

**Nomination of Benjamin Joel Beaton to the United States District Court for the  
Western District of Kentucky  
Questions for the Record  
Submitted September 16, 2020**

**QUESTIONS FROM RANKING MEMBER FEINSTEIN**

1. In 2001, you wrote an opinion piece in *The Cento* which contained several troubling statements about race. In the article, you wrote that the “most glaring racial problem in America today is not racial profiling or underrepresented minority leadership” but rather affirmative action. You claimed that the persistence of “racial preference in college admissions and corporate hiring has not brought significant benefits to African-Americans...What it has done is reinforce many of the problems facing minorities in America, namely failing schools.” In this same 2001 article, you also characterized diversity programs as “preferences based arbitrarily on race” and claimed that “the incorporation of racial and ethnic groups, some of which have never experienced discrimination, into preferential hiring or matriculation programs” has resulted in “white males [being] three times more likely to experience reverse discrimination.”

- a. What evidence supports your claim that diversity programs have not benefitted people of color?**

To the best of my recollection after approximately 20 years, the op-ed relied on academic or statistical studies that I no longer recall or have access to. As I explained at my hearing in response to a question from Senator Durbin, my views on these questions have changed during the subsequent two decades. I would not write that particular statement today.

- b. What racial and ethnic groups that “have never experienced discrimination” are incorporated into preferential hiring or matriculation programs?**

Please see my response to question 1(a).

- c. What evidence supports your claim that “white males are three times more likely to experience reverse discrimination?”**

Please see my response to question 1(a).

2. The Supreme Court has repeatedly held that obtaining “the educational benefits that flow from student body diversity” is a compelling interest that allows race-conscious admissions to satisfy strict scrutiny.

**Do you agree with this statement?**

I recognize that the Supreme Court has on several occasions addressed the constitutionality

of race-conscious admissions policies, including whether and when “the educational benefits that flow from student body diversity” amounts to a compelling interest that satisfies strict scrutiny, and that the Supreme Court has upheld such policies in particular circumstances. If confirmed I would fully and faithfully apply these precedents of the Supreme Court. To the extent such questions remain the subject of pending or impending litigation, the ethical canons preclude me from commenting further.

3. Based on your public Financial Disclosure Report, the Federalist Society paid you \$2,000 in honoraria in 2019. Please list each of the appearances or events for which you were compensated. For each, please include the date, a summary of the subject matter, and the specific honorarium amount.

Oct. 3, “Supreme Court Preview,” University of Kentucky College of Law, Student Chapter, \$1000.

Sept. 18, “Post-Kavanaugh Kumbaya? Civility and Professionalism at the U.S. Supreme Court,” Ohio State Moritz College of Law, Student Chapter, \$1000.

4. Please respond with your views on the proper application of precedent by judges.

- a. **When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

It is never appropriate for lower courts to depart from Supreme Court precedent.

- b. **Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

A federal district judge is duty-bound to rigorously follow all applicable Supreme Court precedents, regardless of that judge’s own legal views on a particular issue raised at or by the Court. A district judge would be in a position to author a concurrence or dissent if the judge is sitting by designation on a court of appeals or on a specially constituted three-judge district court panel. Although it may occasionally be proper for a district judge to observe that the Supreme Court’s jurisprudence is confusing or problematic in the course of applying that precedent or explaining a district court decision, a district judge must decide each case based on fidelity to Supreme Court precedent.

- c. **When, in your view, is it appropriate for a district court to overturn its own precedent?**

District court decisions lack “binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). Federal Rules of Civil Procedure 59 and 60 provide the standards under which a district court may reconsider a prior ruling. District court judges also appropriately apply the principles of *res judicata*, collateral estoppel, and the

law-of-the-case doctrine.

**d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

Lower courts may not anticipate Supreme Court departures from its own precedent. *See Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989). Only the Supreme Court may do so, and several Supreme Court precedents discuss factors—such as reliance, workability, and whether a party requested reversal—which have affected the Court’s decision whether or not to revisit precedent under the particular circumstances of a given case.

5. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

**a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?**

I am not aware of judicial authority discussing or defining the concepts of super-stare decisis or superprecedent. As discussed above, lower courts lack authority to call into question the precedential effect of binding Supreme Court decisions. *Roe v. Wade* is binding precedent for all lower courts. If confirmed, I will fully and faithfully apply the Supreme Court’s decisions.

**b. Is it settled law?**

Yes. District court judges are bound to apply all Supreme Court precedent.

6. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes. District court judges are bound to apply all Supreme Court precedent.

7. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its

proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms.”

**a. Do you agree with Justice Stevens? Why or why not?**

It would be inappropriate for me, as a district court nominee, to opine on the correctness of Supreme Court precedent or the legal reasoning of an opinion, concurrence, or dissent authored by a Justice of the Supreme Court. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). Justice Stevens' position was articulated in his opinion dissenting from the majority opinion in *Heller*. As an inferior court judge, I am bound to apply the holding in *Heller*'s majority opinion. If confirmed, I will fully and faithfully apply that precedent as well as all other applicable precedents from the Supreme Court and the Sixth Circuit.

**b. Did *Heller* leave room for common-sense gun regulation?**

The majority opinion in *Heller* stated that “the right secured by the Second Amendment is not unlimited,” and explained that nothing in that “opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626–27 (2008).

**c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?**

The opinion of the Court in *Heller* “conclude[d] that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.” 554 U.S. at 625. The Justices' writings in *Heller* disagreed regarding the scope and applicability of the Court's decisions addressing the Second Amendment right to keep and bear arms.

8. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

**a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

The opinion for the Court in *Citizens United* held that “the First Amendment protection extends to corporations.” This is binding precedent that I would apply fully and faithfully, regardless of any personal beliefs I might or might not have, if I am confirmed as a district judge. Additionally, litigation concerning the scope of the *Citizens United* decision is pending or impending, rendering comment by a judicial nominee inappropriate.

**b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

Please see my answer to question 8(a).

**c. Do you believe corporations also have a right to freedom of religion under the First Amendment?**

The Supreme Court’s decision in *Burwell v. Hobby Lobby* held that the Religious Freedom Restoration Act applies to closely-held corporations. This represents binding precedent that I will faithfully and fully apply, if confirmed. Given pending or impending litigation before the courts, it would be inappropriate for me to comment further on this issue.

9. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The interaction of these two constitutional provisions is among the questions raised in a Supreme Court case scheduled to be argued in the Court’s upcoming term. See *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020). Therefore Canons 2A and 3A(6) of the Code of Conduct for United States Judges render it inappropriate for a district court nominee to comment on this issue. If confirmed as a district court judge, I will fully and faithfully apply all relevant and binding Supreme Court and Sixth Circuit precedent on this question.

10. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

*Loving v. Virginia* held that laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Loving*.

11. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

Given pending or impending litigation before the courts, it would be inappropriate for me to comment on this question.

12. You indicated on your Senate Questionnaire that you first became a member of the Federalist Society in 2006. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

**a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?**

I am not familiar with the quoted language and have not discussed it with anyone at the Federalist Society. Therefore I cannot elaborate on what this portion of the website may be referring to.

**b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?**

Please see my response to question 12(a).

**c. What "traditional values" does the Federalist society seek to place a premium on?**

Please see my response to question 12(a).

**d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.**

Many of my friends and colleagues are members of or otherwise affiliated with the Federalist Society and have encouraged me to consider judicial service or contacted me to congratulate me on my nomination. The same is true for friends and colleagues of mine who are members of or otherwise affiliated with the American Constitution Society and many other legal organizations of various stripes.

- e. **Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?**

No.

- f. **When you joined the Federalist Society again in 2019—9 years after you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary or within the Trump Administration? Please answer either “yes” or “no.”**

No.

1. **If your answer is “no,” then why did you decide to join the Federalist Society in 2019, 9 years after you began practicing law?**

I have considered myself a member and attended events of the Federalist Society since law school. For much of the period until 2018, I was unaware that members registered and paid dues. In 2018 I formally joined the lawyers division in connection with the establishment of a new lawyers chapter in Kentucky.

13. In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct].” (*Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

- a. **Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?**

I was generally aware of this draft ethics opinion when it was reported in the press, though I have not read the draft. By the time I was nominated for this position, I believe the draft ethics opinion had already been withdrawn.

- b. **If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?**

If confirmed, I will consider whether and how Canon 4 of the Code of Conduct for United States Judges, Advisory Opinion #116, and other applicable ethical guidelines affect my membership and affiliation with the groups to which I belong. I also plan to confer with other judges regarding their experiences and interpretation concerning these issues.

14. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

- a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

At my interview, I discussed my general understanding of and approach to various legal doctrines and Supreme Court precedents. That discussion may have included doctrines and precedents related to administrative law. I do not remember anyone asking about my thoughts on administrative law specifically.

- b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

Not that I recall. From time to time I speak or write publicly about legal issues, as disclosed in my Senate Judiciary Questionnaire. These discussions occasionally cover administrative law—although typically the courts' views or decisions on administrative law, rather than any views of my own.

- c. What are your "views on administrative law"?**

Congress and the Supreme Court have articulated standards governing how courts review issues relating to administrative law and the decisions of administrative agencies. Canons 2 and 3 of the Code of Judicial Conduct render it inappropriate for me to express any personal views on subjects relating to administrative law, which are frequently litigated. If confirmed as a district judge, I would faithfully apply Supreme Court precedent.

15. Do you believe that human activity is contributing to or causing climate change?

It would be inappropriate for me, as a nominee for a federal judgeship, to comment on a political issue, particularly one—such as the disputes over anthropomorphic contribution to or remediation of climate change—that is the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

16. When is it appropriate for judges to consider legislative history in construing a statute?

According to the Supreme Court, “[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005).

17. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

18. Please describe with particularity the process by which you answered these questions.

I received these questions on Wednesday, September 16, 2020. I read them and prepared draft responses. I received comments on the questions and my draft responses, including from attorneys at the Department of Justice’s Office of Legal Policy. I considered those suggestions in making final revisions. Each answer is my own.

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**QUESTIONS FROM SENATOR WHITEHOUSE**

1. In a 2018 article for the Yale Journal on Regulation, you wrote that you espouse a view of “textualism in the trenches,” “championed in the opinions of Justices Gorsuch and Thomas, driven by plain meaning, statutory structure, and the traditional tools of interpretation.” You continued to say that Judge Posner’s “brand of policy-oriented pragmatism is ‘fundamentally at odds with our experience litigating and deciding cases in the federal courts.’”

To clarify, the article I published in the Yale Journal on Regulation described my understanding of Judge Amul Thapar’s approach to statutory interpretation and administrative law, not necessarily my own. The second quotation refers to an article entitled *The Pragmatism of Interpretation* that I co-authored with Judge Thapar in the Michigan Law Review reviewing Judge Posner’s book, and reflects my own publicly stated views.

- a. Justice Thomas has argued that child labor laws, minimum wage laws, and bans on whites-only lunch counters are unconstitutional. In dissent in *Brown v. Entertainment Merchants Assn.*, Thomas reasoned that First Amendment rights do not extend to high school students because “[i]n the Puritan tradition common in the New England Colonies, fathers ruled families with absolute authority,” and “[i]n light of this history, the Framers could not possibly have understood ‘the freedom of speech’ to include an unqualified right to speak to minors.”

- i. Do you make a conceptual distinction between textualism and originalism?

Yes.

- ii. Do you believe that a rigid adherence to an eighteenth-century originalist interpretation is closer in line to your experience litigating and deciding cases than an approach that takes twenty-first-century policy implications into account?

The Michigan Law Review article did not state that rigid adherence to an eighteenth-century originalist interpretation is closer in line to our experience litigating and deciding cases than an approach that takes twenty-first-century policy implications into account. The article advocated for adherence to textualism in statutory interpretation as a more pragmatic, efficient, and legitimate approach than a more outcome-driven approach that took policy implications into account.

- iii. Do you believe that the process of discerning the plain meaning of a piece of text is one impervious to creeping biases?

I am not sure what creeping biases this question refers to. But in general, no method of interpretation is absolutely impervious to extratextual influences. This is why the Michigan Law Review article discussed above concluded with the observation that:

the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely.

116 Mich. L. Rev. at 834 (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989)).

- b. Justice Gorsuch, writing for the majority in *Epic Systems Corp. v. Lewis*, held that individual arbitration agreements are enforceable under the FAA, regardless of NLRA allowances. In so doing, Gorsuch’s textualist reading relied on the assumption that coerced agreements between employers and employees are voluntary contracts.
  - i. Do you think that acknowledging the power differential between employers and employees is outside the scope of textualist interpretation?

The ethical canons applicable to judicial nominees counsel against commenting on specific legal issues that are the subject of pending or impending litigation, on issues of political debate, and on the merits of opinions issued by other judges. As a general matter, whether textualist interpretation accounts for concerns such as employer-employee dynamics would depend on whether the text and structure of the statute at issue, along with any other relevant legal materials, accounted for such dynamics. If the scope of the law, as drafted and enacted through the political process, encompassed those considerations, then it would be incumbent on a judge interpreting the law to consider and apply that aspect of the legislature’s enactment.

- ii. If so, can you identify a limiting principle to place on normative judgments that are permissible to enter into textualist analysis?

See my response to question 1(b)(i).

- 2. In an exchange with Senator Durbin, you clarified your current views on affirmative action, distinguishing your critical remarks on the topic from a 2001 article. Justice Thomas, in a concurring opinion in *Fisher v. University of Texas*, wrote that the government should only consider race when there is a “pressing public necessity . . . to provide a bulwark against anarchy, or to prevent violence.” In Thomas’s view, affirmative action does not meet those standards. Do you agree with Justice Thomas’s assessment?

It would be inappropriate for me, as a district court nominee, to opine on the correctness of Supreme Court precedent or the legal reasoning of an opinion, concurrence, or dissent authored by a Justice of the Supreme Court. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). Justice Thomas’ position was articulated in his concurrence. As an inferior court judge, I am bound to apply the holdings in the *Fisher* decisions. If confirmed, I will fully and faithfully apply that precedent as well as all other applicable precedents from the Supreme Court and the Sixth Circuit.

- 3. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice

President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I believe I read the article around the time the Washington Post published it, but am not certain. I reviewed it again in connection with my responses to this question.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

The Canons of the Code of Conduct for United States Judges prohibit me from commenting on political matters related to judicial nominations. If confirmed, I will always strive to protect the integrity and independence of the federal judiciary from the risk of corruption.

- c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my response to question 3(b).

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I have no such knowledge.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

Please see my response to question 3(b).

4. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "[m]y job is to call balls and strikes and not to pitch or bat."

- a. Do you agree with Justice Roberts' metaphor? Why or why not?

Like many metaphors, this one is to some extent imprecise and does not account (or purport to account) for every nuance of the judicial role. As compared to the pitcher and batter, however, I agree that the umpire most closely reflects the role of the judge in our

adversarial system: to avoid any real or perceived stake in the outcome, to resolve rather than initiate controversies, and apply rules set forth in advance to the facts and circumstances of particular contests.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

In general, judges consider the practical consequences of a particular ruling when the governing legal standard enacted by lawmakers calls on judges to do so. The law does so in various circumstances, for example those involving criminal sentencing, civil remedies, preliminary injunctions, and discovery disputes.

5. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

No. The Supreme Court has addressed the appropriate approach to Rule 56 in a number of decisions—including *Anderson v. Liberty Lobby*, *Celotex v. Catrett*, and *Matsushita v. Zenith Radio*—which district and circuit judges regularly and faithfully apply consistent with their duty to administer justice fairly and impartially.

6. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

- a. What role, if any, should empathy play in a judge's decision-making process?

Empathy involves the ability to understand and appreciate the perspective of others. This should not be confused with one's own views, and it does not trump a judge's obligation to apply the law equally to all persons. This accords with then-Judge Sotomayor's explanation, during her confirmation hearings, that "judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusion in cases, it's the law." Empathy is nevertheless a crucial quality for effective litigators, respected judges, and decent humans to possess. Its role in a judge's decision-making process is limited but important. Although empathy may not play a large role in the interpretation of the words of a particular legal provision, for example, it is vital to imposing criminal sentences in a manner faithful to sentencing laws and guidelines as well as the interests of victims and defendants.

- b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

A judge's personal life experiences, particularly ones involving people from a variety of backgrounds and viewpoints, may prove valuable in supplying a judge with the sensitivity, judgment, and empathy that are so often necessary to ensure the judiciary is both impartial and perceived as such.

7. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

8. The Seventh Amendment ensures the right to a jury “in suits at common law.”

- a. What role does the jury play in our constitutional system?

The jury plays a fundamental role in the administration of justice in criminal and civil proceedings, as reflected by the Framers’ protection of the jury right, in certain circumstances, under the Sixth and Seventh Amendments. The jury reinforces liberty and self-government by involving a litigant’s peers in decisions regarding many of our most important legal rights.

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

Issues relating to the enforceability of mandatory pre-dispute arbitration clauses are commonly the subject of litigation in federal courts. Therefore it would be inappropriate for me to comment on this topic pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges. The Supreme Court, moreover, has issued important decisions regarding arbitration clauses. If confirmed as a district court judge, I would fully and faithfully follow those and all other precedents, taking into consideration all appropriate constitutional and statutory provisions.

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to question 8(b).

9. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

Several Supreme Court decisions, including for example *Alabama v. Garrett* (2001) and *Turner Broadcasting v. FCC* (1994), address judicial consideration of congressional fact-finding, which varies based on the context of the congressional legislation and judicial review. If confirmed, I will fully and faithfully apply all such precedents.

10. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

I previously had not, but have done so in connection with my response to this question.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

Judicial independence and the reality and perception of impartiality are all central to the rule of law and to the judicial duty. The Code of Conduct for United States Judges and Advisory Opinion #116 protect the independence of the judiciary, and I would look to them for guidance in the event I am invited to attend a seminar or conference of any type. As Advisory Opinion #116 says, “it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis.” As part of that case-by-case analysis, if confirmed, I will consider each of the factors that Advisory Opinion #116 lists as appropriate for consideration.

- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to question 19(b)(i).

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to question 19(b)(i).

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to question 19(b)(i).

- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to question 19(b)(i).

- c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to question 19(b)(i).

- 11. Earlier this year, the Federal Judiciary’s Committee on the Codes of Conduct drafted a proposed advisory opinion concluding that a judge’s ongoing “membership in . . . the Federalist Society is inconsistent with obligations imposed by the Code [of Conduct.]” After an aggressive lobbying campaign by Federalist Society-affiliated judges, the Committee ultimately voted to table the proposed opinion. In doing so, the Committee observed: “The nation depends on a judiciary that is impartial and independent. Consistent with the judge’s oath, each individual judge should take care to make all membership decisions in a way that is consistent with the highest ideals of the profession as expressed in the Code of Conduct.” (emphasis added.)

- a. If confirmed, do you plan to continue your membership in the Federalist Society?

If confirmed, I will consider whether and how Canon 4 of the Code of Conduct for United States Judges, Advisory Opinion #116, and other applicable ethical guidelines affect my membership and affiliation with the groups to which I belong. I also plan to confer with other judges regarding their experiences and interpretation concerning these issues.

- b. In the draft of Advisory Opinion #117, the Committee concluded that official affiliation with ACS or the Federalist Society “could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge’s impartiality on subjects as to which the organization has taken a position; and generally frustrates the public’s trust in the integrity and independence of the judiciary.”

- i. Do you think the Federalist Society is an organization “that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency”? Why or why not?

In my personal experience with the Federalist Society, which may or may not reflect others’ experiences or perceptions, the organization serves the interests generally of those who use the legal system by encouraging thoughtful debate and dialogue among the bench, bar, and interested citizenry.

- ii. Do you think the Federalist Society “is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations”? Why or why not?

I have no basis on which to state an informed position on the public’s general view about whether the Federalist Society has “adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations.”

- iii. Do you believe that a judge’s membership in the Federalist Society may reasonably be seen by the public as engendering indirect advocacy of the organization’s political, social, or civic objectives? Why or why not?

If confirmed, I will consider whether and how Canon 4 of the Code of Conduct for United States Judges, Advisory Opinion #116, and other applicable ethical guidelines affect my membership and affiliation with the groups to which I belong. I also plan to confer with other judges regarding their experience and interpretation concerning these issues. If confirmed I will always strive to instill public confidence in the impartiality and perception of impartiality of the federal courts.

- iv. Do you believe that reasonable members of the public would perceive a judge who has membership in the Federalist Society, a self-described group of conservatives and libertarians, to be partial or impartial? Why?

Please see my response to question 11(b)(ii).

- v. The draft opinion notes “the Federalist Society’s funding comes substantially from sources that support conservative political causes.” Do you believe that membership in an organization tied to such funding could give rise to the appearance of impropriety or partiality? Why or why not?

I do not know whether the Federalist Society’s funding comes substantially from sources that support conservative political causes. As to the appearance of impropriety or partiality, please see my response to question 11(b)(iii).

**Nomination of Benjamin J. Beaton, to be United States District Court Judge for the  
Western District of Kentucky  
Questions for the Record  
Submitted September 16, 2020**

**QUESTIONS FROM SENATOR COONS**

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

If confirmed, I would faithfully apply the framework set forth by the Supreme Court for addressing substantive due process rights protected under the Fourteenth Amendment. In *Washington v. Glucksberg*, the Court noted that its substantive due process analysis requires that the fundamental right at stake must be described carefully and must be objectively and deeply rooted in this Nation's history and tradition.

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes, consistent with Supreme Court and Sixth Circuit precedent.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes, consistent with Supreme Court and Sixth Circuit precedent. The Supreme Court has relied on treatises, common law sources, state constitutions, and other historical sources.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of any court of appeals?

Yes. If confirmed, I would fully and faithfully apply all precedents from the Supreme Court and Sixth Circuit. Absent binding precedent, I would consider persuasive authority from other circuit courts of appeals. See also my response to Question 1(b).

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes. See my answer to Question 1(c).

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. I would consider and apply these aspects of *Casey* and *Lawrence*, two binding Supreme Court precedents, to the extent they were relevant and/or raised in the case before me.

- f. What other factors would you consider?

If confirmed, I would consider any other factors that had been held applicable by the Supreme Court or Sixth Circuit, to the extent they were relevant and/or raised in the case before me.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court held in *United States v. Virginia* that the Fourteenth Amendment's Equal Protection Clause applies to racial as well as gender-based distinctions.

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Many precedents of the Supreme Court and Sixth Circuit address the proper ways to interpret and apply the Fourteenth Amendment in cases of alleged racial and gender discrimination. If confirmed, I would faithfully apply those precedents.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I am not aware of the circumstances that led to the Supreme Court's decision to grant certiorari in *United States v. Virginia* and address the question presented in that case when it did. As a district court judge, I would faithfully apply this precedent of the Supreme Court as I would other binding Supreme Court precedent.

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Supreme Court recently addressed the Fourteenth Amendment's applicability to gay and lesbian couples, in the marriage context, in *Obergefell v. Hodges*. That decision represents binding precedent that I would faithfully apply if confirmed. Other aspects of the Fourteenth Amendment's applicability to gay and lesbian couples are currently the subject of pending or impending litigation. To the extent those questions have not been resolved by the Supreme Court or the Sixth Circuit, the ethics canons make it inappropriate for me to comment. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

The Supreme Court recently addressed the applicability of certain statutory nondiscrimination protections to transgender people in *Bostock v. Clayton County*. That decision represents binding precedent that I would faithfully apply if confirmed. It is my understanding that the Fourteenth Amendment's applicability to transgender people is currently the subject of pending or impending litigation. To the extent those questions have not been resolved by the Supreme Court or the Sixth Circuit, the ethics canons make it inappropriate for me to comment. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court held in *Griswold* and *Eisenstadt* that there is a constitutional right to privacy that protects a woman's right to use contraceptives. If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and Sixth Circuit, including *Griswold* and *Eisenstadt*.

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court has held in multiple cases that there is a constitutional right to privacy that protects a woman's right to obtain an abortion. If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and Sixth Circuit, including, for example, *Roe*, *Casey*, *Whole Woman's Health*, and *June Medical*.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has held in *Obergefell* and *Lawrence* that a constitutional right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders. If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and Sixth Circuit, including *Obergefell* and *Lawrence*.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*,

135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The Supreme Court acknowledged in *United States v. Virginia* and *Obergefell* that in some circumstances courts may consider evidence that sheds light on changing societal understandings. If confirmed, I would fully and faithfully apply these and other Supreme Court precedents and the guidance they may provide on this question. With respect to particular legal issues, as a judicial nominee, it would not be appropriate for me to comment on issues that could come before me as a judge. See Canons 2 and 3 of the Code of Conduct for United States Judges.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Those issues are generally governed at the trial court level by Federal Rule of Evidence 702 and 703, as interpreted by the Supreme Court’s decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). How such evidence would affect a given judicial proceeding would depend on the nature of the particular issues arising in the case. If confirmed, I would fully and faithfully apply *Daubert*, the Federal Rules of Evidence, and other relevant precedents from the Supreme Court and Sixth Circuit on the admission of expert testimony and scientific evidence.

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

The Supreme Court has held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Supreme Court also has instructed that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I would fully and faithfully apply all precedents of the Supreme Court and the Sixth Circuit, including *Obergefell*,

*Lawrence*, and *Masterpiece Cakeshop*. Because aspects of this question are the subject of pending or impending litigation that may come before me, the ethics canons make it inappropriate for me to comment further. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

Please see my responses to questions 1 and 5(a).

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I am generally aware of scholarship and other historical analysis debating this question. See, e.g., Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 Harvard J. Law & Pub. Policy 457 (1995); *Bostock v. Clayton County*, 150 S. Ct. 1731, 1835 n.10 (2020) (Kavanaugh, J., dissenting). *Brown* is a landmark decision of the Supreme Court that vindicated the 1896 dissent of the first Justice Harlan in *Plessy v. Ferguson*. If confirmed as a district court judge, I would faithfully apply the Supreme Court’s decision in *Brown* and its progeny.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Sept. 16, 2020).

I have not read this white paper. If confirmed, it is highly likely that I would be called upon to consider arguments concerning the freedom of speech, equal protection, and due process. I would fully and faithfully consider such arguments consistent with all applicable precedents of the Supreme Court and Sixth Circuit.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court has recognized the importance of the Constitution's text, structure, and original understanding in interpreting a constitutional provision, including the public's understanding of a constitutional provision's meaning at the time of its adoption. See, e.g., *District of Columbia v. Heller*. For a U.S. district judge, binding precedent of the Supreme Court and Sixth Circuit dictate the appropriate approach to the meaning of particular constitutional provisions. If confirmed I would faithfully apply those precedents to constitutional questions that came before me.

- d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my answer to the prior question.

- e. What sources would you employ to discern the contours of a constitutional provision?

Please see my answers to the questions above. As a general matter, courts first consider and apply binding precedent. If precedent does not resolve the matter, courts consider, among other things, the text and structure of the Constitution, the original public meaning of those terms in the provision, relevant historical context informing the meaning of those terms, and the application of that or related constitutional text in analogous circumstances or precedents.

**Nominations**  
**Hearing before the Senate Committee on the Judiciary**  
**Questions for the Record**  
**September 9, 2020**

**QUESTIONS FROM SENATOR BLUMENTHAL**

**Questions for Mr. Benjamin J. Beaton**

- 1. Please describe whether you believe *Brown v. Board of Education* was correctly decided.**

I believe *Brown v. Board of Education* was correctly decided.

**Questions for the Record for Benjamin Joel Beaton  
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

**a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.

**b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

No.

2. In 2001, you wrote an op-ed in college that criticized affirmative action as outdated. You argued “political correctness has diluted any progress made by mandating the incorporation of racial and ethnic groups, some of which have never experienced discrimination, into preferential hiring or matriculation programs.” You also claimed that as a result, “white males are three times more likely to experience reverse discrimination.”

**a. Which racial and ethnic groups that, in your view, have “never experienced discrimination” are benefitting from preferential treatment or school admissions from affirmative action programs?**

To the best of my recollection after approximately 20 years, the op-ed relied on academic or statistical studies that I no longer recall or have access to. As I explained at my hearing in response to a question from Senator Durbin, my views on these questions have changed during the subsequent two decades. I would not write that particular statement today.

**b. What is the factual evidence for your claim that affirmative action subjects white men to three times the rate of reverse discrimination?**

Please see my response to question 2(a).

3. In 2015, you represented a Chinese company, Wuhan State Owned Industrial Holdings, and argued it could not be sued in U.S. courts under the Foreign Sovereign Immunities Act. Some of my Republican colleagues are proposing to change this law to allow lawsuits against China for damages related to the COVID-19 pandemic.

- a. **Given your experience representing foreign states under the Foreign Sovereign Immunities Act, are you aware that these proposals create the risk of retaliatory lawsuits against the United States by China and other foreign countries?**

I am not aware of these proposals or any risks they might create.

- b. **From the filing of the complaint to final resolution, how long did your case involving Wuhan State Owned Industrial Holdings last?**

Based on a review of the docket, that case lasted just over 8 years. The plaintiff filed its complaint on June 4, 2010. The Ninth Circuit affirmed dismissal of the action and issued its mandate on July 5, 2018. I was involved with this case for only part of this period.

- c. **Could these COVID-19 lawsuits against China drag on for years without resulting in China actually paying any damages related to the COVID-19 pandemic?**

I am not aware of any pending COVID-19 lawsuits against China, or of any lawsuits of China that would or could be filed in the event of potential legislative amendments mentioned above. To the extent such lawsuits are pending or impending, it would be inappropriate for a judicial nominee, before whom such a lawsuit could theoretically be filed, to comment on the lawsuits or their potential outcomes.

- d. **Do you believe the Foreign Sovereign Immunities Act should be amended to allow lawsuits against China for damages related to the COVID-19 pandemic?**

Under the ethics canons applicable to judicial nominees, it would be inappropriate for me to comment on any legislative proposals to amend the law.

4. You have worked closely with Justin Walker and have been nominated to fill his seat in the District of Kentucky. When Walker was nominated to this seat and to the D.C. Circuit, you wrote two personal letters to this Committee vouching for Walker's character. You wrote: "His demeanor is judicious, his tone respectful, and his mind open." You also claimed he had a "respect for our important but limited roles as judges."

- a. **At Judge Walker's investiture ceremony for his district court position, he stated: "[I]n Brett Kavanaugh's America, we will not surrender while you wage war on our work or our cause or our hope or our dream." He also said that "although my legal principles are prevalent, they have not yet prevailed. That although we are winning we have not won." Are his statements reflective of your view of a respectful tone, an open mind, and a judicious demeanor that recognizes the limited role of judges?**

My comments accurately described my experiences with Judge Walker as a co-clerk, co-teacher, lawyer, and friend. Judge Walker elaborated on his investiture speech at length in his oral and written responses to this Committee's questions, and I would not presume to further characterize those statements. Each judge must decide for himself or herself the applicability of the ethical canons and other guidelines meant to ensure a respectful tone, an open mind, and a judicious demeanor that recognizes the limited role of judges—as

well as the appearance thereof. If confirmed, I will strive to reflect these attributes in my words and actions.

**b. Is that the type of judge you will be – some who is engaged in war to ensure that *your* legal principles and *your* cause prevails?**

If confirmed, I would endeavor always to follow the law as written by its framers and interpreted in binding precedent by the Sixth Circuit and Supreme Court. I would not and do not conceive of the duty of a district judge to involve advancing his or her own legal principles or cause.

5. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

**a. Do you agree that training on implicit bias is important for judges to have?**

Judges are required to preside over and decide cases without regard to bias, prejudice, or preference. The law includes many provisions and mechanisms meant to remove bias of all sorts from legal decisionmaking, and if confirmed I would always strive to achieve that crucial goal. I agree that training to help judges understand and fulfill this obligation is important.

**b. Have you ever taken such training?**

I have attended CLE programs concerning implicit bias, and I am confident such programs have involved judges.

**c. If confirmed, do you commit to taking training on implicit bias?**

If confirmed, I commit to reviewing any materials and training made available by the Administrative Office of the Courts regarding implicit bias, and to participating in any number of training opportunities that will help me perform my duties to the best of my ability.

**Nomination of Benjamin J. Beaton**  
**United States District Court for the Western District of**  
**Kentucky Questions for the Record**  
**Submitted September 16, 2020**

**QUESTIONS FROM SENATOR**

**BOOKER**

1. In 2001, you wrote in your college newspaper that “the most glaring racial problem in America today” is affirmative action.<sup>1</sup> To support this assertion you argued that affirmative action had “not brought significant benefits to African-Americans” and said that it had “reinforce[d] many of the problems facing minorities in America, namely failing schools.”<sup>2</sup> Additionally, you claimed that in 2001 “African-Americans are now five times less likely to receive benefits due to their race, and white males are three times more likely to experience reverse discrimination.”<sup>3</sup>

- a. What motivated you to write that op-ed?

To the best of my recollection after approximately 20 years, an undergraduate course assignment required me to advocate this position (or to take a position and advocate for it; I cannot remember) in connection with the then-pending U.S. Supreme Court consideration of the *Grutter/Gratz* cases. I cannot recall any details, but believe a student editor of the newspaper may have encouraged me to convert my assigned writing into an op-ed, which I agreed to do.

- b. Do you hold the same beliefs expressed in the op-ed in 2001 today? If so, please indicate what research, data or evidence you rely upon to support your assertions.

As indicated during my hearing in response to a question from Senator Durbin, my views on this question have changed since 2001.

- c. If you are confirmed, why should a litigant arguing in favor of affirmative action expect to have a fair and impartial judge, in light of your statements and record on affirmative action issues?

Any litigant should expect and receive a fair and impartial hearing on this and all other issues. The Supreme Court has considered the constitutionality of race-conscious admissions policies on several occasions during the subsequent two decades. As a district judge I would fully and faithfully apply the binding precedent of the Supreme Court and Sixth Circuit.

To the extent the op-ed advanced a legal position (as opposed to the undertheorized policy arguments known to a young student untrained in the law), that position fell well within the mainstream of legal debate at the time, and overlapped substantially with the Supreme Court’s eventual decisions in

the *Grutter/Gratz* cases. The op-ed, moreover, did not argue against affirmative action, but rather advocated for a more nuanced approach to its use in undergraduate admissions.

And to the extent I have a record on affirmative action and other issues involving race, that record would reflect sustained efforts to support and expand access, reconciliation, and diversity in the schools, churches, neighborhoods, workplaces, and other institutions dear to my family, including my undergraduate alma mater. I wrote this piece nearly 20 years ago, as a 20-year-old college student who had not begun law school. As I explained during my hearing, in response to a question from Senator Durbin, my views and my life experience have changed since then.

2. You are a strong proponent of textualism and published a law review article with Judge Amul Thapar critiquing Judge Richard Posner's 2017 book, "The Federal Judiciary" and arguing that "textualism is a particularly egalitarian and democratic approach to the law."<sup>4</sup>

- a. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

Yes. Textualism may be defined in many ways; indeed, Justice Kagan famously reflected on Justice Scalia's legacy by stating that "we're all textualists now." I discussed various aspects of textualism at length in a co-authored article entitled *The Pragmatism of Interpretation*. If confirmed, I will apply the law fairly and impartially as written. Further, I will follow Supreme Court and Sixth Circuit precedent that addresses acceptable methods of constitutional and statutory construction.

- b. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

Yes. Originalism likewise may be defined in different ways, and is more frequently associated with constitutional interpretation than with statutory interpretation. One straightforward description of originalism simply describes it as textualism applied at a given point in time—specifically the time of a legal provision's enactment. If confirmed, I will apply the law fairly and impartially as written. Further, I will follow Supreme Court and Sixth Circuit precedent that addresses acceptable methods of constitutional and statutory construction.

- c. Why do you disagree that textualism and originalism "are backward-looking heuristics promising false precision in the law"?

As discussed in our article, Judge Posner argued that the utility of textualism and formalism was limited and overstated because the law "means one thing to conservatives, another to liberals," and "has no

fixity.” This account is inconsistent with the frequency with which judges and lawyers agree regarding the meaning of legal provisions, notwithstanding so-called ideological or political differences.

The article went on to explain further reasons for our disagreement with Judge Posner’s position. The view advanced in his book, we stated:

vastly discounts the value of orthodox legal interpretation, in which lawyers and judges engage in a shared enterprise of discerning the familiar guidelines of text, context, and precedent. For that matter, it rejects the two interpretive tools equally accessible and intelligible to judges, lawyers, and clients of all sorts: the statutory and constitutional text set forth in the official laws of the United States, and the binding precedents published in the official reports of the courts of the United States. In a very real and even mundane sense, these represent the ‘fixed’ law that binds the bench and bar. This is our common starting point. Because we all begin at the same place, moreover, people across a vast country can coordinate and organize their lives around shared and certain principles. By reducing these binding rules to advisory guidelines, Posner’s pragmatism forfeits our most valuable tool for ensuring uniform, intelligible law: the legal text itself.

116 Mich. L. Rev. at 829 (footnotes omitted).

d. Why do you describe originalism as democratic?

The article applied this description to textualism, rather than originalism—although many of the principles overlap. As we explained in the article, “textualism is a particularly egalitarian and democratic approach to the law” because:

When the interpretive task is limited to the statute as written and publicly understood, and as interpreted by courts in subsequent published decisions, this constrains the sources the judge and lawyer (and regulator and regulated) must consult to interpret it. The text is accessible in a way that inside information—particularly about legislative history and judges’ predilections—is not. Lest we overstate our case, it is worth reiterating that many questions of interpretation are hard, and may require deep dives into history and usage. But measured against the uncabined arguments available before a pragmatist judge, a restrained approach to interpretation increases the transparency and accessibility of legal decisionmaking.

*Id.* at 830 (footnotes omitted). The article further explained that:

These tools [of text and precedent] are also the stabilizing forces that refresh the courts’ legitimacy within a democratic republic—as well as

the people's capacity for self government. When the people gave the government the authority to control their day-to-day activities, the people retained ultimate control over who formed the government. When judges disrespect that bargain by applying their own policy preferences rather than the law as written, they drain the ability of the people, through their elected representatives, to resolve social problems. Filing a lawsuit is far easier—though far less stable and representative—than enacting legislation or amending the Constitution.

*Id.* at 833 (footnotes omitted).

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<sup>1</sup> Benjamin Beaton, *Affirmative Action for Dummies: revamping an archaic system*, Cento, December 6, 2001. SJQ Attachment 12(a) at p. 226.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Amul Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 Mich. L. Rev. 819, 141 (2018). SJQ Attachment 12(a) at 130.

3. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

According to the Supreme Court, "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). If confirmed, I will follow and apply Supreme Court and Sixth Circuit precedents governing the consideration of legislative history in the construction of a statute.

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

If confirmed as a lower-court judge, I would carry out my duty to respectfully evaluate all relevant arguments presented by litigants in cases that came before me. Please also refer to my response to question 3(a).

4. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

I do. As discussed in the Michigan Law Review article, "measured against the uncabined arguments available before a pragmatist judge, a restrained approach to interpretation increases the transparency and accessibility of legal decisionmaking." Adhering to text and precedent, the article continued, "constrains judicial decisionmaking," with "[t]he whole point" being "to minimize the role of the particular judge and maximize the rule of law." 116 Mich. L. Rev. at 834 (footnotes omitted).

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>5</sup> Was that decision guided by the principle of judicial restraint?

As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Heller*.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>6</sup> Was that decision guided by the principle of judicial restraint?

As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Citizens United*.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>7</sup> Was that decision guided by the principle of judicial restraint?

As a district court nominee, it would be inappropriate under Canon 2A of the Code of Conduct for United States Judges to opine on the propriety of any portion of an opinion of the Supreme Court. If confirmed as a district court judge, I will fully and faithfully apply all Supreme Court precedent, including *Shelby County*.

5. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>8</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>9</sup>

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not studied whether in-person voter fraud is a widespread problem in American elections. Regardless of my personal beliefs, the answer to this question implicates policy choices appropriately made by the state and federal legislative branches. I am aware that the U.S. Supreme Court addressed related questions in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). As a district court nominee, it would be inappropriate for me to express my personal belief on this issue, or comment on legal precedent addressing it, because it may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

<sup>5</sup> 554 U.S. 570 (2008).

<sup>6</sup> 558 U.S. 310 (2010).

<sup>7</sup> 570 U.S. 529 (2013).

<sup>8</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org>

/analysis/debunking-voter-fraud-myth.

<sup>9</sup> *Id.*

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not studied whether or where restrictive voter ID laws might suppress voting. Please see my response to question 5(a).

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I am not familiar with this statement or the context in which it may have been made. Please see my response to question 5(a).

6. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>10</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>11</sup> These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>12</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>13</sup>

- a. Do you believe there is implicit racial bias in our criminal justice system?

Racism unquestionably exists in our society. I have not researched the question of implicit racial bias in the criminal justice system. If confirmed, I will always remain vigilant regarding the potential for racial bias of all forms, and will work to exclude it from my courtroom.

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have attended presentations regarding implicit bias, but have not studied the issue by independently reviewing books, articles, or reports on this topic.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.<sup>14</sup> Why do you think that is the case?

I am not familiar with this study and therefore cannot offer any views regarding the reasons for the divergence it describes. Such a disparity, however, should

concern policymakers, the legal community, and society at large, and warrants further study at each level.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.<sup>15</sup> Why do you think that is the case?

I am not familiar with this study and therefore cannot offer any views regarding the reasons for the divergence it describes. Such a disparity, however, should concern policymakers, the legal community, and society at large, and warrants further study at each level.

- f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

All participants in the criminal justice system, including federal judges, must take care to ensure bias of any sort does not affect criminal (or any other) proceedings. For example, judges take an oath to “administer justice without respect to persons” and are required to sentence defendants in a manner that “avoid[s] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” By hewing to the law as enacted, without showing favor or disfavor to individual litigants, judges can help minimize the opportunities for bias to creep into the criminal justice system.

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<sup>10</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>. <sup>11</sup> *Id.*

<sup>12</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

<sup>13</sup> *Id.*

<sup>14</sup> U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>15</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

7. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.<sup>16</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>17</sup>

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue and therefore lack an empirical basis on which to assess any link between changes in the numbers of incarcerated persons and changes in crime rates.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

See my answer to Question 7(a).

8. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

9. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes. My understanding is that the prevailing convention of the federal courts is to honor such requests in references to gender identity.

10. Do you believe that *Brown v. Board of Education*<sup>18</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

11. Do you believe that *Plessy v. Ferguson*<sup>19</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. On numerous occasions I have approvingly cited Justice Harlan's dissent in *Plessy*, a position later vindicated in *Brown*.

12. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

In preparation for my Judiciary Committee hearing, I reviewed and discussed prior nominees' answers to questions, such as the ones contemplated here, that Senators frequently ask nominees. No one dictated how I would or should answer any given question, and each answer was entirely my own.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”<sup>20</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

A judge’s race or ethnicity is not a basis for recusal. See 28 U.S.C. § 455. If confirmed, I will consider whether a basis exists for recusal or disqualification according to that statute and 28 U.S.C. § 144. As a judicial nominee, it would be inappropriate for me to opine on statements made by the President or other political figures.

14. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases,

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<sup>16</sup> Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

<sup>17</sup> *Id.*

<sup>18</sup> 347 U.S. 483 (1954).

<sup>19</sup> 163 U.S. 537 (1896).

<sup>20</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

bring them back from where they came.”<sup>21</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court in *Zadvydas v. Davis* indicated that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” 533 U.S. 678, 693 (2001). If confirmed, I will fully and faithfully apply all applicable Sixth Circuit and Supreme Court precedent. As a judicial nominee, it would be inappropriate for me to opine on statements made by the President or other political figures.

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<sup>21</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted September 16, 2020**  
**For the Nomination of:**

**Benjamin J. Beaton, to be United States District Judge for the Western District of Kentucky**

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

If confirmed, before I sentenced a particular defendant, I would review and consider any plea agreement, the presentence report, the advisory sentencing guidelines, any sentencing memoranda submitted by the parties, the parties' arguments, the allocution of the defendant and any applicable victim, and the sentencing factors identified in 18 U.S.C. § 3553(a).

- b. **As a new judge, how would you plan to determine what constitutes a fair and proportional sentence?**

If confirmed, I would determine what constitutes a fair and proportional sentence by using the sentencing process described above, consulting with other judges as appropriate, and considering other sentences imposed in comparable cases. Specifically, I would examine sentencing data for the Western District of Kentucky, as well as data from the nation as a whole.

- c. **When is it appropriate to depart from the Sentencing Guidelines?**

Because the Sentencing Guidelines are advisory, not mandatory, district courts may depart from them in appropriate cases. The Guidelines themselves also authorize departures from advisory Guidelines ranges in certain circumstances. See Part K, § 5. District courts may impose sentences that fall outside the Guidelines range when they determine that such sentences are appropriate based on the sentencing objectives in 18 U.S.C. § 3553(a), subject to the procedural and substantive constraints imposed by the federal sentencing laws as interpreted by the Supreme Court and the Sixth Circuit.

- d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.<sup>1</sup>

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<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>.

i. **Do you agree with Judge Reeves?**

My understanding is that Judge Reeves' comments rested on his specific experience sentencing criminal defendants. The role of a judge sitting on the U.S. Sentencing Commission differs in certain respects from the role of a district judge who does not participate directly in the Commission's important work. The deterrent and other effects of mandatory minimum sentences concern a policy issue to be addressed by policymakers. If I am confirmed as a district court judge, I will faithfully apply federal sentencing laws and any applicable Sixth Circuit and Supreme Court precedent. It would be inappropriate for a judicial nominee to comment on pending legislative questions or reforms under the Canons.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my response to question (1)(d)(i).

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my response to question (1)(d)(i).

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.<sup>2</sup> **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

It would be inappropriate for a judicial nominee to pre-commit to taking particular steps, not specifically called for by governing statutes or binding precedents, in future cases. If confronted with injustice after confirmation as a district judge, I would address it with the authority appropriately bestowed on the courts, mindful that the judiciary's role under our separation of powers is to say what the law is, not what it should be.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

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<sup>2</sup> See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>.

Please see my response to question (1)(d)(iv)(1).

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

Please see my response to question (1)(d)(iv)(1).

- e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

If confirmed, I would commit to following 28 U.S.C. sec. 994(j) and any other authority brought to my attention by defense counsel (or otherwise appropriately before the court) concerning alternatives to incarceration.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

- b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

I am aware of academic studies describing racial disparities in, for example, the representation of minorities among the incarcerated population. I cannot personally provide specific examples or data of my own.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

- a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

- b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

The Code of Conduct for United States Judges, Canon 3(B)(3), states that a judge should “exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism.” If confirmed, I commit to ensuring that all individuals, including qualified minorities and women,

are given equal consideration for such positions. I also commit to affording particular attention to encouraging applications from qualified candidates whose backgrounds may, for whatever reason, have required them to overcome disadvantages in terms of educational or professional attainment.

**Senator Josh Hawley**  
**Questions for the Record**

**Benjamin J. Beaton**  
**Nominee, U.S. District Court for the Western District of Kentucky**

- 1. Under Supreme Court and U.S. Court of Appeals for the Sixth Circuit precedent, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment’s prohibition on cruel and unusual punishment?**

The Supreme Court, in *Bucklew v. Precythe* and earlier decisions, has interpreted the Eighth Amendment’s prohibition on “cruel and unusual” punishment to forbid cruel and unusual methods of capital punishment, but not to guarantee a prisoner a painless death. For a method-of-execution claim to succeed, “a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” 139 S. Ct. 1112, 1125 (2019). The Sixth Circuit has held, en banc, that “to challenge successfully a State’s chosen method of execution, the plaintiffs must ‘establish that the method presents a risk that is sure or very likely to cause’ serious pain and ‘needless suffering[.]’” *Fears v. Morgan (In re Ohio Execution Protocol)*, 860 F.3d 881, 886 (6th Cir. 2017) (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015)). And, consistent with Supreme Court precedent, the Sixth Circuit also requires a plaintiff “to prove that an alternative method of execution is ‘available,’ ‘feasible,’ and can be ‘readily implemented,’” *Fears*, 860 F.3d at 890 (quoting *Glossip*, 135 S. Ct. at 2737), and that the state “lacks a ‘legitimate reason for declining to switch from its current method of execution’ to the proposed alternative,” *Adams v. DeWine (In re Ohio Execution Protocol Litig.)*, 946 F.3d 287, 291 (6th Cir. 2019) (quoting *Bucklew*, 139 S. Ct. at 1129–30).

- 2. Under the Supreme Court’s holding in *Glossip v. Gross*, is a petitioner required to establish the availability of a “known and available alternative method” that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

Yes.

- 3. Have the Supreme Court or the U.S. Court of Appeals for the Sixth Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

The Supreme Court has ruled that no constitutional right ensures post-conviction DNA testing for a habeas petitioner seeking to prove actual innocence. See *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). I am not aware of a Sixth Circuit decision departing from or elaborating on the rule set forth in *Osborne*. In an unpublished decision, the Sixth Circuit held that, under *Osborne*, “there is no freestanding substantive due process right to DNA testing.” *In re Smith*, 349 F. App'x 12, 15 (6th Cir. 2009).

- 4. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

No.

- 5.**
- a. Under Supreme Court and U.S. Court of Appeals for the Sixth Circuit precedent, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

*Employment Division v. Smith* held that enforcement of facially neutral and generally applicable laws against religious conduct ordinarily does not trigger strict scrutiny under the Free Exercise Clause, even where those laws impose a substantial burden on religious exercise. Under the Supreme Court's decision in *Smith*, as applied in *Church of Lukumi Babalu Aye v. City of Hialeah*, strict scrutiny applies to state laws that burden religious exercise if the law at issue “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” 508 U.S. at 532. The law must be one of general applicability to avoid strict scrutiny, with courts scrutinizing measures for departures from neutrality or covert suppression of religious beliefs. *Id.* at 531–34, 546. Courts also review whether the government expressed or revealed hostility to religious beliefs. *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*. The ministerial exception also ensures that internal church decisions affecting its own faith

and mission are not subject to *Smith*'s rule. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*.

In the Sixth Circuit, unequal treatment between comparable religious and secular conduct triggers strict scrutiny. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). Finally, the Religious Land Use and Institutionalized Persons Act subjects some facially neutral state governmental actions to strict scrutiny as a matter of statutory rather than constitutional law.

**b. Under Supreme Court and U.S. Court of Appeals for the Sixth Circuit precedent, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.**

The Supreme Court has held that the Free Exercise Clause protects against governmental action that “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (discriminatory purpose). *Trinity Lutheran v. Comer* (denial of access to government program based on religious affiliation), *Espinoza v. Montana Dep’t of Revenue* (denial of access to funding based on religious affiliation), and *McDaniel v. Paty* (denial of benefit based on status as minister), for example, all subjected discriminatory state laws to (at least) strict scrutiny. Improper animus may be found in either the text or in the law’s operation. *Lukumi Babalu*, 508 U.S. at 534–35; *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, Slip Op. at 14 (discussing Commission’s disparagement of religion). The Opinion of the Court in *Trinity Lutheran*, 137 S.Ct. 2012, 2021 (2017), explained that under the Court’s precedents:

A law ... may not discriminate against “some or all religious beliefs.” 508 U. S., at 532. Nor may a law regulate or outlaw conduct because it is religiously motivated. And, citing *McDaniel* and *Smith*, we restated the now-familiar refrain: The Free Exercise Clause protects against laws that “impose[] special disabilities on the basis of . . . religious status.” 508 U.S., at 533 (quoting *Smith*, 494 U. S., at 877).... The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.

Under Sixth Circuit law, “[d]iscriminatory laws come in many forms.” *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). Aside from express bans, which are clearly unconstitutional unless they somehow survive the strictest of scrutiny, facially neutral bans that apply to religious activity while recognizing exceptions for comparable secular activities constitute discriminatory conduct. See *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

**c. What is the standard in the U.S. Court of Appeals for the Sixth Circuit for evaluating whether a person’s religious belief is held sincerely?**

The Supreme Court’s decision in *Hobby Lobby* acknowledged that it is generally inappropriate for a federal court to question the sincerity of a religiously held belief. The court’s “narrow function is to determine whether the party’s asserted religious belief reflects “an honest conviction.” *Thomas v. Review Bd. Of Indiana Employment Sec. Division*, 450 U.S. 707, 715 (1981); *New Doe Child #1 v. Congress of U.S.*, 891 F.3d 578, 586 (6th Cir. 2018) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)). “Sincerity is distinct from reasonableness.” *Id.*; see also *Haight v. Thompson*, 763 F.3d 554, 566 (6th Cir. 2014) (courts are not “to inquire into the centrality to a faith of certain religious practices—dignifying some, disapproving others”).

**6. What is your understanding of the Supreme Court’s holding in *District of Columbia v. Heller*?**

The Supreme Court’s core holding in *Heller* recognized that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation,” and allows “law-abiding, responsible citizens to use arms in defense of hearth and home,” not just in connection with militia service.

**7. Please state whether you agree or disagree with the following statement and explain why: “Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted.”**

I agree with this statement, which I believe to be consistent with and compelled by Supreme Court precedent. The justifications for this approach to textual interpretation are discussed at length in an article I co-authored in the *Michigan Law Review* entitled *The Pragmatism of Interpretation*. These reasons include democratic consent and legitimacy, the separation of powers, the intelligibility and uniformity of the law, and the efficiency

of the justice system as applied to litigants and others ordering their primary conduct in reliance on the law as written.