Nomination of Matthew Kacsmaryk to the Northern District of Texas
Questions for the Record
December 20, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be "originalist"? If so, what does that mean to you? If not, how would you describe your approach?

   If I were fortunate enough to be confirmed as a District Judge for the Northern District of Texas, I would be bound by oath to faithfully apply Supreme Court and Fifth Circuit precedent. It is my understanding that scholars have affixed the "originalist" label to a number of interpretive methodologies, including: (1) "original intent" intentionalism, (2) "plain meaning" textualism, (3) strict constructionism, and (4) purposive construction or purposivism. Where the Supreme Court has interpreted a constitutional provision using an "originalist" methodology, I will faithfully follow that precedent.

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

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

   Never. Lower courts are not authorized to depart from Supreme Court precedent.

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

   Circuit judges are authorized to write concurring or dissenting opinions on any number of topics—including the possibility that the Supreme Court may revisit or refine its prior precedents. *See, e.g.*, *Allapattah Servs. v. Exxon Corp*., 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing *en banc*) ("Because a majority of the federal circuit courts of appeals have addressed this question and failed to come to a consensus … the Supreme Court should exercise its certiorari jurisdiction to resolve this circuit split."). That said, neither Circuit nor District Court judges have authority to *depart* from Supreme Court precedent.

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

   The Fifth Circuit has consistently applied the "rule of orderliness" to its own precedents: a panel of the Fifth Circuit cannot overrule a prior panel's decision "absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court or by our *en banc* court." *Jacobs v. Nat'l Drug Intelligence Ctr*., 548 F.3d 375, 378 (5th Cir. 2008); *see also United States v. Castillo-Rivera*, 853 F.3d 218, 227 (5th Cir. 2017) (holding same).

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

As a nominee to a lower federal court, it would be inappropriate for me to comment on the cases, controversies, or circumstances that might cause the Supreme Court to overturn its own precedent. Only the Supreme Court has "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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

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

A district judge must treat all Supreme Court precedent as "superprecedent," in the sense that all of the Supreme Court's decisions are binding on all lower federal courts —including *Roe v. Wade* and *Planned Parenthood v. Casey*. Additionally, a District Judge for the Northern District of Texas is bound to the Fifth Circuit precedent applying said Supreme Court precedent.

b. Is it settled law?

Please see my response to Question 3(a).

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote:

"The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the merits or demerits of a particular Supreme Court opinion. That said, the Supreme Court has held that the Second Amendment protects an individual right to possess a firearm unconnected with service in the militia. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). If confirmed, I will fully and faithfully apply Supreme Court precedent—including *Heller*.

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

The Supreme Court in *Heller* stated: "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and it emphasized that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . 554 U.S. 570, 626-27 (2008). It added that "[w]e are aware of the problem of handgun violence in this country…. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns." *Id.* at 636.

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

As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the merits or demerits of a particular Supreme Court opinion. *Heller* is binding on all lower courts and if confirmed, I will fully and faithfully apply it.

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

Obergefell is a precedent of the Supreme Court and therefore binding on all lower federal courts. If confirmed, I will fully and faithfully apply Supreme Court precedent—including *Obergefell*.

6. At your nomination hearing, several senators asked questions about an argument you made in an amicus brief that you submitted in *Obergefell*. You focused on the alleged "road to potential tyranny" that would result if the Court were to find a nationwide right to same-sex marriage. You also argued that legalizing same-sex marriage across the nation "would inevitably exacerbate [the] conflicts" between those who support same-sex marriage and those who oppose it on religious grounds, adding that it would "inexorably result[] in additional violations of free speech rights." (Brief of Amici Curiae Religious Organizations et al. in Support of Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015))

a. Has the Court's decision in *Obergefell* finding a nationwide right to same-sex marriage led the nation down the "road to potential tyranny"? If so, in what way?

The language to which this question refers was meant to describe situations "where religious dissenters from same-sex marriage have been silenced by state actors and thereby denied access to the marketplace of ideas." (Br. at 10, 20-26, 29-31). This language is immediately followed by the core thesis of the amicus brief: "In reaching its decision, this Court should reaffirm that the Free Speech Clause of the First Amendment protects religious dissenters who disagree with state recognized same-sex marriage and to reaffirm the importance of free debate and free inquiry in this democratic Republic." (Br. at 10, 16-18, 32).

b. Your amicus brief cites several pre-*Obergefell* examples of alleged violations of free speech rights of those who oppose same-sex marriage. Does the Court's opinion in *Obergefell* prohibit anyone who is opposed to same-sex marriage from stating their personal opposition?

As a pending nominee to the District Court, it would be inappropriate for me to comment on cases that may come before me were I so fortunate to be confirmed. I note that that the *Obergefell* opinion holds "that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." 135 S.Ct. at 2607.

c. Please outline all the examples of "additional violations of free speech" that have resulted from the *Obergefell* decision.

The Supreme Court heard oral arguments in the *Masterpiece Cakeshop* case on December 5, 2017. (No. 16-111). Petitioners and respondents have raised, briefed, and argued Free Speech issues that may further define the contours of *Obergefell*. I have not had occasion to catalogue all cases raising similar issues. But in any event, as a nominee to a lower federal court, it would inappropriate to comment on this pending Supreme Court case or any similar cases.

7. At your nomination hearing, you were asked about a claim you made in a 2015 interview that the *Windsor* case, which challenged the federal Defense of Marriage Act (DOMA), may have been a "case of collusion" between the Obama Administration and LGBT advocates. In the same interview, you also paraphrased conservative commentator Ed Whelan as follows: "Nothing has typified the march towards so-called marriage equality than complete lawlessness. It has been a complete abuse of rule of law principles."

a. Please provide the evidence you have that the Obama Administration colluded with LGBT advocates to bring the challenge to DOMA that led you to make this allegation.

My commentary summarized the portion of the Supreme Court's opinion in *Windsor* addressing the issue of "prudential standing" in the context of the Executive's refusal to defend DOMA. *See* 133 S. Ct. at 2684-89. In any event, as a District Judge I would be bound by oath to faithfully apply all Supreme Court precedent—including *Windsor.*

b. Please provide all the examples of "complete lawlessness" you relied on to repeat a paraphrase of Ed Whelan's quote.

Please see my response to Question 7(a).

8. In 2016, you represented two Oregon bakers, Melissa and Aaron Klein, who had refused to bake a cake for a same-sex union. The Oregon Bureau of Labor and Industries (BOLI) determined that the Kleins had violated two Oregon statutes that prohibit businesses from discriminating on the basis of sexual orientation. In challenging that finding and the penalties imposed on the Kleins, you argued that BOLI's actions boiled down to "the state forcing business owners to publicly facilitate ceremonies, rituals, and other expressive events with which they have fundamental and, often, as in this case, religious disagreements." (Petitioners' Opening Brief at 5, *Klein v. Oregon Bureau of Labor and Industries*) You also argued that BOLI's order against the Kleins violated their First Amendment right to be free from compelled association or expression, and you contended that there was "no evidence in the record [to suggest] that allowing businesses to decline to provide goods and services to same-sex weddings will undermine [the state's] ability to pursue its interest in deterring sexual orientation-based discrimination." (*Id.* at 48-52)

a. Is there a state interest in preventing discrimination, including discrimination based on sexual orientation?

Because the *Klein* appeal is still pending before the Oregon Court of Appeals, I must refrain from commenting on this question. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

b. You argued businesses should be permitted to refuse to make or sell products to would-be customers on the basis of the customers' sexual orientation if it violates their religious beliefs. What other characteristics should businesses be allowed to make decisions on based on their religious beliefs? Can a company refuse to sell cake to a mixed race couple if it violates their religious belief?

Please see my response to Question 8(a).

c. What is the proper balance between a business owner's constitutional rights and a customer's constitutional rights? When should the business owner's constitutional rights prevail over the customer's and vice versa?

Please see my response to Question 8(a).

d. How does permitting a business to decline to bake a cake for a same-sex wedding <u>not</u> undermine the state's interest in deterring sexual orientation-based discrimination?

Please see my response to Question 8(a).

9. You have led efforts to challenge the Affordable Care Act's (ACA) contraceptive coverage requirement in at least three cases: *Zubik v. Burwell* (2016), *Insight for Living Ministries v. Burwell* (2014), and *Christian and Missionary Alliance Foundation v. Burwell* (2015). But in addition to filing amicus briefs or representing parties directly challenging the requirement, you have also led efforts since President Trump took office to have the Administration counteract if not outright overturn the coverage requirement. Following a July 2017 meeting with the White House, you said of those efforts: "Our clients have been litigating against the government's efforts to punish business owners and ministry leaders for following their religious beliefs and moral convictions since 2013."

a. Please provide the evidence you have to support your claim that the Obama Administration instituted the contraceptive coverage requirement in an effort to "punish" those who follow "their religious beliefs and moral convictions."

As an advocate for clients in a July 2017 meeting with the Office of Management and Budget (OMB), I delivered a letter that argued that the Final Rule should "respect the conscience rights for all Americans, religious and non-religious alike," thereby stating support for the "broad language of the draft regulation protecting objections on the basis of 'religious beliefs' or 'moral convictions.'"

As a District Judge, however, I would not advocate for clients or a particular policy but instead is bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

b. Does the government have a compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage?

That remains an open question. In *Hobby Lobby*, the Supreme Court assumed without deciding that the federal government had a compelling governmental interest under the applicable RFRA analysis. And in *Zubik*, the Supreme Court issued a post-argument Order that stated "no view on the merits of the cases," and expressly stated that it did not decide "whether the Government has a compelling interest." *Zubik*, (Op. at 4-5). Because the question may come before me as a judge, I must refrain from commenting. *See* Canon 3(A)(6), Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

c. **What is the government interest in providing full health care coverage? How far does that extend? Can the government provide full health care coverage for men, but not women?**

Please see my response to Question 9(b).

10. In your time at the First Liberty Institute, you have been a frequent opponent of transgender rights. For instance, you filed an amicus brief in *Gloucester County School Board v. G.G.*, in which a transgender student challenged a school board's policy requiring students to use the restroom that corresponds to their "biological gender." You attacked the Fourth Circuit's opinion for the deference it afforded to a letter issued by the Department of Education, contending that giving deference to that letter deprived Americans of their "First Amendment right to participate in public debate on issues that impact them."

You also signed onto three letters submitted to three different federal agencies that criticized regulations that sought to expand transgender rights. In one, submitted to the Department of Housing and Urban Development (HUD), you wrote that allowing transgender individuals to receive HUD assistance — including access to sex-segregated emergency housing — according to the individuals' self-identified gender would "positively undermine" interests such as health, safety, and expectations of privacy. In a letter to the Department of Labor (DOL), you opposed DOL regulations under the Workplace Innovation and Opportunity Act (WIOA) for defining "sex" to include transgender status and gender identity. And in August 2016 letter to the Department of Health and Human Services, you wrote that transgender identity is "a psychological condition in need of care, not a category of persons in need of special legal protection."

a. **Please explain how allowing transgender students to use restrooms that do not correspond to their biological gender deprives Americans of their "First Amendment right to participate in public debate on issues that impact them." Please also provide examples.**

The *Gloucester* amicus brief did not make such an argument but instead argued that *Auer* deference should not extend to an unpublished sub-regulatory letter that was not subject to the Administrative Procedure Act's notice and comment provisions (5 U.S.C. § 553), which are designed to safeguard the First Amendment rights of stakeholders who may be affected by rule changes.

Regardless, as a District Judge for the Northern District of Texas I would not be an advocate for particular clients or policies. I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

b. **Please explain how allowing transgender individuals to receive HUD assistance — including access to sex-segregated emergency housing — according to the individuals' self-identified gender would "positively**

undermine" interests such as health, safety, and expectations of privacy. Please provide specific examples.

The HUD public comment was a *collaborative* project of several religious organizations that operate, represent, or advocate for (1) overnight homeless shelters and (2) shelters for battered women. The public comment expressly stated that the relevant HUD rules should *balance* the rights of *all* persons—including transgender persons: "The health, safety, and privacy of all persons served by HUD programs are important…. The housing needs of a man who self-identifies as a woman can and should be met in a way that objectively respects his or her health, safety, and privacy, but without compromising the health, safety, and privacy of other beneficiaries."

Regardless, as a District Judge for the Northern District of Texas I would not be an advocate for particular clients or policies. I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

c. **Do you continue to believe that those who identify as transgender have a "psychological condition" that warrants "care"? Please explain what kind of "care" is warranted.**

I did not author these statements and they do not represent my personal beliefs. Rather, they are quotes from licensed physicians, psychiatrists, and practitioners, cited as evidence of divergent views in support of USCCB-led public comments requesting accommodations for medical practitioners who cannot participate in select practices or procedures for reasons of conscience or sincere religious belief.

Regardless, as a District Judge for the Northern District of Texas I would not be an advocate for particular clients or policies. I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

d. **According to the FBI's Uniform Crime Reporting (UCR) Program statistics for 2016, of 131 individuals who were reported as being the victims of gender-identity bias, 111 were the victims of anti-transgender bias. Human Rights Campaign has catalogued at least 28 transgender individuals who were fatally shot or killed by other violent means in 2017 alone. In light of these statistics, are transgender individuals "not a category of persons in need of special legal protection"? If not, what would be required to demonstrate a need for special legal protection?**

I previously served as an Assistant United States Attorney and thereby received Department of Justice training that referenced data from the FBI's Uniform Crime Reporting (UCR) Program. This is precisely the sort of data that could and should be cited in supporting legal protections for *any* persons who have been targeted for violence or harassment.

e. **Given your frequent antipathy to transgender rights, how can you assure transgender litigants that you will approach their cases without bias or prejudice? What evidence can you offer them that you are capable of doing so?**

As Deputy General Counsel to First Liberty Institute, my client advocacy, legal commentary, and public comments focused on narrow, particularized exceptions or accommodations for religious persons or conscientious objectors who cannot participate in select activities, procedures, or practices—within the architecture of the Constitution, federal law, state law, or administrative law.

As an Assistant United States Attorney, I was bound by oath to enforce the laws of the United States—including 18 USC § 249, the federal hate crime legislation. In that capacity, I served as a CLE instructor on *Batson* procedures and policies—including the Department of Justice policy applying *Batson* to sexual orientation. I served under Republican and Democrat appointees and received "outstanding" performance ratings every year.

If I am confirmed, I will be bound by a similar oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [District Judge] under the Constitution and laws of the United States." 28 U.S. Code § 453. I will do so.

11. Given your extensive commentary and advocacy that is hostile to the civil rights of LGBT individuals, you were asked at your hearing if you would commit to recuse in cases involving LGBT individuals. You declined to commit to recuse yourself. **But given your extensive records on these issues—how would it not create an appearance of impropriety for you to decide a case involving an LGBT individual's rights?**

28 U.S.C. § 455(a) requires a federal judge to "disqualify himself in any proceeding in which his partiality might be questioned." 28 U.S.C. § 455(b) lists additional grounds for recusal. If I am confirmed, I will apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics.

12. Your former colleague at the First Liberty Institute, Jeff Mateer, was quoted as referring to transgender children as evidence of "Satan's plan." **Do you agree with Mr. Mateer's views on transgender children?**

No.

13. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

Without disclosing specific advice by any attorneys, it is my understanding that the instructions were to disclose responsive material truthfully and to the best of my ability.

b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did <u>not</u> need to disclose certain material, including material "published only on the Internet," as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

No. It was and remains my understanding that the instructions were to disclose responsive material, including material "published only on the Internet," truthfully and to the best of my ability.

c. Have you ever maintained a public blog or public social media account, including on Facebook or Twitter? If so, during what time period? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

No.

d. Have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

No. *See* Response to Question 13(b).

e. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

No. *See* Response to Question 13(b).

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

Under Supreme Court precedent, courts may have recourse to legislative history when the relevant statutory text is ambiguous. As a District Court judge, I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

15. According to your Senate Questionnaire, you helped co-found the Fort Worth Chapter of the Federalist Society in 2012. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I did not author that statement and am not aware of what its author meant by it. I attended law school at the University of Texas, an institution that fosters free speech, discourse, and dialogue in its undergraduate, graduate, and professional schools.

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

I did not author the statement and do not know what the author meant by it. In my experience as both a member and an officer, the Federalist Society takes no position on specific issues but instead provides an open forum for the informed presentation of multiple viewpoints vis-à-vis the Constitution, the Rule of Law, the Separation of Powers, and the role of the Judiciary.

c. As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.

Please see my response to Question 15(b).

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

I received the questions after the close of business on Wednesday, December 20, 2017. I personally drafted answers to all of the questions, solicited comments from the Department of Justice attorneys working on my nomination, and revised my draft answers as I thought appropriate in light of those comments.

Senator Dick Durbin
Written Questions for Matthew Kacsmaryk
December 20, 2017

For questions with subparts, please answer each subpart separately.

Questions for Matthew Kacsmaryk

1. On November 13, 2016, then-President-elect Trump was asked on *60 Minutes* about same-sex marriage. He said: "it was already settled. It's law. It was settled in the Supreme Court. I mean it's done." **Do you agree with President Trump that same-sex marriage is settled law?**

   Obergefell holds that "same-sex couples may exercise the fundamental right to marry in all States" and "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." 135 S. Ct. 2584, 2607-08 (2015). If confirmed, I will fully and faithfully apply all Supreme Court precedent—including *Obergefell*.

2. On September 4, 2015, you authored an article entitled "The Inequality Act: Weaponizing Same-Sex Marriage." In it, you wrote about the Supreme Court's *Obergefell* decision:

   > [F]ive justices of the Supreme Court found an unwritten "fundamental right" to same-sex marriage hiding in the due process clause of the 14th Amendment - a secret knowledge so cleverly concealed in the nineteenth-century amendment that it took almost 150 years to find.

   a. **Do you believe *Obergefell* was wrongly decided?**

      As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the merits or demerits of a particular Supreme Court opinion. *See, e.g.*, Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1, Commentary. If confirmed, I will fully and faithfully apply all Supreme Court precedent—including *Obergefell*.

   b. **Do you think the *Obergefell* majority used judicial activism to reach its result?**

      Please see my response to Question 2(a).

3. In 2008, the Supreme Court decided the *D.C. v. Heller* case 5 to 4 and found, for the first time, that the Second Amendment protects an individual right to possess guns as opposed to a right related to militia activity. The *Heller* case came 217 years after the ratification of the Bill of Rights. Conservative 4th Circuit Judge J. Harvie Wilkinson wrote about the *Heller* decision:

> The majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in the more than two hundred years since the amendment's enactment. The majority then used that same right to strike down a law passed by elected officials acting, rightly or wrongly, to preserve the safety of the citizenry.

a. **Do you believe that the *Heller* majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in the more than two hundred years since the amendment's enactment?**

Please see my response to Questions 4(a) and 4(c) from Senator Feinstein.

b. **Do you believe the *Heller* case was wrongly decided?**

As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the merits or demerits of a particular Supreme Court opinion. *See, e.g.*, Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1, Commentary. If confirmed, I will fully and faithfully apply all Supreme Court precedent—including *Heller*.

4. Judge Wilkinson described the *Heller* decision in a 2008 law review article as "a form of judicial activism." He wrote about how the *Heller* majority grounded its opinion in originalism, but employed "the subjective choices that originalism allows," such as cherrypicking historical evidence and cutting loose the preamble of the Second Amendment even though that preamble also reflected the Framers' views.

Do you think the *Heller* majority used a form of judicial activism to reach its result?

Please see my response to Question 4(a) and 4(c) from Senator Feinstein.

5. In your article on "Weaponizing Same-Sex Marriage," you contrast the civil rights movement with what you call the Sexual Revolution, which you appear to define as including the movement for marriage equality. You said of the Sexual Revolution:

> It sought public affirmation of the lie that the human person is an autonomous blob of Silly Putty unconstrained by nature or biology, and that marriage, sexuality, gender identity, and even the unborn child must yield to the erotic desires of liberated adults. In this way, the Sexual Revolution was more like the French Revolution, seeking to destroy rather than restore.

a. **Please explain in writing what you meant by this passage.**

The article was published in a journal focused on philosophy and the aforementioned paragraph summarizes the philosophy, teleology, and phenomenology of existentialists who influenced the 20th Century Sexual Revolution in Europe and the United States; more specifically, it was written to quickly summarize or encapsulate the self-definition views of French existentialists Simone de Beauvoir and Jean-Paul Sartre.

b. **You wrote this passage in a section of your article that you subtitled "The Long War Ahead." What is the war ahead that you were referencing?**

It was a metaphor for the continuing political and legislative contests between supporters and opponents of policies related to sex and marriage. The use of martial metaphors is common in American politics; thankfully, "campaigns," "battlegrounds," "occupations," and "wars" are rarely *literal* in American politics.

As a District Court judge, though, I would not be an advocate for clients or a particular policy but instead be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

6. On November 14, the Committee received a letter from 35 LGBT advocacy organizations opposed to your nomination as well as the nomination of Kyle Duncan to the 5th Circuit. The letter says:

> Mr. Duncan's and Mr. Kacsmaryk's deep professional commitment to resisting equal rights for LGBT people, as well as their public statements to that effect, inspire no confidence that they could be fair and impartial when adjudicating key legal questions affecting the lives of LGBT people.

The letter went on to say:

> Our concern is not just about these nominees' extremist views and willingness to gut landmark decisions that form the basis of all protection for LGBT people. Our concern goes further than that. These nominees have challenged LGBT peoples' right to form families at all, and argued expressly that the families that they have formed are less legitimate than other families.

Do you believe that your past work on issues involving LGBT rights creates the appearance of a conflict of interest that would warrant your recusal from cases involving these issues, if you are confirmed?

28 U.S.C. § 455(a) requires a federal judge to "disqualify himself in any proceeding in which his partiality might be questioned." 28 U.S.C. § 455(b) lists additional grounds for recusal. If I am confirmed, I will apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics.

7. On October 14, 2014, which was prior to the *Obergefell* decision, you contributed to a blog post for the Liberty Institute criticizing the Supreme Court for declining to review appeals from five states that had legalized same-sex marriage. You are quoted at that time saying:

> By declining to review appeals filed by five states, the Supreme Court abdicated its sworn responsibility to uphold the constitutional rights of millions of citizens to define marriage as the sexually complementary union of one man and one woman serving the proven state interest of binding biological fathers to mothers and their children.

   a. **Please explain the nature of this constitutional right that you referenced to define marriage.**

      I do not recall making the above-listed quote. That said, the quote makes reference to the Supreme Court's declination of petitions filed by "five states" seeking review of their marriage laws. Consequently, the underlying substantive issues are now likely controlled by the Supreme Court's holding in *Obergefell*. If confirmed, I will fully and faithfully apply all Supreme Court precedent—including *Obergefell*.

   Later in this blog post, you are quoted saying:

> Though the citizens of the 50 states have not endured a *Roe*-style national upheaval, traditional marriage is suffering death by a thousand cuts as activist District Court and Circuit judges are misreading *Windsor* and misreading the text and history of the Constitution to effect social change via judicial fiat. Advocates of same-sex marriage understandably perceive that American society is at a tipping point, <u>but it is not the job of the federal judiciary to make the final push, to ratify popular trends through a mendacious re-writing of the Constitution</u>.

   b. **Is it still your view that nationwide same-sex marriage came about through a mendacious re-writing of the Constitution?**

      I do not recall making the above-listed quote. That said, based on my reading of the quote, I believe that the underlying substantive issues are likely controlled by the Supreme Court's opinions in *Windsor* and *Obergefell*. If confirmed, I will fully and faithfully apply all Supreme Court precedent—including *Windsor* and *Obergefell*.

8. In the Liberty Institute's October 14, 2014 blog post, you are quoted saying the following: "Learning from the pro-life movement, the pro-marriage movement must prepare for the long war: fight for the right to remain in the public square, earn conscience protections for religious dissenters, and collect the social data for traditional marriage that will win the case 40 years from now." **Please explain in writing what you meant by this.**

I do not recall making the above-listed quote. That said, the quote makes reference to "conscience protections for religious dissenters." That said, my public writings, statements, and comments reflect a common thesis on this policy point: narrow and particularized exceptions or accommodations for religious persons and conscientious objectors are standard in American history.

Regardless, a District Judge does not advocate for particular policies but instead is bound by oath to faithfully and impartially read and apply legislation as it is written and apply all Supreme Court and Fifth Circuit precedent.

9. On June 24, 2015, you wrote an article entitled "*The Abolition of Man…and Woman*" in which you noted that the Supreme Court would decide the *Obergefell* case in the next few weeks and speculated whether five justices would "invent a constitutional right to same sex marriage." **Do you think that the *Obergefell* majority invented a constitutional right in that case?**

   As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the merits or demerits of a particular Supreme Court opinion. *See, e.g.*, Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1, Commentary. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Obergefell*.

10. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

    The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's Circuit Court nominees, including Joan Larsen, David Stras, and others.

    a. **Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

       As a pending nominee to the federal judiciary, I cannot and should not comment on political or policy matters. *See, e.g.*, Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity"); Canon 1, Commentary.

    b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

       Please see my response to Question 10(a).

c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my response to Question 10(a).

11.

a. **Is waterboarding torture?**

It is my understanding that Congress enacted legislation for the express purpose of stating clearly that waterboarding as illegal under U.S. law.

b. **Is waterboarding cruel, inhuman and degrading treatment?**

Please see my response to Question 11(a).

c. **Is waterboarding illegal under U.S. law?**

Please see my response to Question 11(a).

12. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on "political questions"?**

Pursuant to Article II, Section 2, Clause 2 of the United States Constitution, the President nominates judges to the Article III judiciary "with the advice and consent of the Senate." Concurrently, nominees must maintain the independence and impartiality of an Article III judiciary that exercises "neither force nor will but merely judgment." The Federalist No. 78. The balance inheres in the separation of powers.

13. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

As a pending nominee to the federal judiciary, I cannot and should not comment on political questions. *See, e.g.*, Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity"); Canon 1, Commentary.

14. In your questionnaire you list yourself as having been a member of the Federalist Society since 2012.

a. **Why did you join?**

I joined The Federalist Society in law school because it provides an open forum for debate and discussion of timeless and timely topics: the Constitution, the Separation of Powers, the role of the Judiciary, and pending Supreme Court cases.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great

judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

As a pending nominee to the federal judiciary, I cannot and should not comment on political questions. *See, e.g.*, Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity"); Canon 1, Commentary.

c. **Please list each year that you attended the Federalist Society's annual convention.**

It is my recollection that I attended the Federalist Society's National Lawyers Convention each year from 2012 to 2017.

d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

After attending the opening sessions of the National Lawyers Convention on November 16 and November 17, I returned to Texas to attend my daughter's birthday party. I did not attend the event featuring Attorney General Jeff Sessions.

15.

a. Can a president pardon himself?

I have never had occasion to research this question. If confirmed and confronted with the question, I would research and analyze the text of the Constitution, any relevant federal statutes, all relevant Supreme Court and Fifth Circuit cases, consider the arguments of the parties before me, and discuss the question with law clerks.

b. What answer does an originalist view of the Constitution provide to this question?

I have not had occasion to research this question.

c. If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?

Were the original public meaning unable to be determined using the text, structure, and history of the Constitution, a judge should then apply longstanding and accepted canons of interpretation and refer to contemporaneous writings like dictionaries and treatises to ascertain the meaning of the text.

16. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

When I served as an Assistant United States Attorney, I frequently experienced empathy for all of the above listed persons. It is the natural response. That said, a District Judge swears an oath to "administer justice without respect to persons, do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent … under the Constitution and laws of the United States." 28 U.S.C. § 453.

Nomination of Matthew Kacsmaryk to the
United States District Court for the
Northern District of Texas
Questions for the Record
Submitted December 20, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

    Yes. The baseball metaphor (imperfectly) describes an essential element of the separation of powers set forth in the Constitution: Article III judges should read and apply the law as written by the Article I branch and executed by the Article II branch—not *rewrite* the law to fit their own policy or political preferences.

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

    The judge should consider only those "practical consequences" that expressly inhere in the text of a particular statute or legal doctrine. For example, the standard for entering a preliminary injunction requires a judge to consider, among other things, whether there is "a substantial threat that [a person] will suffer irreparable harm if the injunction is not entered." *Bluefield Water Ass'n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 252-53 (5th Cir. 2009).

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

    No. Both the Supreme Court and the Fifth Circuit have held and explained that Rule 56 requires the judge to determine if a "genuine dispute as to a material fact exists" as an *objective* matter. *See Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 350 (5th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). The Supreme Court has further emphasized that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

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

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

When I served as an Assistant United States Attorney, I frequently experienced empathy for *all* the persons impacted by the underlying criminal conduct: the victim, victim's family, defendant, defendant's family, and the law enforcement professionals who investigated, prosecuted, and incarcerated the defendant. That said, a District Judge swears an oath to "administer justice without respect to persons, [to] do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent … under the Constitution and laws of the United States." 28 U.S. Code § 453.

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

See Response to Questions 1(b) and 2(a).

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

No.

4. What assurance can you provide this Committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

In response to Question 25 of the Questionnaire for Judicial Nominees to this Committee, I described my extensive pro bono experience:

"During my time at Baker Botts, I maintained an active pro bono docket. In five years, I billed over 700 pro bono hours on behalf of a diverse array of clients, including: a Moroccan immigrant seeking to finalize an international adoption under the Hague Service and Adoption Conventions; a Waxahachie ISD student who was punished for wearing a "John Edwards for President" tee shirt; a predominantly African-American church in Wichita Falls that was wrongly denied a tax-exemption and parsonage exemption; and low-income Dallas residents facing unlawful eviction. In 2005, I received the Baker Botts *Opus Justitiae* Award for Outstanding Commitment to Pro Bono Work.

At First Liberty Institute, all clients are assisted on a pro bono basis, and all money recovered is either returned to the client or retained by the 501(c)(3) non-profit entity to defray court, legal research, or related costs, consistent with best practices for public interest law firms. During my time as Deputy General Counsel, I have assisted hundreds of individual or institutional church, ministry, school, and student clients."

In summary, I have dedicated much of my legal career to uphold the constitutional, statutory, regulatory, and international law rights of the "little guy," consistent with the rule of law.

That said, a District Judge swears an oath to "administer justice without respect to persons, [to] do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent … under the Constitution and laws of the United States." 28 U.S. Code § 453.

a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

   On April 6, 2017, I gave a CLE presentation entitled: "*Lawyering as a Vocation: Doing Well in Order to Do Good*." On Slide 22 of that presentation (provided to this committee), I taught that Texas Disciplinary Rule of Professional Misconduct § 3.02 is consonant with the virtue of *temperance* because it requires Texas attorneys to "minimize the burdens and delays of litigation" and states that a Texas attorney "shall not take a position that unreasonably increase the costs or other burdens of the case or that unreasonably delays resolution of the matter."

   Consistent with the Federal Rules of Civil Procedure, Federal Rules of Evidence, and the Local Rules of the United States District Court for the Northern District of Texas, a District Judge should make certain that litigants are not abusing the discovery process or filing vexatious motions.

5. You have written and advocated extensively against the interests of the LGBTQ community, including by opposing protections against discrimination based on sexual orientation and gender identity. Given this track record, many people are concerned that, as a district court judge, you will be predisposed to rule against LGBTQ interests. Do you understand why people have those concerns? Beyond giving a commitment to neutrally apply the law, can you point to any specific examples in your career that reflect your capacity to act objectively in this issue area?

   As Deputy General Counsel to First Liberty Institute, my client advocacy, legal commentary, and public comments focused on narrow, particularized exceptions or accommodations for religious persons or conscientious objectors who cannot participate in select activities, procedures, or practices—within the architecture of the Constitution, federal law, state law, or administrative law.

   As an Assistant United States Attorney, I was bound by oath to enforce the laws of the United States—including 18 USC § 249, the federal hate crime legislation. In that capacity, I served as a CLE instructor on *Batson* procedures and policies—including the Department of Justice policy applying *Batson* to sexual orientation. I served under Republicans and Democrats, and received "outstanding" performance ratings every year.

   If I am confirmed, I will be bound by a similar oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me." 28 U.S.C. § 453. I will do so.

Senate Judiciary Committee
"Nominations"
Questions for the Record
December 13, 2017
Senator Amy Klobuchar

Questions for Matthew Kacsmaryk, Nominee to the United States District Court for the Northern District of Texas

In 2015, you filed an amicus brief in *Obergefell v. Hodges* urging the Court to find that there is no nationwide right to same-sex marriage and commenting on what you described as the danger of "religious dissenters from same-sex marriage" being "silenced by state actors." You also asserted that legalizing same-sex marriage would "inevitably…exacerbate" conflicts between supporters of same-sex marriage and those who oppose it on religious grounds, and that it would "result in additional violations of free speech rights."

- How would legalizing same-sex marriage result in violations of free speech rights, and is it your view that this has happened since the Court's ruling in 2015?

  Please see my responses to Question 6 from Senator Feinstein.

- Will you commit to upholding the precedent established by the Supreme Court in *Obergefell* if you are confirmed as a federal judge?

  Yes. *Obergefell* is a precedent of the Supreme Court and therefore binding on all lower federal courts. If confirmed, I will fully and faithfully apply Supreme Court precedent.

Nomination of Matthew J. Kacsmaryk, to be United States District Judge for the Northern District of Texas
Questions for the Record
Submitted December 20, 2017

QUESTIONS FROM SENATOR COONS

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

   If confirmed, I would consider the factors set forth in the Supreme Court and Fifth Circuit cases that have explained the scope and extent of the Fourteenth Amendment. *See, e.g.*, *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

      Yes.

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

      Yes. As set forth in *Glucksberg*, the court should "examin[e] our Nation's history, legal traditions, and practices," as evidenced for instance by long-established state legislative and judicial practices, by the "Anglo-American common law tradition," and by American colonial practices. 521 U.S. at 710-16.

      Furthermore, the District Judge is subordinate to two *superior* courts—I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

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

      Yes. The District Judge is subordinate to two *superior* courts; I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent. I would consider, but not be bound by, out-of-circuit precedent, which is merely *persuasive* authority.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

Yes. The Supreme Court has explained that courts are bound to apply not only the result of binding precedent but also its governing rationale. *See, e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66-67 (1996) (collecting decisions).

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

Both *Casey* and *Lawrence* are binding precedents of the Supreme Court, and I would apply them fully and faithfully as well as all other applicable precedents.

f. What other factors would you consider?

Please see my response to Question 1.

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

It is well settled that the Equal Protection Clause of the Fourteenth Amendment applies to discrimination on the basis of sex as well as race. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) ("[T]his Court underscored that a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification.").

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

If confirmed and serving as a District Judge, I would respond that this question is purely academic and not relevant to my determination. In contrast to law professors who theorize on such subjects or Supreme Court Justices who adjudicate novel questions, the District Judge is subordinate to two superior courts. I would be bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent.

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

I have not researched the question and do not know why the litigation culminating in *United States v. Virginia* was not filed until the 1990s.

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

Obergefell held that the Fourteenth Amendment requires same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." 135 S. Ct. at 2607.

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

Because this question is currently pending in federal courts, I am precluded from stating any opinion under the Canons applicable to judicial nominees. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

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

The Supreme Court recognized such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

The Supreme Court recognized such a right in cases such as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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

The Supreme Court recognized such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

See Responses to Questions 3(a), 3(b), 3(c), and 3(d).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

If confirmed to serve as a District Judge, I would be bound by oath to faithfully apply Supreme Court and Fifth Circuit precedent on the admission and consideration of evidence on changing societal standards.

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

Generally, a federal district court may consider expert evidence of such matters where it may assist the trier of fact in resolving a question at issue and where the evidence meets the standards of reliability set forth by governing Supreme Court precedent. *See, e.g*., *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579 (1993).

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

a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

It is my understanding that preeminent constitutional scholars studied this issue and ascertained that *Brown* is entirely consistent with originalism. *See, e.g*., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). If confirmed, I would view the question as purely academic, given the binding force of *Brown* under Supreme Court and Fifth Circuit precedent.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited December 19, 2017).

I would agree that it can be difficult to fully ascertain the original public meaning of select constitutional provisions or phrases. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) . Furthermore, I agree that it can be difficult to apply the original public meaning to modern technology. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (applying Fourth Amendment to infrared heat imaging).

That said, the difficulty of the task does not and should not alter the *process* of constitutional interpretation: (1) ascertain the original "public meaning" using the text, structure, and history of the constitution; (2) where the text, structure, and history are unclear, apply longstanding and accepted canons of interpretation; and (3) where the canons yield conflicting results, refer to contemporaneous writings like dictionaries and treatises to better ascertain the original "public meaning"—but never to override, invert, or subvert the plain text.

In any event, a District Judge for the Northern District of Texas is first and foremost bound by oath to faithfully apply Supreme Court and Fifth Circuit precedent.

6. In August 2016 you signed on to a letter saying that transgender identity is a "psychological *condition* in need of *care*, not a category of *persons* in need of special legal *protection*."

   a. Will you now acknowledge that identifying as transgender is not a mental illness?

      Please see my response to Question 10(c) of Senator Feinstein.

   b. How can transgender litigants trust you to properly uphold their rights given that you previously asserted that they were in need of care, not "special legal protection"?

      Please see my response to Question 10(e) of Senator Feinstein.

7. In the amicus brief you filed in *Obergefell v. Hodges*, you asserted that, "Religious dissenters from same-sex marriage have been silenced by state actors and thereby denied access to the marketplace." In *Employment Division v. Smith*, 494 U.S. 872 (1990), Justice Scalia stated, "Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." (Citation omitted.)

   a. Do you agree that a neutral law of general applicability that prohibits discrimination on the basis of race, religion, national origin, sexual orientation, and gender identity in public accommodations is subject to rational basis review?

   b. What precedent applies when evaluating a religious objection to a nondiscrimination law based on opposition to racial integration?

   c. What precedent applies when evaluating a religious objection to a nondiscrimination law based on opposition to same-sex relationships?

      If confirmed, I will apply the standard of review discerned and declared in the relevant Supreme Court and Fifth Circuit precedents.

8. You have defended objections to the Affordable Care Act's contraceptive mandate based on religious objections.

a. Do you agree that contraceptives serve a valid health purpose?

As counsel to clients in cases in the Fifth and Eleventh Circuits, I argued that my clients were entitled to injunctive and permanent relief from an ACA provision that imposed a $100 per-day per-beneficiary fine. That said, a District Judge does not advocate for clients but instead is bound by oath to faithfully apply all Supreme Court and Fifth Circuit precedent—including *Hobby Lobby* and *Zublik*.

b. Do you agree that women can face economic hardship if contraceptives are not covered by their health plan?

Please see my response to Question 8(a).

9. As a district court judge, you would have a substantial criminal docket, and criminal sentencing will be among your most weighty responsibilities. You previously submitted an amicus brief asserting that secular prison programs are not effective and referencing a "widely cited study" for the conclusion that "secular prison reform programs are effectively worthless."

a. Is it currently your view that secular anti-recidivism programs are "effectively worthless"?

No. My amicus brief in *Holt v. Hobbs* argued that Congress enacted RLUIPA to broadly protect the Free Exercise rights of prisoners, including Muslims.

b. Will you utilize secular anti-recidivism programs in criminal sentencing orders?

Because this question relates to sentencing matters that are pending or may be pending in the near future, I am precluded from stating an opinion under the Canons applicable to judicial nominees. *See* Canon 3(A)(6), Code of Conduct for United States Judges. That said, it is my understanding that District Judges are authorized to consider recidivism programs—secular or religious—approved by the courts, the Bureau of Prisons, and the United States Sentencing Commission.

10. Do you agree that it is unconstitutional to prevent some or all Muslims from entering the country based on religion?

The Supreme Court twice affirmed the "plenary power" of Congress to regulate immigration. *Fong Yue Ting v. United States*, 149 U. S. 698 (1893); *Kleindienst v. Mandel*, 408 U.S. 753 (1973). But the Supreme Court has never expressly held that said "plenary power" might be exercised to bar entry to an entire religion.

Questions for the Record for Mr. Matthew Kacsmaryk
Submitted by Senator Richard Blumenthal
December 20, 2017

1. In April 2015, you testified before the Texas House of Representatives in support of a bill, HB 3864, that would essentially provide a license to discriminate by allowing faith-based adoption agencies to refuse to place children with same-sex couples. You noted in your Questionnaire that you did not submit written testimony or retain a copy of your handwritten notes, and the Committee was unable to find recordings of the testimony. You provided a cursory description of your testimony during your nomination hearing.

   a) Can you please describe in detail your testimony in support of this Texas bill?

   From what I recall, I testified that First Liberty Institute represented faith-based adoption agencies that were supportive of the legislation and that family and church friends had personally benefitted from the services provided by faith-based agencies. I also testified that the core conscience clause was consistent with the Texas Constitution and the Texas Religious Freedom Restoration Act and that other states had passed similar legislation after Catholic Charities ceased its adoption operations in Massachusetts and the District of Columbia.

   As noted in the nomination hearing, the legislation cleared the Juvenile Justice & Family Issues Committee on a bipartisan 6-to-1 vote but was *not* enacted into law. In any event, a District Judge does not write or comment on legislation but instead is bound by oath to fairly and impartially read and apply legislation as written.

   b) Do you believe that adoption agencies should be allowed to deny adoptions to same-sex couples?

   Because there is pending litigation on a similar matter arising under the Establishment and Equal Protection Clauses of the United States Constitution, *see, e.g.*, *Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017), I am precluded from stating any opinion under the Canons applicable to judicial nominees. Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.")

   c) If so, on what basis should they be able to deny adoptions to same-sex couples?

   See Response to Question 1(b).

   d) Should they be able to deny adoptions to couples who profess a different religion?

   See Response to Question 1(b).

   e) Should they be able to deny adoptions to couples who are racial minorities?

   It is my understanding that the Multiethnic Placement Act (MEPA) and Interethnic Placement Act (IEPA) forbids consideration of "race, color, or national origin" in federally funded adoption and foster care. First Liberty Institute does not and will not represent any faith-based adoption agency that fails to comply with MEPA and IEPA or equivalent state laws.

2. In a 2015 article entitled "*The Inequality Act: Weaponizing Same-Sex Marriage*," you expressed contempt for the decades-long movement to end legal restrictions on divorce, abortion rights, and LGBT equality. You described the leaders of these movements as "sexual libertines" acting on the basis of "elitist postmodern philosophy." In describing the movements themselves, you wrote that they:

> "sought public affirmation of the lie that the human person is an autonomous blob of Silly Putty unconstrained by nature or biology, and that marriage, sexuality, gender identity, and even the unborn child must yield to the erotic desires of liberated adults."

a) Is it a "lie" to say that women and LGBT individuals should get to make their own decisions on deeply personal questions—like whether and with whom to get married, or when and whether to bear children?

Please see my response to Question 5(a) of Senator Durbin.

b) Do you think your writings reveal an animus toward LGBT rights and reproductive rights?

No. As Deputy General Counsel to First Liberty Institute, my client advocacy, legal commentary, and public comments focused on narrow, particularized exceptions or accommodations for religious persons or conscientious objectors who cannot participate in select activities, procedures, or practices—within the architecture of the Constitution, federal law, state law, or administrative law.

c) What assurances can you provide that litigants in an LGBT rights or reproductive rights case would get a fair hearing in front of a Judge Kacsmaryk?

Please see my response to Question 10(e) of Senator Feinstein.

3. In July 2014, you wrote a post for the Liberty Institute opposing an Obama Administration executive order that prohibited government contractors from discriminating on the basis of sexual orientation and gender identity. In that post, you wrote that the Obama Administration was exhibiting "blatant disregard for people of faith" with its "sexual revolution radicalism and intolerance" by issuing that executive order.

a) How do nondiscrimination protections for LGBT individuals exhibit "sexual revolution radicalism and intolerance"?

My commentary on Executive Order 13672 criticized the Obama Administration for refusing to include *exemptions* requested by faith-based ministries like the Salvation Army and Catholic Charities. These faith-based ministries were willing to comply with the non-discrimination requirements in the delivery of goods and services to all program-eligible recipients but sought written assurance that they retained "religious staffing" rights under Title VII and the DOL/OFCCP regulations and FAQs.

Regardless, a District Judge is not charged with writing or commenting on Executive Orders but instead is bound by oath to faithfully and impartially apply the law as written.

b) How do nondiscrimination protections for LGBT individuals display "blatant disregard for people of faith"?

See Responses to Questions 2(b) and 3(a).

c) Do you believe that government contractors should be permitted to discriminate on the basis of sexual orientation and gender identity?

See Responses to Questions 2(b) and 3(a).

d) Do you believe that government contractors should be permitted to discriminate on the basis of religion?

See Responses to Questions 2(b) and 3(a).

e) As a general matter, do you believe that taxpayer dollars should fund discrimination?

See Responses to Questions 2(b) and 3(a).

4. In a September 2015 radio interview, you commented on the Defense of Marriage Act and the then-recently decided *Obergefell* case. You said, "Nothing has typified the march towards so-called marriage equality than [*sic*] complete lawlessness. It has been a complete abuse of rule of law principles."

a) How has the effort to establish marriage equality been characterized by lawlessness?

Please see my response to Question 7(a) of Senator Feinstein.

b) How has it been an abuse of rule of law principles?

Please see my response to Question 7(a) of Senator Feinstein.

Prior to *Obergefell,* in October 2014, you wrote a blog post for the Liberty Institute suggesting that Justice Anthony Kennedy wanted to avoid writing the opinion that established marriage equality as the law of the land, writing that Justice Kennedy "does not want to author the *Roe v. Wade* of the 21st century."

c) What similarities do you see between *Roe* and *Obergefell*?

As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the merits or demerits of a particular Supreme Court opinion. *See*, *e.g.*, Canon 3(A)(6), Code of Conduct for United States Judges; Canon 1, Commentary. If confirmed, I will fully and faithfully apply all Supreme Court precedent—including *Roe* and *Obergefell*.

d) Why wouldn't a justice on the Court want to author a 21st century *Roe*?

Please see my response to Question 4(c).

In a June 2015 article, shortly before *Obergefell* was decided, you expressed concern that five justices would "invent a constitutional right to same-sex marriage" in that case.

e) Do you believe that the majority in Obergefell "invented" marriage equality?

Please see my response to Question 4(c).

Questions for the Record for Matthew Kacsmaryk

Senator Mazie K. Hirono

1. At the hearing, I asked you whether you believe there should be conscientious objection exemptions for judges based on your statement in 2016 addressing conscientious objection exemptions for religious dissenters. You, however, responded by addressing the issue of recusal.

   a. Yes or no, do you believe there should be conscientious objection exemptions for judges?

   If I am confirmed, I will fully and faithfully apply the law of recusal, including the Code of Conduct for United States Judges, 28 U.S.C. § 455, the Ethics Reform Act of 1989, and all applicable rules and orders of the United States District Court for the Northern District of Texas. In any case in which the law requires me to recuse, I will do so.

   b. Are there any issues for which you have conscientious objections based on religion?

   I cannot think of any cases or category of cases requiring recusal on grounds of conscience. If I am confirmed, I will fully and faithfully apply the law of recusal, including the Code of Conduct for United States Judges, 28 U.S.C. § 455, the Ethics Reform Act of 1989, and all applicable rules and orders of the United States District Court for the Northern District of Texas. In any case in which the law requires me to recuse, I will do so.

   c. If confirmed, would you be able to uphold rights related to same-sex marriage, emergency contraceptives, and LGBTQ issues based on precedent and the law without bias? If not, will you recuse yourself from matters involving these issues?

   I will apply all statutes, regulations, and rules as written, using accepted canons of interpretation and contemporaneous writing to resolve any ambiguities. If confirmed, I will be bound by oath to fully and faithfully apply all Supreme Court and Fifth Circuit precedent. Furthermore, I will be bound by oath to "administer justice without respect to persons, do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties." 28 U.S.C. § 453. I will do so.

2. In your September 2015 article in the *Public Discourse* entitled *The Inequality Act: Weaponizing Same—Sex Marriage*, you distinguished the fight between marriage equality and interracial marriage by pointing out that while "[s]ome southerners wrapped their racist politics in the rhetoric of religion," it was a "larger coalition" of religious groups that "brought an end to 'racial purity' laws using direct appeals to shared religious principles." Alluding to *Roe v. Wade* and *Obergefell v. Hodges*, you contrasted what you described as the religious-based Civil Rights Movement and the Sexual Revolution.

a. Do you believe that women's rights and equal rights based on sexual orientation and gender identity are less valid than equal rights based on race and ethnicity because you believe the latter is based on "religious principles"?

No.

As noted in my nomination hearing, the above-referenced article was published in a journal that is focused on philosophy. The aforementioned paragraphs summarized the philosophy, teleology, and phenomenology of existentialists who influenced the 20th Century Sexual Revolution in Europe and the United States, as contrasted with those of the Protestant, Catholic, and Evangelical ministers who influenced the 20th Century Civil Rights Movement. *E.g.*, Martin Luther King, Jr., Southern Christian Leadership Conference (SCLC).

This historical evidence was marshaled to support my thesis that the two movements were coterminous in time and duration but had "different origins, different leaders, different objectives, and different legacies." This thesis and commentary was political and philosophical in nature, not jurisprudential.

b. Do you believe there is constitutional justification for equal treatment of women? Do you believe there is constitutional justification for the equal treatment of LBGTQ people?

If confirmed, I will be bound by oath to fully and faithfully apply all Supreme Court and Fifth Circuit precedent—including precedent affecting the aforementioned persons, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *United States v. Virginia*, 518 U.S. 515 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S.Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

3. I asked you at the hearing about the amicus brief you filed in *Zubik v. Burwell* where you argued that the Religious Freedom Restoration Act of 1993 (RFRA) was essentially a "super-statute." You responded that you did not recall that statement, but you asserted that RFRA should be given "full effect."

a. After reviewing the amicus brief, can you please clarify what you meant by the argument that RFRA is essentially a "'super-statute'—a statutory requirement of religious accommodation for all believers that 'cut[s] across all other federal statutes (now and future, unless specifically exempted) and modif[ies] their reach'"?

As I stated at my hearing, I was a co-author of the aforementioned amicus brief, but did not draft the "super-statute" language you refer to.

Upon review, I believe that the author meant that unlike other religious exemptions or accommodations that are moored to a *specific* statute, regulation, or rule and limited thereto, the Free Exercise protection of the federal RFRA "cuts across all other federal statutes" and may be overridden in just two circumstances: (1) Congress may "explicitly" except RFRA in a particular enactment or (2) the government proves on a case-by-case basis that a "substantial burden" on religious exercise furthers a compelling government interest using the least restrictive means. *See* 42 U.S.C. § 2000bb-3(b); § 2000bb-1(b); *see also Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

b. What did you mean by your statement that RFRA should be given "full effect"? What is the "full effect" of RFRA?

If I am so fortunate as to be confirmed, I will fully and faithfully apply all statutes, regulations, and rules as written and to give them their "full effect"—including the federal RFRA. In so doing, I am bound by oath to fully and faithfully apply all Supreme Court and Fifth Circuit precedent interpreting the federal RFRA.