has not articulated a uniform analysis to be employed in these cases. However, because decisions in viewpoint discrimination cases are often resolved narrowly on the particular facts presented, any analysis of allegedly discriminatory treatment accorded religious institutions would require a meticulous factual discussion in the context of applicable First Amendment principles. In conducting this analysis, I would rigorously apply existing precedent and be guided solely by the rule of law.

- 3. Sessions Question 2(e). This question asked the following: To what extent does the Establishment Clause limit the government’s ability to include churches, religious schools, or other religious organizations in neutral government aid programs? You stated that you were unable to answer “because it seeks an advisory opinion and is unrelated to a particular case that was decided by the Supreme Court of Virginia.” I disagree that this question asks for an “advisory opinion.” Rather, the question simply asks you to state the law on Establishment Clause jurisprudence. Please provide an answer to the question.**

Response: The law on Establishment Clause jurisprudence requires the analysis that I described in my response to Question (1)(c). As noted there, a landmark case in Establishment Clause jurisprudence relating to governmental aid to religious institutions and programs is Lemon v. Kurtzman, 403 U.S. 602 (1971). There, the Supreme Court articulated a three-part test to be applied in Establishment Clause cases: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive entanglement with religion.’” Id. at 612-613 (citations omitted). Later, in Agostini v. Felton, 521 U.S. 203 (1997), the Supreme Court reaffirmed this basic test and further stated that the primary consideration in such cases requires a determination “whether the government acted with the purpose of advancing or inhibiting religion” and “whether the aid has the ‘effect’ of advancing or inhibiting religion.” Id. at 222-223. The Court stated that in conducting this analysis a court must consider the “character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” Id. at

232. The Court went on to explain that if a government program does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement, that program will be permissible. Id. at 234.

These cases provide the basic framework for an Establishment Clause analysis relating to governmental aid to religious institutions and programs. I would apply these and other Supreme Court precedent in conducting an Establishment Clause analysis. As the Supreme Court precedent illustrates, Establishment Clause cases of this nature are very fact-intensive. Accordingly, I would meticulously analyze the facts presented in the context of applicable Establishment Clause principles, and would apply existing Supreme Court precedent guided solely by the rule of law.

4. **Sessions Question 3(a)(iii). In response to my question, you stated that you “have never been required to set aside [your] own values in deciding a case.” Please answer the following question:**

Do you believe that judges are ever required to choose between their personal values and the rule of law in deciding a case?

Response: A judge is never required to make such a choice, because personal values are never properly a part of a judge’s decision-making process. The rule of law is the sole source of authority that must be applied in the resolution of every case.