Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Toby Heytens
Nominee to the Court of Appeals for the Fourth Circuit
August 4, 2021

1. **You have practiced before numerous courts, including the Supreme Court of the United States, the Fourth Circuit, and state appellate courts in Virginia and Maryland. You have clerked for a judge on the Third Circuit and for Justice Ruth Bader Ginsburg. And as an academic, you have written about how appellate courts interact with trial courts. Through all that I am assuming you have developed a perspective on what qualities good federal judges bring to the bench.**

    a. **Can you tell us about your views on the qualities a judge needs to excel on the bench?**

    Response: I believe that two of the most important qualities a judge needs to excel on the bench are: (a) the ability to maintain (and convey) an open mind; and (b) a willingness to engage in hard work. For appellate judges, I would additionally note that collegiality and a willingness to work collaboratively with other judges to resolve cases is deeply important and a quality I saw modeled by both Judge Becker and Justice Ginsburg.

    b. **Looking back on your experience appearing before judges and analyzing the structure of judicial decisionmaking in your academic writings, can you provide a few examples of things judges have done that you thought indicated the right temperament or the right approach?**

    Response: Temperament is critically important to being a good judge. Although most judges will hear a great many cases over their career, each one of those cases may be the only contact that the parties, witnesses, jurors, or spectators have with the judicial system. For that reason, it is essential for judges to treat the parties, witnesses, jurors, and spectators with respect and in a manner befitting the importance of the work being done. I also admire the Fourth Circuit's tradition of having the judges come down off the bench to greet counsel after each oral argument because it is tangible way of conveying respect for the critical role that lawyers play in our adversarial system.

2. **The Committee has received a number of letters of support from conservatives who have worked and clerked with you.**

    For instance, former Solicitors General Paul Clement, Gregory Garre, and Theodore Olson—all appointed by President George W. Bush—signed a letter stating: "The signatories to this letter include members of both parties with a wide variety of jurisprudential views. But our professional experience with Mr. Heytens leaves each of

us confident that he is highly qualified to serve on the Fourth Circuit and will be an excellent appellate judge."

The Committee also received a letter signed by 26 Supreme Court law clerks who clerked alongside you during the October 2002 Term. The 26 signatories included clerks to Chief Justice Rehnquist and Justices Scalia and Thomas, among others.

Can you describe for us the importance you place on working with colleagues who may have different views or who may approach an issue differently than you do?

Response: At all stages of my career, I have benefited tremendously from working with and learning from colleagues whose views or approach may differ from my own. Many times, we have been able to find at least some common ground. And, even when not, I have found that my own thinking benefits greatly from understanding other perspectives and grappling seriously with the strongest arguments for and against any particular legal position.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Toby Heytens
Nominee to be United States Circuit Judge for the Fourth Circuit Court of Appeals

1. **In 2015, you spoke at the University of Virginia Law School's student chapter of the Federalist Society about the cult of personality surrounding the Supreme Court. You noted that many Supreme Court picks did not have trial judge experience and did not serve as circuit judges for a significant amount of time. You also claimed, I think jokingly, that the D.C. Circuit was "not a real court." Which Justices were you referring to?**

   Response: The event in question was a panel discussion of an article written by Professors Craig S. Lerner and Nelson Lund entitled "Judicial Duty and the Supreme Court's Cult of Celebrity," which examined what the authors called "the rise of … the celebrity justice" and proposed various reforms. Professor Lund was present and my role was that of a commentator on the article and on his remarks. Although I do not recall which specific Justices I may have had in mind at the time, I believe that Justice Sotomayor was the only member of the then-current Supreme Court who had ever served as a trial judge.

2. **In Spring 2020, you wrote an article titled "Two Centuries of Virginia in the Supreme Court." In this article, one of the sections was labeled "The Wrong Side of History." Many of the cases and issues in this section are ones that you and I would probably agree are "wrong." I want to know what you meant by that.**

   a. **Can a law or judicial decision be morally right but legally wrong?**

      Response: Yes.

   b. **Can a law or judicial decision be morally wrong but legally right?**

      Response: Yes.

   c. **You now represent the Commonwealth of Virginia. Would you defend a position that was legally wrong? Would you defend a position that was morally wrong?**

      Response: I would note that, as of July 31, I am no longer the Solicitor General of Virginia and have returned to my faculty position at the University of Virginia School of Law. In all of the roles where I have served as an advocate, my role was to make the best arguments I could on behalf of my clients that are consistent with the available facts and the then-governing law without regard to my own personal views.

d. If confirmed as a judge, would you uphold a law or action that you believed to be morally wrong but legal?

Response: Yes.

e. If confirmed as a judge, would you uphold a law or action that you believed to be morally right but illegal?

Response: No.

3. Does history have a "side"?

Response: Societies sometimes reach broad consensus about past events. For example, although the original Constitution expressly contemplated slavery, our Nation now acknowledges it to have been an abhorrent practice.

4. Should judges look to see which side of a litigation is likely to be on the side of history?

Response: No.

5. In your 2008 article *Doctrine Formulation and Distrust*, you wrote that, "Ascribing motivations to a multimember body is difficult at best." You were referring to the Supreme Court, but I believe this also applies to Congress. If confirmed as a judge, how would you go about the difficult task of discovering Congressional intent?

Response: If confirmed as a circuit judge, I would follow the Supreme Court's guidance about the proper method for determining Congress's intent. Specifically, I would begin with the text of the statute that Congress enacted. If necessary, I would also consult dictionary definitions, apply appropriate canons of construction or other interpretative principles, and review pertinent legislative history.

6. Isn't legislative history a helpful way to gauge Congressional intent?

Response: The Supreme Court has stated that legislative history can sometimes be helpful in interpreting an ambiguous statutory text and I would follow that guidance if confirmed.

7. What is your understanding of originalism?

Response: Broadly speaking, I understand "originalism" to be the view that the Constitution should be interpreted in the way the relevant text would have been understand at the time it was adopted.

8. What is your understanding of how an originalist views the Bill of Rights and subsequent Constitutional Amendments?

Response: I do not consider myself an expert in originalism. Broadly speaking, however, I believe that originalists view the Bill of Rights and subsequent Constitutional Amendments as parts of the Constitution that should be interpreted in the same manner as other constitutional provisions.

9. Do you know any originalists who ignore the Bill of Rights?

Response: Personally, no.

10. Do you know any originalists who believe black Americans should be counted as 3/5 of a vote?

Response: Personally, no.

11. Do you know any originalists who believe women should not be able to vote?

Response: Personally, no.

12. Which areas of constitutional law has the Supreme Court instructed lower courts to interpret using original public meaning?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), which involved a claim under the Second Amendment, the Supreme Court stated that "the public understanding of a legal text in the period after its enactment or ratification….is a critical tool of constitutional interpretation." *Id*. at 605. The Supreme Court has also considered original public meaning in construing the Confrontation Clause, *see Crawford v. Washington*, 514 U.S. 36 (2006), and certain questions under the Fourth Amendment, *see United States v. Jones*, 565 U.S. 400 (2012).

13. Which areas of constitutional law has the Supreme Court instructed lower courts to interpret using the living constitution?

Response: I am not aware of any areas of constitutional law where the Supreme Court has instructed lower courts to interpret using the "living constitution."

14. If confirmed, are you willing to interpret the Constitution according to its original public meaning when the Supreme Court has mandated you do so?

Response: Yes.

15. Have you read *A Matter of Interpretation* by Antonin Scalia?

Response: Yes.

16. Justice Scalia once said at Villanova Law School, "There is no such thing as a 'Catholic judge. The bottom line is that the Catholic faith seems to me to have little effect on my work as a judge . . . . Just as there is no 'Catholic' way to cook a hamburger, I am hard pressed to tell you of a single opinion of mine that would have come out differently if I were not Catholic." Do you agree with Justice Scalia? What do you view as the role of religion for a federal judge?

Response: All federal judges have a duty to decide the cases that come before them consistently with the law and without regard to the judge's personal religious beliefs.

17. Do you believe property damage caused during rioting, or even protests, should be prosecuted to the fullest extent of the law?

Response: Under our system of separation of powers, the decision about whether to bring a prosecution and what charges to pursue is generally a matter for local, state, and federal prosecutors. If confirmed as a judge, my responsibility would be to faithfully apply the law to individual cases that came before me.

18. Under the Supreme Court's First Amendment jurisprudence, can someone shout "fire" in a crowded theater?

Response: In *Schenk v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court stated, in dicta, that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.* at 52.

19. In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?

Response: In more than two decades as a lawyer, law professor, and law clerk, I have never encountered a constitutional issue where there was literally no relevant precedent and I suspect that very few such issues remain. If I were confirmed as a judge and were such an unlikely event to occur, I would begin by examining the text of the constitutional provision in question and any relevant precedent (including Supreme Court and Fourth Circuit precedent) considering similar issues or similarly worded constitutional provisions. If that precedent was insufficient to resolve the case, I would examine any sources that the Supreme Court has directed should be considered when applying the relevant constitutional provision.

20. What role should empathy play in interpreting the law?

Response: A judge is duty bound to apply the law to the case in question regardless of personal feelings. If confirmed, I would faithfully discharge that duty.

21. You were counsel of record on an amicus brief in *Our Lady of Guadalupe School v. Morrissey-Berru*, arguing against a broad application of the ministerial exemption.

a. Why did you file this brief involving a case out of the Ninth Circuit?

Response: The brief in question was filed in my role as Solicitor General of Virginia. After the Attorney General decided that the Commonwealth of Virginia should file an amicus brief in that case, it was my responsibility to supervise the drafting of the brief and serve as counsel of record.

b. What do you understand to be the limits of the ministerial exemption under current law?

Response: In *Our Lady of Guadalupe*, the Supreme Court stated that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." 140 S. Ct. 2049, 2069 (2020). As in a previous decision, the Court "declined to adopt a rigid formula" for assessing ministerial-exception claims and stated that, "as in" the previous case, "it is sufficient to decide the cases before us." *Id.*

22. Should judicial decisions take into consideration principles of social "equity"?

Response: Judicial decisions should be based on the claims of the parties, the relevant law, and the facts before the court.

23. What is implicit bias?

Response: I do not consider myself an expert in implicit bias. Broadly speaking, I understand it to be a branch of psychological research that examines types of cognition that operate below the level of conscious awareness.

24. Do you have any implicit biases? If so, what are they?

Response: I believe that all human beings, including me, have implicit biases that operate below the level of conscious awareness.

25. Are legal doctrine and practice best understood as an objective and defensible scheme of human association? Or are they better understood as of instrumental use for political ends?

Response: I have not studied that issue and I do not have an overarching theory of legal doctrine and practice is best understood.

26. How do you define formalism?

Response: Black's Law Dictionary defines "[l]egal formalism" as "[t]he theory that law is a set of rules and principles independent of other political and social institutions." *Black's Law Dictionary* 904 (7th ed. 1999).

27. Do you consider yourself a formalist?

Response: I do not think there is any single label that accurately captures the approach I would take to the act of judging if I were confirmed. If confirmed, I would carefully review the arguments of the parties, the decision under review, and the record and then apply all relevant law to those facts to the best of my ability.

28. Can the Supreme Court mandate formalism on lower courts?

Response: I am not aware of any Supreme Court decision that mandates formalism on lower courts. However, where the Supreme Court has directed lower courts to apply a particular analytical approach in addressing a particular type of case, I would faithfully apply that precedent if confirmed.

29. Can an appeals court mandate formalism on trial courts?

Response: I am not aware of any appellate court mandating formalism on trial courts. Broadly speaking, however, appellate court decisions create precedents that are binding on trial courts within the relevant jurisdiction.

30. Is the complexity of precedent and its multiplicity a feature or a bug of the law?

Response: The Supreme Court has noted that the doctrine of stare decisis "permits society to presume that bedrock principles are founded in the law, rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986).

31. How do you define legal realism?

Response: Black's Law Dictionary defines "[l]egal realism" as "[t]he theory that the law is based not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy." *Black's Law Dictionary* 907 (7th ed. 1999).

32. Do you consider yourself a legal realist?

Response: I do not think there is any single label that would accurately capture the approach I would take to the act of judging if I were confirmed. If confirmed, I would carefully review the arguments of the parties, the decision under review, and the record and then apply all relevant law to those facts to the best of my ability.

33. Do you agree that all lawyers are, at some level, legal realists?

Response: I agree that lawyers must be realistic about what courts may and may not do and take that into account when advising and representing their clients.

34. Are you familiar with the Law and Economics movement?

Response: Broadly, yes.

35. What value, if any, do you see in Law and Economics?

Response: Insights developed by Law and Economics scholars have influenced numerous areas of law, including antitrust, contracts, and torts. If confirmed, I would faithfully apply all binding Supreme Court and Fourth Circuit precedent, including those that incorporate insight derived from Law and Economics.

36. Is the practice of judicial review defensible absent the existence of neutral legal principles?

Response: The Supreme Court has long held that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

37. What is the purpose of criminal sentencing under the law?

Response: For federal cases, Congress has identified the purposes of criminal sentencing as:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3353(a)(2).

38. What is the purpose of criminal sentencing from a moral perspective?

Response: For federal cases, Congress has identified the purposes of criminal sentencing as:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3353(a)(2).

39. What, if anything, do you think is the relationship between morality and the law when it comes to punishing criminals?

Response: The role of a judge in imposing a criminal sentence is to find the underlying facts and apply the specified legal standards to reach an outcome that is consistent with what the law requires.

40. What is the relationship between morality and the law generally?

Response: In all cases, the role of a judge is to consider the arguments raised by the parties, review the underlying facts, and apply the specified legal standards to reach an outcome that is consistent with what the law requires.

41. What is your understanding of the original meaning of the Cruel and Unusual Punishment Clause?

Response: I have not studied the original meaning of the Eighth Amendment generally or the Cruel and Unusual Punishment Clause specifically. If confirmed, I would faithfully apply all Supreme Court and Fourth Circuit precedent concerning the Cruel and Unusual Punishment Clause.

42. Do you think law firms should allow paying clients to influence which pro bono clients they take?

Response: I believe that decisions about what clients a law firm should accept and under what conditions are for the law firm to make.

43. Do you think law-firm clients should use their financial position to influence which pro bono clients their attorneys take?

Response: I believe that decisions about what law firm a client should engage are for the client to make.

44. Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?

Response: I believe that decisions about what clients a law firm should accept and under what conditions are for the law firm to make.

45. As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?

Response: I do not.

46. Do you agree with the Supreme Court that the principle of church autonomy goes beyond a religious organization's right to hire and fire ministers? Please describe your view on whether and/or how the Supreme Court has placed limits on church autonomy.

Response: Yes. For example, the Supreme Court has also held that "the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters" and that "[w]hen this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them." *Serbian Eastern Orthodox Diocese for the United States v. Milivojevich*, 426 U.S. 696, 724-25 (1976).

47. What level of scrutiny applies to a Second Amendment challenge in the Fourth Circuit?

Response: The Fourth Circuit has adopted a two-part test for analyzing Second Amendment challenges. *See Schrader v. Holder*, 704 F.3d 980, 988 (2013). First, the Court considers "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). If the answer to this question is no, the inquiry ends. *Id.* If the answer is yes, the Court "move[s] to the second step of applying an appropriate form of means-end scrutiny," which "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* at 680, 682. If the right is "severely buren[ed]," the Court applies strict scrutiny; if not, the Court applies intermediate scrutiny. *Kolbe v. Hogan*, 849 F.3d 114, 133, 145 (4th Cir. 2017) (en banc).

48. One of the federal courts' important functions is reading statutes and regulations, determining what they mean, and determining how they apply to the facts at hand.

a. How would you determine whether statutory or regulatory text was ambiguous?

Response: Assuming that there was no applicable Supreme Court or Fourth Circuit precedent construing the specific provision at issue, I would, if confirmed, begin with the relevant statutory or regulatory text, applying (if necessary) any pertinent canons of construction or clear-statement rules.

b. Would you apply different standards to determining whether statutory text and regulatory text were ambiguous? If so, how would the ambiguity standards differ?

Response: No.

c. When interpreting ambiguous text, what tools would you use to resolve the ambiguity?

Response: If confirmed, I would look to Supreme Court or Fourth Circuit precedent analyzing the same or similar language in other statutes or regulations, as well as legislative history as appropriate. I would also apply any pertinent interpretive principles, including the rule of lenity. Finally, I would consider the relevant views of any agency charged with administering the statute or that issued the regulation in question. *See Kisor v.Wilkie*, 139 S. Ct. 2400 (2019); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

d. When interpreting ambiguous text, how would you handle two competing and contradictory canons of statutory interpretation?

Response: If confirmed, I would begin by considering whether the Supreme Court or the Fourth Circuit has offered any guidance on the appropriate means of resolving any such apparent conflict. If no such guidance existed, I would consider other interpretive aids, described in Question 4(c), to resolve the issue.

49. Is climate change real?

Response: If confirmed, and if a case came before me that required me to evaluate claims regarding the existence or extent of climate change, I would carefully review the facts and record of the case and apply any binding Supreme Court and Fourth Circuit precedent.

50. Do people have implicit racial bias?

Response: I believe that all human beings, including me, have implicit biases that operate below the level of conscious awareness. If confirmed, I would strive to ensure that all parties receive equal justice in all cases that come before me.

51. Does human life begin at conception?

Response: I am not aware of any Supreme Court decision definitely addressing when human life begins. If confirmed, and if a case came before me that required me to evaluate when human life begins, I would scrupulously review the facts and record of the case and apply all relevant Supreme Court and Fourth Circuit precedent.

52. The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?

Response: If confirmed, I would have no litmus test for hiring law clerks.

53. The Blackstone Legal Fellowship "prepares Christian law students for careers marked by integrity, excellence, and leadership." Blackstone "is a program of Alliance Defending Freedom. ADF is the world's largest legal organization committed to protecting religious freedom, free speech, and the sanctity of life." Would you hire a Blackstone Fellow to serve in your chambers as a law clerk?

Response: If confirmed, I would have no litmus test for hiring law clerks.

54. Please explain, with detail, the process by which you became a circuit-court nominee.

Response: On March 3, 2021, Senators Mark Warner and Tim Kaine posted a joint announcement seeking applications to serve as a United States Circuit Judge for the Fourth Circuit. I submitted an application on March 5, 2021. I then interviewed with a committee appointed by the Senators on April 9, 2021, and with the Senators themselves on April 27, 2021. On May 12, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 30, 2021, the President announced his intent to nominate me.

55. Have you had any conversations with individuals associated with the group Demand Justice—including, but not limited to, Brian Fallon or Chris Kang—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: No.

a. To your knowledge, has anyone had such conversations on your behalf?

Response: I did not ask anyone to have conversations with any such individuals on my behalf.

56. Have you had any conversations with individuals associated with the American Constitution Society—including, but not limited, to Russ Feingold—in connection with this or any other potential judicial nomination? If so, please explain the nature of the conversations.

Response: As someone who has been an appellate lawyer and law professor for many years, a large portion of my professional network consists of people who are associated with the American Constitution Society or the Federalist Society for Law and Public Policy, and I have spoken with many of those individuals about my interest in becoming a federal judge and this position in particular. My only contact with Russ Feingold is that he sent me an email congratulating me on my nomination.

a. To your knowledge, has anyone had such conversations on your behalf?

Response: I did not ask anyone to have conversations with any such individuals on my behalf.

57. Please explain with particularity the process by which you answered these questions.

Response: I reviewed the questions and drafted my answers, conducting research wherenecessary. I provided my draft responses to the Department of Justice's Office of Legal Policy for review and feedback. After receiving feedback from the Office of Legal Policy, I revised and finalized my responses for submission.

58. Do these answers reflect your true and personal views?

Response: Yes.

Senator Marsha Blackburn
Questions for the Record
Senate Judiciary Committee
Toby J. Heytens, Nominee to be United States Circuit Judge for the Fourth Circuit

1. **In 2000 as a law student, you wrote that Blaine Amendments—amendments to state constitutions that ban the use of public funds to support religious schools—are possibly unconstitutional under the Equal Protection Clause. Does the position you took on Blaine Amendments in 2000 still reflect your thinking today?**

   Response: The argument referenced above is from a paper that I wrote as a law student more than two decades ago and that was published before the Supreme Court's subsequent decisions in *Zelman v. Simmons Harris*, 536 U.S. 649 (2002), *Locke v. Davey*, 540 U.S. 712 (2004), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). If confirmed as a judge, it would be my obligation to decide any case that came before me under those precedents (as well as other relevant Supreme Court and Fourth Circuit precedent) rather than based on my own personal views.

2. **Would you describe yourself as an originalist? Do you think it is best to start with the original public meaning of the text when interpreting the Constitution?**

   Response: I do not think that there is any single label that accurately captures the approach I would take to the act of judging. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that "the public understanding of a legal text in the period after its enactment or ratification….is a critical tool of constitutional interpretation," *id.* at 605, and I would follow that guidance if confirmed.

3. **While defending Virginia Governor Ralph Northam's decision to remove the Robert E. Lee statute in Richmond, VA, you stated that there was a "tension between permitting private expression on government property and restricting it" in response to questions about whether the state was responsible for removing graffiti from the statute prior to its removal. Graffiti on government property is vandalism. As a judge, your views of the limits on free speech is important. Do you think that graffiti is an expression of free speech or is it a crime?**

   Response: I do not recall making the specific statement quoted in the question. Although I am not aware of any law specifically prohibiting graffiti, there are various laws that prohibit altering the property of another without permission to do so.

4. **Virginia was one of a number of states that banned gatherings of more than 10 people in churches. You supported the state's decision. How do you balance that support with the respect for free religious expression that the constitution demands?**

   Response: As Solicitor General of Virginia, it was my duty to advocate for my clients (including the Governor) in various suits challenging measures that the executive branch of government had undertaken to combat the COVID-19 pandemic. No state or federal court in Virginia ever held that any of the challenged orders violated the Constitution by "prohibiting the free exercise" of religion. *See* U.S. Const. amends. I & XIV. However, I would note that, if confirmed as a judge on the U.S. Court of Appeals for the Fourth Circuit, I would apply Supreme Court and Fourth Circuit precedent to any cases that came before me on this issue, including *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Toby Jay Heytens, Nominee for the Fourth Circuit

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previouslyprovided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible andwhat efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, pleasestate the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. In 2018, you accepted an invitation to speak on a panel entitled, "The Legal Resistance to the Trump Administration."

a. Did you ever publicly or privately describe yourself as the "resistance"? Ifso, please state the circumstances.

Response: Not to the best of my recollection.

b. In connection with this panel, did you ever criticize the use of the term "legal resistance"?

Response: Not to the best of my recollection.

c. Proponents of the term the legal "resistance" presumably mean to invoke the brave individuals in Europe in the first half of the 20th century who fought against Nazi rule. Do you believe that legal efforts to oppose the policies of President Trump were comparable to these individuals fightingagainst Nazi rule?

Response: I do not recall using the term "legal 'resistance,'" and I do not know what any "[p]roponents of the term" "mean to invoke" by it. I believe that comparisons to the unique historical horrors of the Nazi regime are almost always ill-advised.

d. Do you regret agreeing to serve on this panel given its title?

Response: The panel referenced above was part of William & Mary Law School's annual Supreme Court Preview, a long-standing and widely attended gathering of lawyers, journalists, law professors, and judges that I have attended several times. I did not choose the title of the panel and I do not regret agreeing to serve on it.

2. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be an religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: The Supreme Court has issued a number of opinions discussing the limits on government's ability to regulate private institutions, including religious organizations and small businesses operated by observant owners, including *Little Sister of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018), *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), among others. If confirmed, I would faithfully follow all Supreme Court and Fourth Circuit precedent.

3. The First Amendment guarantees churches and religious institutions the freedom to determine their own religious leaders without government interference. Yet, as

Solicitor General of Virginia, you led an amicus brief in *Our Lady of Guadalupe School v. Morrissey-Berru*. In that brief, you argued that the government has the right to tell a Catholic school whether it can fire ateacher, even though we all know that teachers at Catholic schools teach muchmore than the three Rs—they teach children about the Catholic faith. This amicus brief wasn't about defending Virginia law.

a. Why did Virginia lead an amicus brief opposing religious freedom in this case?

Response: As with all Supreme Court amicus briefs for which I served as Counsel of Record in my role as Solicitor General of Virginia, the decision for the Commonwealth of Virginia to author that particular brief was made by its elected Attorney General.

b. Were you instructed to write this amicus brief, or did you recommend taking this position?

Response: As with all Supreme Court amicus briefs for which I served as Counsel of Record in my role as Solicitor General of Virginia, the decision for the Commonwealth to author that particular brief was made by its elected Attorney General. Because I was a lawyer for a client in that case, the duty of confidentiality prohibits me from disclosing any recommendations I made to or instructions I received from my client.

4. In the amicus brief referenced in question 3, you argued that applying the so- called "ministerial exception" to Catholic school teachers would be "overly broad" and would threaten to "severely undermine workplace protections at both the federal and state level." Do you believe that argument was correct?

Response: My role in the case referenced above was as an advocate for my client, the Commonwealth of Virginia, acting through its duly elected Attorney General. As a lawyer, my ethical obligations prevent me from expressing a personal opinion about whether any of my client's arguments—in any case—were or were not correct. In every case where I have represented a client, I have made good-faith arguments based on the current state of the law on behalf of my client's legal position. If confirmed as a judge, my role would be not to advocate for one side but instead decide each case consistently with the facts and the law.

5. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes.

6. During the pandemic, Virginia banned churches from having gatherings of more than 10 people while allowing businesses like liquor stores and professional offices to remain open. The Department of Justice filed a statement in support of the churches suing Virginia. The Supreme Court later ruled in a case addressing another state's

laws, that this discrimination againstchurches violated the First Amendment. But as Solicitor General, you defended these orders.

a. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: The Supreme Court has stated that laws that discriminate on basis of religion are subject to strict scrutiny. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). To survive that standard, the challenged law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal quotation marks and citation omitted).

b. In your brief defending Virginia against allegations of religiousdiscrimination, you wrote that Virginia's actions were "evidence-based." Is there an "evidence-based" exception to the freedom of religion?

Response: The First Amendment states that "Congress shall make no law … prohibiting the free exercise" of religion. U.S. Const. amend. I. This command is incorporated against the States via the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Supreme Court has stated that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny" and that, to satisfy that standard, such a law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

7. In 2018, the Supreme Court held in *Janus v. American Federation of State, County, and Municipal Employees*, that it violates the First Amendment for a state to require its employees to donate to a union. Shortly after that decision was handed down, you wrote an article for SCOTUSblog saying the decision would "severely undermine the ability of public-sector unions to provide protections, benefits, and fair pay to working people." Should the Court have considered these policy consequences when deciding *Janus*?

Response: In *Janus*, the Supreme Court specifically "assume[d] that 'labor peace' … is a compelling state interest" and extensively considered whether "designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably interlinked." 138 S. Ct. 2448, 2465 (2018).

8. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

Response: The Constitution states that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

9. Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's philosophy from Warren, Burger, Rehnquist, or Robert's Courts is most analogous with yours.

Response: There is no single label I would use to describe the approach I would take to judging. Although I admire many past and current members of the Supreme Court, my admiration does not flow from their jurisprudence or how they may have voted in any particular case. I admire Justices Thurgood Marshall and Ruth Bader Ginsburg for their trailblazing work in advancing equality before they joined the bench, and, as an appellate advocate, I admire the craft they demonstrated in written and oral advocacy. I admire Justices Antonin Scalia and Elena Kagan for their writing ability. I also admire Justices John Paul Stevens and Samuel Alito for their skill in crafting incisive questions that cut to the heart of cases before them.

10. Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?

Response: The Supreme Court's understanding of certain constitutional provisions has changed over time. *Compare, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (interpreting the Equal Protection Clause as permitting "separate but equal"), *with Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (stating that the Court "cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written" and concluding "that in the field of public education the doctrine of 'separate but equal' has no place"). If confirmed, I would follow all applicable Supreme Court and Fourth Circuit precedent concerning the meaning of the Constitution in applying its provisions.

11. Is the ability to own a firearm a personal civil right?

Response: Yes. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

12. Does the right to own a firearm receive less protection than the other individualrights specifically enumerated in the Constitution?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that: "Like most rights, the Second Amendment right is not unlimited." *Id.* at 595. If confirmed, I will faithfully follow all Supreme Court and Fourth Circuit precedent about the meaning and scope of the Second Amendment.

13. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that: "Like most rights, the Second Amendment right is not unlimited." *Id.* at 595. If confirmed, I will faithfully follow all Supreme Court and Fourth Circuit precedent about the meaning and scope of the Second Amendment.

14. Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?

Response: I am not aware what training programs are or are not provided by the United States Court of Appeals for the Fourth Circuit or what roles the judges of the court play in determining their existence or content. Any trainings programs that exist must be consistent with the Constitution and laws of the United States and should be consistent with sound pedagogy.

15. Is the criminal justice system systemically racist?

Response: I have never studied the criminal justice system as a whole or had occasion to conduct quantitative or qualitative research about whether it is systemically racist. If confirmed as a judge, it would be my job to make sure that no one involved in any matters before me is treated unfairly because of their race.

16. Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?

Response: The executive and legislative branches are responsible for making political appointments and are required to follow the Constitution in doing so. If confirmed and called on to rule on the constitutionality of a particular executive appointment, I would follow all Supreme Court and Fourth Circuit precedent in resolving that case.

17. Does the President have the authority to abolish the death penalty?

Response: Article I of the Constitution vests Congress with "[a]ll legislative Powers herein granted." U.S. Const. art. I, § 1. The Constitution further states that "[t[he executive Power shall be vested in a President," U.S. Const. art. II, § 1, and specifically grants the President the "Power to grant Reprieves and Pardons for Offenses against the United States," U.S. Const. art. II, § 2.

18. In *Van Buren v. United States*, the Court was asked to clarify the scope of Section 1030(a)(2) of the Computer Fraud and Abuse Act of 1986. Please explain the Court's holding in that case.

Response: In *Van Buren*, the Supreme Court held that the provision in question "covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend." 141 S. Ct. 1648, 1652 (2021). The Court further held that the provision "does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." *Id.*

19. In *Americans for Prosperity Foundation v. Bonta,* the Court majority ruled that California's disclosure requirement was facially invalid because it burdens donors' First Amendment rights to freedom of association. However, the majority was evenly split as to which standard of scrutiny should apply to suchcases. Please explain

your understanding of the two major arguments, and which of the two standards an appellate judge is bound to apply?

Response: In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Chief Justice wrote for a plurality of the Court that "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." *Id.* at 2384. Justice Thomas wrote a separate opinion concurring in part and concurring in the judgment, arguing that the challenged law should be subject to strict scrutiny. *Id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment). Justice Alito wrote a separate opinion concurring in part and concurring in the judgment that was joined by Justice Gorsuch, stating that he saw "no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment." *Id.* at 2392 (Alito, J., concurring in part and concurring in the judgment). In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court provided guidance for determining a case's holding "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices," *id.* at 193, and I would follow that guidance if confirmed as a judge.

20. In the Supreme Court's decision in *Carpenter v. United States,* what criteria did the Supreme Court use to distinguish between phenomena that are covered by the 4th Amendment 3rd Party Doctrine and those that are not?

Response: In *Carpenter*, the Supreme Court cited "the unique nature of cell phone location records"—which convey "not just dialed digits, but a detailed and comprehensive record of the person's movements"—for its decision to "decline to extend" its previous third-party doctrine cases "to cover these novel circumstances." 138 S. Ct. 2206, 2217 (2018).

Senator Josh Hawley
Questions for the Record

Toby Heytens
Nominee, U.S. Court of Appeals for the Fourth Circuit

1. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

   Response: I do not recall any such cases before becoming Solicitor General of Virginia. In my role as Solicitor General of Virginia, I was responsible for overseeing all of the Commonwealth's appellate litigation (including claims brought by incarcerated individuals, which sometimes involved religious liberty claims), as well as defending constitutional challenges to Virginia statutes and various actions taken in response to the COVID-19 pandemic.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

      Response: The cases I am able to specifically recall are:

      Argued cases
      Greenhill v. Clarke, 944 F.3d 243 (4th Cir. 2019)

      Diaz-Bonilla v. Northam, 1:20-cv-00377-AJT (E.D. Va., June 5, 2020)

      Hughes v. Northam, Case No. CL20-415 (Russell County Cir. Ct., April 9, 2020)

      Other briefed cases
      Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020)

      Burke v. Clarke, 842 F. App'x 828 (4th Cir. 2021)

      Gentry v. Robinson, 837 F. App'x 952 (4th Cir. 2020)

      Updegrove v. Herring, No. 1:20-CV-1141, 2021 WL 1206805 (E.D. Va., Mar. 30, 2021), appeal pending (4th Cir. Case No. 21-1506)

      Lighthouse Fellowship Church v. Northam, No. 2:20CV204, 2021 WL 302446 (E.D. Va. Jan. 27, 2021), appeal pending (4th Cir. Case No. 21-1153)

      Calvary Road Baptist Church v. Herring, Case No. CL20006499 (Loudoun Cir. Ct.)

      Young v. Northam, Case No. CL-20-2010 (Culpeper Cir. Ct., Feb. 27, 2021)

Hermsmeier v. Northam, Case No. 20004844 (Madison Cty. Cir. Ct.)

2. What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." *Id*. at 605.

3. Do you consider legislative history when interpreting legal texts?

Response: The Supreme Court has stated that legislative history can sometimes be helpful in interpreting ambiguous statutory text and I would follow that guidance if confirmed.

a. If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?

Response: The Supreme Court has stated that certain forms of legislative history are more persuasive than others. For example, the Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 285 (2002) (internal quotation marks and citation omitted).

b. When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?

Response: The Constitution is a domestic document. If confirmed, I would look to the text, structure, and background of the Constitution itself in carrying out the task of constitutional interpretation.

4. Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, 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?

Response: To prevail on such a claim, a claimant must show that the challenged method creates a substantial risk of severe pain when compared to known and available alternatives that present a significantly reduced risk of severe pain. *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015); *see also Baze v. Rees*, 553 U.S. 35, 51-52 (2008).

5. Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), 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?

Response: Yes. *See Glossip v. Gross*, 135 S. Ct. 824, 867 (2015).

6. Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?

Response: Neither the Supreme Court nor the Fourth Circuit has recognized a freestanding constitutional right to DNA analysis for habeas corpus petitioners alleging actual innocence. *See, e.g., District Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (finding no substantive due process right to DNA evidence). Both the Supreme Court and the Fourth Circuit have recognized that state law can create "a liberty interest in demonstrating [a prisoner's] innocence with new evidence under state law." *Id.* at 68; *see also Lamar v. Ebert*, 681 F. App'x 279, 288 (4th Cir. 2017) (per curiam).

7. 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?

Response: No.

8. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, 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.

Response: Under current free exercise doctrine, "laws incidentally burdening religious are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877. "A law is not generally applicable if," among other things, "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (internal quotation marks, brackets, and citation omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*; *see also Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (addressing COVID gathering restrictions).

9. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, 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.

Response: Please see my answer to Question 8.

10. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Fourth Circuit has cautioned that "[i]t is not [the] place" of a court "to question the correctness or even the plausibility of [a claimant's] religious understanding." *United States Equal Employment Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 142 (4th Cir. 2017). "So long as there is sufficient evidence that [the] beliefs are sincerely held[,] . . . that is the end of the matter." *Id.* at 143.

11. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. *See* 554 U.S. at 576-628.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

12. Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

Response: As Justice Holmes explained in that same opinion, I believe he meant that the "Constitution is not intended to embody a particular economic theory." *Lochner*, 197 U.S. at 75 (Holmes, J., dissenting).

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

Response: If confirmed, I would be bound to follow all governing Supreme Court and Fourth Circuit precedent. *Lochner* was largely abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

13. In *Trump v. Hawaii*, the Supreme Court overruled *Korematsu v. United States*, 323 U.S. 214 (1944), saying that the decision—which had not been followed in over 50 years—had "been overruled in the court of history." 138 S. Ct. 2392, 2423 (2018). What is your understanding of that phrase?

Response: As the Court elsewhere explained, "*Korematsu* was gravely wrong the day it was decided" and "has no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

14. Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?

a. If so, what are they?

Response: I do not believe that *Prigg v. Pennsylvania*, 41 U.S. 539 (1843), or *Dred Scott v. Sandford*, 60 U.S. 393 (1857), have been "formally overruled by the Supreme Court" but both have been superseded by the Reconstruction Amendments. I suspect that the same may be true of certain other pre-Civil War decisions as well.

b. With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?

Response: Yes.

15. Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

a. Do you agree with Judge Learned Hand?

Response: I am not familiar with the quoted statement by Judge Learned Hand. If confirmed, I would be required to—and would—faithfully apply governing Supreme Court and Fourth Circuit precedent about what constitutes a monopoly.

b. If not, please explain why you disagree with Judge Learned Hand.

Response: Please see my answer to Question 15(a).

c. What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.

Response: If confirmed, I would be required to—and would—faithfully apply governing Supreme Court and Fourth Circuit precedent regarding what constitutes a monopoly.

16. Please describe your understanding of the "federal common law."

Response: Broadly speaking, I understand federal common law to refer to rules of decision that are formulated by federal courts as part of their Article III authority to decide cases and controversies that come before them. The Supreme Court has long emphasized, however, that "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

17. If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?

Response: The meaning of a state constitutional provision is ultimately a matter of state law upon which federal courts must defer to the decisions of the highest court of the relevant State. *See generally Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

a. Do you believe that identical texts should be interpreted identically?

Response: Please see my response to Question 17(a).

b. Do you believe that the federal provision provides a floor but that the state provision provides greater protections?

Response: Because the Federal Constitution is the "supreme Law of the Land," U.S. Const., art. VI, ¶ 2, its protections are binding on the States, regardless of what a State's own constitution provides. The meaning of a state constitutional provision is ultimately a matter of state law upon which federal courts must defer to the decisions of the highest court of the state. *See generally Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

18. Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided?

Response: Yes.

19. Do federal courts have the legal authority to issue nationwide injunctions?

Response: The Fourth Circuit has stated that "[a] district court may issue a nationwide injunction so long as the court molds its decree to meet the exigencies of the particular case." *Hias, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021).

a. If so, what is the source of that authority?

Response: The Fourth Circuit has noted that "[d]istrict courts have broad discretion to craft remedies based on the circumstances of a case." *Hias, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021).

b. In what circumstances, if any, is it appropriate for courts to exercise this authority?

Response: The Fourth Circuit has emphasized that although "[d]istrict courts have broad discretion to craft remedies based on the circumstances of a case," they "likewise must ensure that" an injunction "is no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Hias, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021) (internal quotation marks and citation omitted).

20. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Response: The Fourth Circuit has stated that "a nationwide injunction may be appropriate when the government relies on a categorical policy, and when the facts would not require different relief for others similarly situated to the plaintiffs." *Hias, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021) (internal quotation marks and citation omitted).

21. What is your understanding of the scope of qualified immunity?

Response: The Supreme Court has stated that "government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

22. What is your understanding of the role of federalism in our constitutional system?

Response: The Supreme Court has stated that "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011).

23. Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?

Response: The Supreme Court has held that federal courts should generally refrain from intervening in ongoing state criminal proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971). The Court has also held that abstention may sometimes be appropriate in other situations, including "pending determination in state court of state-law issues central to [a] constitutional dispute," *Moore v. Sims*, 442 U.S. 415, 427-28 (1979) (citing *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941)), or "where the exercise of

jurisdiction by the federal court would disrupt a state administrative process," *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

24. What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?

Response: The Supreme Court has described an injunction as "extraordinary remedy" whose issuance requires "irreparable injury and the inadequacy of legal remedies," including damages. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

25. What is your understanding of the Supreme Court's precedents on substantive due process?

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition"and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted). In *Glucksberg*, the Court collected cases previously recognizing such rights, including the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id*. at 720; *see also Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a right of same-sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing a right to travel). The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

26. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Please see my response to Question 8.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: No. For example, the Supreme Court has stated that "[t]he Free Exercise Clause protects against laws that impose special disabilities on the basis

of religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 U.S. 2012, 2021 (2007) (internal quotation marks, brackets, and citations omitted).

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please see my response to Question 8

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please see my response to Question 10.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: The Supreme Court has stated that, where it applies, "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). If confirmed, I would follow all relevant precedent of the Supreme Court and the Fourth Circuit construing RFRA and other federal statutes.

f. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Response: No.

27. Under American law, a criminal defendant cannot be convicted unless found to be guilty "beyond a reasonable doubt." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that you believe something "beyond a reasonable doubt." Please provide a numerical answer.

Response: I am not aware of any Supreme Court or Fourth Circuit decision expressing the beyond a reasonable doubt standard in terms of a numerical confidence threshold.

28. Under American law, a law enforcement officer may obtain a warrant to conduct a search or seizure only for "probable cause." On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that a police officer has "probable cause"? Please provide a numerical answer.

Response: I am not aware of any Supreme Court or Fourth Circuit decision expressing the probable cause standard in terms of a numerical confidence threshold. The Supreme Court has stated that "an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful." *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

29. Under American law, a law enforcement officer may stop and detain an individual based on "reasonable suspicion" that criminal activity is afoot. On a scale of 0% to 100%, what is your understanding of the confidence threshold necessary for you to say that someone has "reasonable suspicion"?

Response: I am not aware of any Supreme Court or Fourth Circuit decision expressing the reasonable suspicion standard in terms of a numerical confidence threshold. The Supreme Court has stated that "[a]lthough a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (citations omitted).

30. The Supreme Court has held that a state prisoner may only show that a state decision applied federal law erroneously for the purposes of obtaining a writ of habeas corpus under 28 U.S.C. § 2254(d) if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

a. Do you agree that if there is a circuit split on the underlying issue of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents"?

Response: I am not aware of any Supreme Court or Fourth Circuit decisions addressing the situation presented in this question. In confirmed, I will faithfully follow all precedent of the Supreme Court and the Fourth Circuit.

b. In light of the importance of federalism, do you agree that if a state court has issued an opinion on the underlying question of federal law, that by definition "fairminded jurists could disagree that the state court's decision conflicts if the Supreme Court's precedents"?

Response: Please see my response to Question 30(a).

c. If you disagree with either of these statements, please explain why and provide examples.

Response: Please see my response to Question 30(a).

31. U.S. Courts of Appeals sometimes issue "unpublished" decisions and suggest that these decisions are not precedential. *Cf.* Rule 32.1 for the U.S. Court of Appeals for the Tenth Circuit.

a. Do you believe it is appropriate for courts to issue "unpublished" decisions?

Response: Federal Rule of Appellate Procedure 32.1(a)(i) specifically recognizes the ability of federal courts of appeals to designate certain dispositions as "unpublished."

b. If yes, please explain if and how you believe this practice is consistent with the rule of law.

Response: Please see answer to Question 31(a).

c. If confirmed, would you treat unpublished decisions as precedential?

Response: Fourth Circuit Local Rule 32.1 specifically recognizes that unpublished opinions may have "precedential value." 4th Cir. Local R. 32.1. If confirmed, I would follow that rule.

d. If not, how is this consistent with the rule of law?

Response: Please see answer to Question 31(c).

32. If confirmed, would you consider unpublished decisions cited by litigants when hearing cases?

Response: Yes. *See* 4th Cir. Local R. 32.1.

a. Would you take steps to discourage any litigants from citing unpublished opinions? *Cf.* Rule 32.1A for the U.S. Court of Appeals for the Eighth Circuit.

Response: The local rules of the Fourth Circuit provide that citation of unpublished opinions issued prior to January 1, 2007, is disfavored except for certain limited purposes, but contain no similar admonition with respect to unpublished opinions issued on or after January 1, 2007. *See* 4th Cir. Local R. 32.1.

b. Would you prohibit litigants from citing unpublished opinions? *Cf.* Rule 32.1 for the U.S. Court of Appeals for the District of Columbia.

Response: The local rules of the Fourth Circuit do not prohibit litigants from citing any unpublished opinions. *See* 4th Cir. Local Rule 32.1.

33. "The judge who always likes the result he reaches is a bad judge."

a. What do you understand this statement to mean?

Response: I am not familiar with the specific statement quoted above. I understand it to mean that a judge who is faithfully interpreting and applying the law will sometimes reach a result that is, in the judge's personal opinion, an undesirable outcome.

34. "Judges are like umpires. Umpires don't make the rules, they apply them."

a. What do you understand this statement to mean?

Response: I am not familiar with the specific statement quoted above. Broadly speaking, I understand it to mean that there is an important difference between the power to make general rules and the duty to apply those rules in particular situations and that the job of a judge is to apply the law rather than to make the law.

b. Do you agree or disagree with this statement?

Response: Based on the understanding set out in the previous subpart, I agree with the statement.

35. When encouraged to "do justice," Justice Holmes is said to have replied, "That is not my job. It is my job to apply the law."

a. What do you think Justice Holmes meant by this?

Response: I believe that Justice Holmes meant that it is the duty of a judge to set aside any personal views and decide cases consistent with what the facts and law requires.

b. Do you agree or disagree with Justice Holmes? Please explain.

Response: Based on the understanding set out in the previous subpart, I agree with Justice Holmes's statement.

36. Have you ever taken the position in a publication that a federal or state statute was unconstitutional?

Response: To the best of my recollection, no.

a. If yes, please provide appropriate citation.

37. Have you ever taken the position in litigation that a federal statute was unconstitutional?

Response: To the best of my recollection, I have never argued as a lawyer that a federal statute was unconstitutional

a. If yes, please provide appropriate citation.

38. Have you ever taken the position in litigation that a state statute was unconstitutional?

Response: To the best of my recollection, I have never argued as a lawyer that a state statute was unconstitutional.

a. If yes, please provide appropriate citation.

39. Have you ever taken a position in litigation that conflicted with your personal views?

Response: Although my ethical obligations prohibit me from identifying specific matters where a position I took as an advocate on behalf of a client was inconsistent with my personal views, I can confirm that such cases have existed.

a. How did you handle the situation?

Response: I fulfilled my duty to advocate zealously on behalf of my client's position and made good-faith, legally supported arguments to that end.

b. If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?

Response: Yes.

40. What three law professors' works do you read most often?

Response: For the last three and a half years, I have been engaged in full-time legal practice and have not read a significant amount of work by law professors. I have, however, frequently consulted the work of Professor A.E. (Dick) Howard, who served as the executive director of Virginia's Commission on Constitutional Revision and wrote a two-volume "Commentaries on the Constitution of Virginia."

41. Which of the Federalist Papers has most shaped your views of the law?

Response: *Federalist* No. 78 (Hamilton).

42. What is a judicial opinion, law review article, or other legal opinion that made you change your mind?

Response: Although I do not recall a specific judicial opinion, law review article, or other legal opinion that cause me to change my mind about an opinion that I had already

formed, I remember finding Charles Black's article "The Lawfulness of the Segregation Decisions" particularly persuasive the first time I read it.

43. In a Notre Dame Law Review article, you drew a contrast between the behavior of the modern Supreme Court and "the fact that the Justices of the Warren era were willing to bear enormous costs to achieve even partial compliance with their vision of a better, fairer, criminal justice system." You also stated that their willingness to bear costs "suggests that [the Justices] were enormously committed to that goal."[1]

a. Does your understanding of judicial power allow for judges to push for their "vision of a better, fairer" system?

Response: The article referenced in the question was written more than a decade ago in my role as a law professor and focused on the U.S. Supreme Court. If confirmed as a judge on the U.S. Court of Appeals for the Fourth Circuit, it would be my duty to apply the law to the facts to reach the legally correct answer in specific cases that came before me.

b. Under your conception of the judicial power, what do you believe are appropriate goals for judges?

Response: I believe that the appropriate goals for judges consist of correctly applying the law to the facts while treating those who come before the courts with fairness and respect.

c. If you are confirmed, the opinions you write will be binding precedent in the Fourth Circuit. As a judge, how would you approach the question of what costs are worth bearing in order to achieve compliance with the rules laid out in your opinions?

Response: If confirmed a judge, my role would be to apply the law to the facts to reach the legally correct result in specific cases that came before me.

44. You authored an article in the Stanford Law Review on the practice of judges on Courts of Appeals remanding a case and reassigning the lower court judge.[2]

a. If you are confirmed, how would you approach reassignment?

Response: The Fourth Circuit has stated that it considers three factors in deciding whether reassignment is warranted in a particular case:

> (1) [W]hether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected;

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[1] Toby Heytens, *Doctrine Formulation and Distrust*, 83 Notre Dame L. Rev. 2045, 2102 (2008).
[2] Toby Heytens, *Reassingment*, Toby J. Heytens, 66 Stan. L. Rev. 1 (2014).

(2) whether reassignment is advisable to preserve the appearance of justice; and
(3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Martinovich, 810 F.3d 232, 245 (4th Cir. 2016). If confirmed, I would follow that precedent.

b. Under what circumstances would you advocate for reassigning a trial court judge?

Response: Please see my response to Question 44(a).

c. What other tools (other than precedent) do Court of Appeals judges have to "control" trial judges?

Response: Federal courts of appeals have jurisdiction to review the decisions of federal district courts. Such review must be conducted in accordance with governing legal principles.

d. Under what circumstances is it appropriate for those tools to be used?

Response: Please see my response to Question 44(c).

45. On behalf of Virginia and several other states, you filed an amicus brief in *Our Lady of Guadalupe School v. Morrissey-Berru.*[3] In section III of that brief, you argued that "the approach advocated by petitioners and the federal government would undermine workplace anti-discrimination protections."

a. This case was focused on interpreting the First Amendment. Can you explain what bearing the effect on anti-discrimination laws has had on interpreting the scope of the First Amendment?

Response: The brief referenced in the question was filed on behalf sixteen States and the District of Columbia. The brief argued that, "regardless of how the federal government chooses to draw the line in its own statutes and policies[,] States have a strong interest in preserving the ability to strike their own balance between employers' claims to religious autonomy and employees' right to be free from invidious discrimination."

b. In that brief, you wrote that "progress towards eradicating discrimination in the workplace requires sustained investment and consistent enforcement of the full panopoly of anti-discrimination protections." Why did you think it was appropriate to treat religious institutions as mere "employers," in light

[3] Brief of Amicus Curiae of the States of Virginia, California and 15 Other States Supporting Respondents, *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ____ (2020), 2020 WL 1478592.

of our nation's history and the protections enshrined in the First Amendment?

Response: The federal statutes at issue in the two cases referenced in the questions contained specific provisions defining the term "employer." *See* 28 U.S.C. § 630(b); 42 U.S.C. § 12111(5)(A).

46. You authored a student note in the Virginia Law Review arguing that "many (if not all) [Blaine Amendments] violate the Equal Protection Clause."[4]

a. What is the difference between the views articulated in this note and the Supreme Court's eventual decision in *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246 (2020)?

Response: The student note in question was written more than two decades before the Supreme Court's decision in *Espinoza* and before numerous other Supreme Court decisions handed down between 2000 and 2020. I have not specifically considered the differences (if any) between the arguments I made as a law student and the conclusions reached by the Supreme Court in *Espinoza.* If confirmed, I would faithfully follow all Supreme Court and Fourth Circuit precedent, including *Espinoza.*

b. What prompted your early interest in religious liberties in law school?

Response: To the best of my recollection, one of my professors suggested the topic for my student note.

c. How would you describe the importance of religious liberties in your professional career?

Response: The protection of religious liberty is a vitally important part of our constitutional system. If confirmed, I would faithfully apply all Supreme Court and Fourth Circuit precedent, including precedent involving religious liberty.

47. After the Supreme Court released its opinion in *Trump v. Vance*, 140 S.Ct. 2412 (2020), you co-authored a portion of a symposium on the decision for SCOTUSblog.[5] At the end of this symposium entry, you stated "the fact that the court reached the right result on presidential immunity shouldn't obscure our indignation that the question was asked in the first place."

a. What did you mean by this?

Response: I do not recall specifically what my co-author and I meant by that specific statement from a blog post written more than a year ago. As we

[4] Toby Heytens, *School Choice & State Constitutions*, 86 Va. L. Rev. 117 (2000).

[5] Martine Cicconi and Toby Heytens, *Symposium: Channeling an old chief to reject a new immunity*, SCOTUSblog (Jul. 10, 2020, 4:59 PM), https://www.scotusblog.com/2020/07/symposium-channeling-an-old-chief-to-reject-a-new-immunity/

explained in that post, however, our view was that the question before the Court in that case had been already been answered by Chief Justice Marshall "more than two centuries ago."

b. Under what circumstances should we be indignant when an individual asserts what they perceive to be their rights?

Response: Under our adversarial system, individuals have the power to assert what they perceive to be their rights and courts have a responsibility to adjudicate those claims in accordance with the law.

48. When evaluating restrictions on firearms ownership under the Second Amendment, some U.S. Courts of Appeals seem to have adopted tests that resemble intermediate scrutiny.[6]

a. Please articulate your understanding of the test for evaluating restrictions of firearm ownership that the Supreme Court explained in the *Heller* decision.

Response: Because *District of Columbia v. Heller*, 554 U.S. 570 (2008), was the Supreme Court's "first in-depth examination of the Second Amendment," the Court specifically declined to attempt "to clarify the entire field" or adopt a single test for evaluating all conditions on firearm ownership. *Id.* at 635. Instead, the Court held that the law before it failed "any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628.

b. How is this test similar or dissimilar from intermediate scrutiny?

Response: Please see my response to Question 48(a).

c. How is this test similar or dissimilar from a cost-benefit analysis?

Response: Please see my response to Question 48(a).

49. Many States, including Virginia, imposed strict COVID-19 restrictions without making appropriate exceptions for religious institutions. The Supreme Court ultimately struck down restrictions of this type in *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021) and in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020).

a. When you handled cases defending Virginia's COVID-19 restrictions, what steps did you take to make sure that Virginia's restrictions adequately took into consideration the religious liberties of its citizens?

Response: My role in the cases referenced above was an advocate defending the legality of actions taken my clients, including the Governor of Virginia and the State Health Commissioner. To the best of my knowledge, no court has ever held

[6] *See Silvester v. Becerra*, 138 S.Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari) (discussing lower court decisions).

that any of Virginia's COVID-19 mitigation measures unlawfully infringed religious liberty.

b. Were you involved in the promulgation of these regulations?

Response: The regulations were promulgated by my clients, the Governor of Virginia and/or the State Health Commissioner.

c. What solicitude was made for religious liberties?

Response: Throughout the COVID-19 pandemic, Virginia has made special accommodations for religious practices. In-person worship services were never suspended and even the temporary stay-at-home order specifically permitted traveling to and from places of worship. Virginia lifted all numerical attendance limits on in-person religious services on July 1, 2020—more than four months before the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and more than eight months before the Supreme Court's decision in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

50. Please provide a detailed summary of the process that led to your nomination.

Response: On March 3, 2021, Senators Mark Warner and Tim Kaine posted a joint announcement seeking applications to serve as a United States Circuit Judge for the Fourth Circuit. I submitted an application on March 5, 2021. I interviewed with a committee appointed by the Senators on April 9, 2021, and with the Senators themselves on April 27, 2021. On May 12, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On June 30, 2021, the President announced his intent to nominate me.

a. Who first raised the possibility of your nomination?

Response: I do not recall who specifically "first raised the possibility of [my] nomination," but I was aware of the vacancy soon after it was reported that Judge Barbara Keenan was taking senior status.

b. Have you spoken with any interest groups, such as Demand Justice, concerning your nomination?

Response: No.

c. How many conversations did you have with White House staff leading up to your nomination?

Response: On May 12, 2021, I interviewed with attorneys from the White House Counsel's Office. Shortly thereafter, I was informed by a member of the White House staff that they wished to begin a formal vetting process. On June 29, 2021, a member of the White House staff told me that the President would be announcing his intent to nominate me the next day.

Questions for the Record for Toby Heytens
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?**

      Response: No.

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

      Response: No.

Senator Mike Lee Questions
for the Record
Toby Heytens, Fourth Circuit Court of Appeals

1. What sources would you consult when deciding a case that turned on the interpretation of a federal statute?

Response: If confirmed, I would first determine whether the Supreme Court or Fourth Circuit had previously interpreted the specific statutory provision at issue. If there was no such precedent, I would begin with the text of the statute, including any relevant statutory definitions, and also consider any applicable canons of construction or other interpretive principles. In appropriate cases, I also would consider persuasive authority from other courts, as well as legislative history.

2. What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?

Response: If confirmed, I would first determine whether the Supreme Court or Fourth Circuit had previously interpreted the specific constitutional provision at issue. Although I believe it would be rare to confront a constitutional issue of true first impression as a circuit court judge, if such a situation were to arise, I would consider the text of the provision and the meaning of the terms at issue, as well as the method of interpretation that the Supreme Court or Fourth Circuit has used in the most analogous circumstance and any persuasive authority from other jurisdictions.

3. What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that "the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." *Id.* at 605.

4. If a constitutional provision is ambiguous, and there is no controlling precedent, would it be appropriate to consult—as Justice Stephen Breyer contends—"the values" underlying the provision's language?

Response: I am not familiar with the statement by Justice Breyer quoted above or the context in which it was made. If I were confirmed as a judge and confronted such a case, I would examine the overall structure of the provision; the use of similar language (and previous constructions) in other portions of the Constitution or predecessor documents; historical materials; case law considering analogous questions; and any other guidance the Supreme Court has provided for construing constitutional provisions. In any such case, I also would be bound by the record created by the parties.

5. How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?

Response: The Supreme Court has repeatedly stated that statutory interpretation begins with the text and that, when the text is clear, it ends there as well. *See, e.g., National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 631 (2018). If confirmed, I would faithfully follow that guidance.

6. Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?

Response: My understanding is that "plain meaning" generally refers to a term's ordinary meaning at the time of its enactment.

7. If confirmed, would you consult legislative history when interpreting ambiguous statutory terms?

Response: The Supreme Court has considered legislative history in interpreting ambiguous statutory text, *see County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471-72 (2020), and I would follow that guidance if confirmed.

8. If confirmed, would you look to the underlying purpose of a Congressional statute to construe ambiguous provisions?

Response: If confirmed, I would first look at the text of the statute and the binding precedent of the Supreme Court or Fourth Circuit. If I needed to go beyond those sources to rule on a case, I would look at the context in which the text was found (including any express "purpose" section in the statute), apply any relevant canons or other principles of interpretation, consult any pertinent legislative history, and review any relevant case law in other circuits. In so doing, I would be bound by the record put before me by the parties.

9. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: Since at least *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court has recognized that Congress has powers beyond those expressly enumerated in the Constitution by virtue of the Necessary and Proper Clause.

10. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: I would apply the relevant Supreme Court and Fourth Circuit precedent to evaluate the constitutionality of the law. For example, I would look to *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), in evaluating whether Congress had the authority to enact a law under the Commerce Clause.

11. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: The Supreme Court has held that the Fifth and Fourteenth Amendments protect certain unenumerated "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition"and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S.702, 720-21 (1997) (internal quotation marks and citations omitted). In *Glucksberg*, the Court collected cases previously recognizing such rights, including the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833(1992). *Id*. at 720; *see also Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a right of same-sex couples to marry); *Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing a right to travel). The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

12. What rights are protected under substantive due process?

Response: Please see my response to Question 11.

13. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: My response to Question 11 is not based on my personal beliefs, but rather my understanding of current Supreme Court's precedent. If confirmed, I will faithfully apply all Supreme Court precedent, regardless of any opinion I may have about the merits of the Court's decisions.

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: The Supreme Court has emphasized that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (internal quotation marks and citation omitted).

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court emphasized that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. If another branch of government purports to assume an authority not granted to it by the Constitution, it is duty of the judicial department to disregard the improper exercise of power.

16. What role should empathy play in a judge's consideration of a case?

Response: A judge is duty bound to apply the law to the case in question regardless of personal feelings. If confirmed, I would faithfully discharge that duty.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding alaw that is, in fact, unconstitutional?

Response: Both outcomes are equally undesirable.

18. How would you explain the difference between judicial review and judicial supremacy?

Response: I understand judicial review to refer to the ability of the judicial branch to assess the legality of actions taken by the legislative or executive branch. Although others may have a different view, I understand judicial supremacy to refer to the (in my view, incorrect) view that courts have the sole ability or obligation to interpret the Constitution.

19. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affectingthe whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independentobligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: Elected officials swear an oath to uphold the Constitution. They are also required to follow properly issued judicial decisions about the meaning of the Constitution. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

20. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: Federal courts do not share the legislature's power to decide what the law should be or the executive's power to enforce the law. A court's role is limited to interpreting what the law is, and only in cases involving actual controversies that are brought before it.

21. As a circuit court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does notappear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extendthe precedent to cover new cases, or limit its application where appropriate and reasonably possible?

Response: If confirmed as a circuit court judge, it will not be within my purview to question the constitutional underpinnings of binding precedent or limit its applicability beyond what Supreme Court or Fourth Circuit precedent requires. If confirmed, I will be bound to fully and faithfully apply binding precedent to the cases before me regardless whether I agree with it.

22. Do you believe it is ever appropriate to look past jurisdictional issues if they prevent the court from correcting a serious injustice?

Response: No.

23. When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?

Response: 18 U.S.C. § 3553(a) specifies the factors a federal judge shall consider when imposing a sentence. No sentencing judge should discriminate when sentencing based on race, gender, nationality, sexual orientation, or gender identity.

24. The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and

queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?

Response: I was not previously familiar with any statement from the Biden Administration defining equity. If a case involving the definition of "equity" came before me, I would look first to Supreme Court and Fourth Circuit precedent to define it. If confirmed, my personal views about the Executive Branch's definition of equity would not factor into any case.

25. Is there a difference between "equity" and "equality?" If so, what is it?

Response: Black's Law Dictionary defines "[e]quity" as "[f]airness; impartiality; evenhanded dealing," and "[t]he body of principles constituting what is fair and right; natural law." *Black's Law Dictionary* 560 (7th ed. 1999). The same source defines "[e]quality" as "[t]he state of being equal; esp., likeness in power or political status." *Black's Law Dictionary* 556 (7th ed. 1999).

26. Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?

Response: The text of the 14th Amendment does not include the term "equity".

27. How do you define "systemic racism?"

Response: I am not aware of any consensus definition of "systemic racism," nor do I have a personal definition of that term. Although I am aware that there is much public discussion and debate about the issue, any personal views I have would not be relevant to any decisions I would make were I confirmed as a circuit court judge.

28. How do you define "critical race theory?"

Response: I am not aware of any consensus definition of "critical race theory." Black's Law Dictionary defines the term as "[a] reform movement within the legal profession, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities." *Black's Law Dictionary* 382 (7th ed. 1999).

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Please see my responses to Questions 27 and 28.

30. You served as Counsel of Record for an amicus brief on behalf of Virginia in *Our Lady of Guadalupe School v. Morrissey-Berru*. There, you asked the Court to rule against religious schools who were sued by their teachers for employment discrimination. Understanding that this question may implicate

confidentiality, please identify whether you (or someone else) decided to involve the state of Virginia in that litigation.

Response: The brief referenced above was filed in my role as Solicitor General of Virginia. The Attorney General decided that the Commonwealth of Virginia should file an amicus brief in that case.

31. In law school, you wrote an article arguing that the "explicit exclusion of religious schools from a private school voucher program would violate the Equal Protection Clause." Do you still agree with that conclusion?

Response: The quoted statement is from a paper that I wrote as a law student more than two decades ago and was published before the Supreme Court's subsequent decisions in *Zelman v. Simmons Harris*, 536 U.S. 649 (2002), *Locke v. Davey*, 540 U.S. 712 (2004), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). If confirmed as a judge, it would be my obligation to decide any case that came before me under those precedents (as well as other relevant Supreme Court and Fourth Circuit precedent) rather than based on my own personal views.

32. Do you still believe that the Blaine Amendments—state constitutional provisions designed to exclude religious schools from state funding—violate the Equal Protection Clause?

Response: The argument referenced above is from a paper that I wrote as a law student more than two decades ago and was published before the Supreme Court's subsequent decisions in *Zelman v. Simmons Harris*, 536 U.S. 649 (2002), *Locke v. Davey*, 540 U.S. 712 (2004), *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). If confirmed as a judge, it would be my obligation to decide any case that came before me under those precedents (as well as other relevant Supreme Court and Fourth Circuit precedent) rather than based on my own personal views.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 28, 2021

For all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

For all judicial nominees:

1. **How would you describe your judicial philosophy?**

   Response: There is no single label I would use to describe the approach I would take to judging. I believe that judges should carefully consider the arguments raised by the parties and reach the result dictated by the law and facts of each case, while treating all persons who come before them with dignity and respect.

2. **Would you describe yourself as an originalist?**

   Response: Please see my response to Question 1.

3. **Would you describe yourself as a textualist?**

   Response: Please see my response to Question 1.

4. **Do you believe the Constitution is a "living" document? Why or why not?**

   Response: I do not use the term "living" to describe the Constitution because that term has several definitions and is fraught for many. Instead, I agree with judges and previous judicial nominees who have described the Constitution as an enduring document whose mandates and principles continue to govern today and can be applied to new and novel circumstances.

5. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

Response: Although I admire many past and current members of the Supreme Court, my admiration does not flow from their jurisprudence or how they may have voted in any particular case. I admire Justices Thurgood Marshall and Ruth Bader Ginsburg for their trailblazing work in advancing equality before they joined the bench, and, as an appellate advocate, I admire the craft they demonstrated in written and oral advocacy. I admire Justices Antonin Scalia and Elena Kagan for their writing ability. I also admire Justices John Paul Stevens and Samuel Alito for their skill in crafting incisive questions that cut to the heart of cases before them.

6. **Was Marbury v. Madison correctly decided?**
7. **Was Lochner v. New York correctly decided?**
8. **Was Brown v. Board of Education correctly decided?**
9. **Was Bolling v. Sharpe correctly decided?**
10. **Was Cooper v. Aaron correctly decided?**
11. **Was Mapp v. Ohio correctly decided?**
12. **Was Gideon v. Wainwright correctly decided?**
13. **Was Griswold v. Connecticut correctly decided?**
14. **Was South Carolina v. Katzenbach correctly decided?**
15. **Was Miranda v. Arizona correctly decided?**
16. **Was Katzenbach v. Morgan correctly decided?**
17. **Was Loving v. Virginia correctly decided?**
18. **Was Katz v. United States correctly decided?**
19. **Was Roe v. Wade correctly decided?**
20. **Was Romer v. Evans correctly decided?**
21. **Was United States v. Virginia correctly decided?**
22. **Was Bush v. Gore correctly decided?**
23. **Was District of Columbia v. Heller correctly decided?**
24. **Was Crawford v. Marion County Election Bord correctly decided?**
25. **Was Boumediene v. Bush correctly decided?**
26. **Was Citizens United v. Federal Election Commission correctly decided?**
27. **Was Shelby County v. Holder correctly decided?**
28. **Was United States v. Windsor correctly decided?**
29. **Was Obergefell v. Hodges correctly decided?**

Responses to Questions 6-29: As a nominee who is already bound by the Code of Conduct for United States Judges, I think it would almost invariably be inappropriate for me to express a personal opinion—positive or negative—about Supreme Court decisions that I would be bound to follow were I confirmed as a circuit judge. Consistent with the practice of past nominees, however, I believe that *Marbury v. Madison, Brown v. Board of Education* (including *Bolling v. Sharpe*), and *Loving v. Virginia* are rare exceptions that I may affirm I believe were correctly decided.

30. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?**

Response: A panel of the Fourth Circuit "cannot overrule a decision issued by another panel." *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc). Under Federal Rules of Appellate Procedure 35, the Court will sit banc panels when a majority of the circuit judges who are in regular active service and who are not disqualified conclude that: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."

31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: Please see my response to Question 30.

32. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: No.

Questions from Senator Thom Tillis
for Toby Jay Heytens
Nominee to be United States Circuit Judge for the Fourth Circuit

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: Although definitions of judicial activism may vary, I understand it to include situations where judges decide a case based on their personal views rather than what the law requires or go beyond the case before them to reach issues that are not properly presented. Neither type of judicial activism is appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: I believe that impartiality is an obligation for all judges.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: A judge who is faithfully interpreting the law will sometimes reach a result that is, in the judge's personal opinion, an undesirable outcome. In all cases, the judge's duty is to set aside any personal views and faithfully interpret and apply the law.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: The Supreme Court has held that the Second Amendment confers "an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), and that that right is incorporated against the States via the Fourteenth Amendment, *see McDonald v. City of Chicago,* 561 U.S. 742 (2010). If confirmed, I will faithfully follow those and other precedents interpreting the Second Amendment.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: The values and ideals of the Constitution matter most in times of crisis. If I were confirmed and such a case came before me, I would begin by reviewing the arguments of the parties and researching Supreme Court and Fourth Circuit precedent. I would then apply the law to the specific facts and record of the case before me.

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: There is significant Supreme Court and Fourth Circuit precedent on qualified immunity, and, if confirmed, I would analyze and apply that precedent in resolving cases that came before me that raised qualified immunity issues. Supreme Court precedent makes clear that officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: As a judicial nominee, I do not believe it would be appropriate for me to offer a personal opinion about whether current doctrine provides "sufficient" protection for law enforcement officers. The Supreme Court has held that law enforcement officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If confirmed, I would faithfully follow Supreme Court and Fourth Circuit precedent about the scope of qualified immunity.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: As a judicial nominee, I do not believe it would be appropriate for me to offer a personal opinion about the "proper scope" of qualified immunity protection for law enforcement officers. The Supreme Court has held that law enforcement officers are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). If confirmed, I would faithfully follow Supreme Court and Fourth Circuit precedent about the scope

of qualified immunity.