IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-40428

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMLEY; DALLAS COUNTY, TEXAS; GORDON BENJAMIN; KEN GANDY; EVELYN BRICKNER,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; STATE OF TEXAS; RUTH R. HUGHS, in her Official Capacity as Texas Secretary of State,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

IMANI CLARK,

Intervenors Plaintiffs-Appellees,

v.

STATE OF TEXAS,

Defendant-Appellant.

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; RUTH R. HUGHS, in her Official Capacity as Texas Secretary of State;
STATE OF TEXAS,

Defendants-Appellants.

EULALIO MENDEZ, JR.; ESTELA GARCIA ESPINOSA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED,

Plaintiffs-Appellees,

v.

STATE OF TEXAS; RUTH R. HUGHS, in her Official Capacity as Texas Secretary of State,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI IN CASE NO. 2:13-CV-193
HONORABLE NELVA GONZALES RAMOS, U.S. DISTRICT JUDGE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Honorable Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellees	**Counsel**
• Marc Veasey • Jane Hamilton • Sergio DeLeon • Floyd Carrier • Anna Burns • Michael Montez • Penny Pope • Oscar Ortiz • Koby Ozias • John Mellor-Crumley • Ken Gandy • Gordon Benjamin • Evelyn Brickner • Dallas County, Texas • League of United Latin American Citizens	• Campaign Legal Center o J. Gerald Hebert o Danielle M. Lang o Mark P. Gaber • Brazil & Dunn LLP o Chad W. Dunn o K. Scott Brazil • Derfner & Altman o Armand G. Derfner • Law Office of Neil G. Baron o Neil G. Baron • Richards, Rodriguez & Skeith LLP o David Richards • Law Office of Luis Roberto Vera, Jr. o Luis Robert Vero, Jr.
• Mexican American Legislative Caucus, Texas House of Representatives • Texas State Conference of NAACP Branches	• Lawyers' Committee for Civil Rights Under Law o Jon M. Greenbaum o Ezra D. Rosenberg • The Brennan Center for Justice at NYU Law School o Myrna Pérez o Wendy Weiser o Eliza Sweren-Becker • Paul, Weiss, Rifkind, Wharton & Garrison LLP

Plaintiffs-Appellees	**Counsel**
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• Estela Garcia Espinosa • La Union Del Pueblo Entero, Inc. • Maximina Martinez Lara • Eulalio Mendez, Jr.	• Texas Rio Grande Legal Aid, Inc. ○ Susan F. Zinn ○ Alexander A. Stamm
• Imani Clark	• NAACP Legal Defense and Educational Fund, Inc. ○ Janai Nelson ○ Sam Spital ○ Leah C. Aden ○ Deuel Ross ○ Victoria Wenger • Wilmer Cutler Pickering Hale and Dorr LLP ○ Jonathan Paikin ○ Kelly P. Dunbar ○ Tania Faransso
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Defendants-Appellants	**Counsel**
• Greg Abbott, in his official capacity as Governor of Texas • Ruth R. Hughs, in her official capacity as Texas Secretary of State • State of Texas	• Office of the Attorney General for the State of Texas o Ken Paxton o Brent Webster o Kyle D. Hawkins o Matthew H. Frederick

/s/ Ezra Rosenberg
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Appellees respectfully request that Circuit Judge S. Kyle Duncan be disqualified from participating in this case. Judge Duncan, as an attorney in private practice at Schaerr Duncan LLP, authored two *amici* briefs *in this case* in favor of the State and opposed to Appellees—the first while this case was pending before this Court en banc, *see* Ex. 1 (En Banc Amicus Brief), and the second in support of the State's petition for a writ of certiorari, *see* Ex. 2 (Supreme Court Amicus Brief). In these *amici* briefs, Judge Duncan contended that SB14 did not violate Section 2 of the Voting Rights Act and, in the alternative, asked this Court and the Supreme Court to declare Section 2 unconstitutional. Appellees' victory before this Court sitting en banc, affirming the district court's Section 2 ruling, which Judge Duncan opposed as counsel for *amici* in this case, is central to the award of fees under review in this appeal.

Under the judicial recusal statute, 28 U.S.C. § 455, and the Code of Conduct for United States Judges, Judge Duncan's prior role as a lawyer in this case requires his disqualification. Moreover, in his Senate confirmation testimony, Judge Duncan committed to recuse from any matter in which his firm had submitted an amicus brief, *see* Ex. 3 at 50 (Questions for the Record ("QFR")), and broadly committed to recuse from "any litigation where I have ever played a role," Ex. 4 at 48 (Questionnaire).

ARGUMENT

Federal law requires that a judge "shall disqualify himself" in a number of specific circumstances, including "[w]here in private practice he served as a lawyer in the matter in controversy." 28 U.S.C. § 455(b)(2). When any of § 455(b)'s enumerated circumstances are present, disqualification "is mandated," *Liteky v. United States*, 510 U.S. 540, 567 (1994), and may not even be waived by the parties, 28 U.S.C. § 455(e). In addition to the enumerated circumstances of § 455(b), federal judges must also disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned." *Id.* § 455(a). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). A judge must be disqualified under § 455(a) "if a reasonable person, knowing all the facts, would harbor doubts concerning the judge's impartiality." *Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004). This Court has explained that § 455(a) "clearly mandates . . . a judge err on the side of caution and disqualify himself in a questionable case." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980); *see also Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 484-85 (5th Cir. 2003) (same).

The Code of Conduct for United States Judges provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned, including but not limited to instances in which . . . the judge served as a lawyer in the matter in controversy." Canon 3(C)(1)(b). Because Canon (3)(C)(1) states the "judge's impartiality might reasonably be questioned," if he or she participates in a proceeding after this type of prior involvement, the Canon ties back to Section 455(a), which *requires* disqualification when such reasonable questions are possible.

Finally, the Code also instructs judges to "avoid impropriety and the appearance of impropriety in all activities," Canon 2, and specifically to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," Canon 2(A). "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances . . . would conclude that the judge's honesty, impartiality, temperament, or fitness to serve as a judge is impaired." Commentary to Canon 2(A). Violations of the Code may, on their own, be sufficient to "destroy[] the appearance of impartiality and thus violate[] § 455(a)." *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 114-15 (D.C. Cir. 2001).

The Fifth Circuit's Internal Operating Procedures require disqualification whenever § 455 or the Code of Conduct for United States Judges is triggered. *See* Rules and Internal Operating Procedures of the U.S. Court of Appeals for the Fifth Circuit, Other Internal Operating Procedures at 46, available at

https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/5thcir-iop.

I. Judge Duncan's Disqualification is Mandatory Because He Served as a Lawyer in this Case.

This is not a complicated or borderline recusal case. Judge Duncan must be disqualified because "he served as a lawyer in the matter in controversy," 28 U.S.C. § 455(b)(2); *see also* Canon 3(C)(1)(b), representing *amici* in support of the State and opposed to Appellees before this Court and the Supreme Court. *See* Exs. 1 & 2. A judge may not adjudicate a case in which he previously participated as counsel. Even the courts that have adopted the most restrictive interpretation of the phrase "matter in controversy" in § 455(b)(2) have concluded that it applies at the very least to "litigation conducted under the same docket number." *Little Rock Sch. Dist. v. Pulaski Cty. Spec. Sch. Dist. No. 1*, 839 F.2d 1296, 1302 (8th Cir. 1988); *see also Blue Cross & Blue Shield of R.I. v. Delta Dental of R.I.*, 248 F. Supp. 2d 39, 44, 46 (D.R.I. 2003) (adopting "restrictive" view of Eighth Circuit); Order at 10, *Jones v. Governor of Fla.*, No. 20-12003 (11th Cir. July 27, 2020) ("If the judge participated in the same proceeding or case in his or her prior job, disqualification is required.").[1]

[1] Other courts have adopted an even more expansive view. *See, e.g.*, *Burke v. Regalado*, 935 F.3d 960, 1057 n.93 (10th Cir. 2019) (noting that if the judge "had been a lawyer in the same *or related* matter in controversy as the case now pending before him," recusal would be required) (emphasis added); *Preston v. United States*, 923 F.2d 731, 734-35 (9th Cir. 1991); *In re Rodgers*, 537 F.2d 1196, 1198 (4th Cir. 1976).

Appellees' Section 2 victory after trial, affirmed by this Court en banc, and their award of attorneys' fees now on appeal, occurred as part of a single, consolidated case under a single docket number. *See Veasey v. Abbott*, No. 13-CV-00193. Judge Duncan participated as a lawyer in the same case—on review from the same docket number—that he is currently set to hear as a judge on appeal. Federal law and the Code of Judicial Conduct forbid his participation.

That prohibition extends to Judge Duncan's role as counsel for *amici*. Section 455(b)(2) applies to any circumstance in which a judge "served as a lawyer" in the case, not merely to his service as counsel for the plaintiffs or defendants. Judge Duncan entered a Notice of Appearance as an attorney in this case on April 25, 2016. *See* Notice of Appearance, *Veasey v. Abbott*, No. 14-41127 (5th Cir. Apr. 25, 2016). He appeared again on behalf of *amici* in his October 27, 2016 Supreme Court brief. *See* Ex. 2. A judge who enters an appearance in a case—regardless of the role of his or her client—"serve[s] as a lawyer" in the case. *See* 28 U.S.C. § 455(b)(2); Canon 3(C)(1)(b); *cf.* Guide to Judiciary Policy Ethics Adv. Op. No. 85, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf (noting that a judge who is a member of an organization or bar association need not disqualify based upon an *amicus* brief "*so long as* the judge has not participated in

the development of the bar association's position" advanced in the *amicus* brief (emphasis added)).[2]

Judge Duncan was a lawyer in this case. Federal law and the Code of Judicial Conduct preclude him from also to being a judge in this case.

II. Judge Duncan Must Be Disqualified Because an Objective Observer Would Doubt His Impartiality.

Judge Duncan must be disqualified because "his impartiality might reasonably be questioned," 28 U.S.C. § 455(a); *see also* Canon 3(C)(1), by his prior role as an attorney in this case opposed to Appellees. Section 455(a)'s disqualification requirement "expand[s] the protection" of the specifically required disqualification scenarios of § 455(b). *Liteky*, 510 U.S. at 552. Congress's goal in enacting § 455(a)'s catchall disqualification provision was to "avoid even the appearance of partiality." *Patterson*, 335 F.3d at 484 (quoting *Liljeberg*, 486 U.S. at 860); *Jackson v. Valdez*, No. 20-10344, 2021 WL 1183020, at *3 (5th Cir. Mar. 29, 2021) (same). "Thus, recusal may be required even though the judge is not actually partial." *Patterson*, 335 F.3d at 484.

[2] Indeed, an *amicus* brief *not authored* by a judge can necessitate a judge's recusal. *See, e.g.*, *Variable Annuity Life Ins. Co. v. Clark*, 13 F.3d 833, 835 (5th Cir. 1994) (noting that "counsel are advised that the participation as amici curiae . . . can result in the recusal of judges because of the identity of the amici and/or their counsel") (Smith, J., dissenting from denial of reh'g *en banc*); *see* Order at 2, *Jones v. Governor of Fla.*, No. 20-12003 (11th Cir. July 21, 2020) (Eleventh Circuit Judge Brasher recusing himself from case because his prior employer had filed an amicus brief in the case); 5th Cir. L.R. 29.4.

Judge Duncan's disqualification is required under § 455(a) and Canon 3(C)(1) because an objective observer would doubt his impartiality for several reasons. Namely, an average, reasonable person would conclude that it is unfair for one person to act as both advocate and judge in the same case, particularly where that person previously argued that plaintiffs should lose on the merits and would now adjudicate their status as prevailing parties, and where failure to recuse would contradict his commitments to the Senate Judiciary Committee. *See In re Faulkner*, 856 F.2d 716, 720 (5th Cir. 1988) (per curiam) (holding that standard under § 455(a) is "the view of the average, reasonable person").

* * *

This is not a close question. Judge Duncan was a lawyer who advocated against Appellees in this case. He cannot also be a judge in this case. Given the standard—requiring disqualification in close cases—disqualification is mandatory here.

CONCLUSION

For the foregoing reasons, Appellees' motion should be granted.

April 22, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. I certify that, on April 22, 2021, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

2. I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(A) because it contains 1,690 words.

3. I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared using 14-point, proportionally spaced, serif typeface in Microsoft Word.

Date: April 22, 2021

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EXHIBIT 1

No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMMEY; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, *Plaintiffs-Appellees*,

TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, *Intervenor Plaintiffs-Appellees*,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

(caption continued on inside cover)

On appeal from the U.S. District Court, Southern District of Texas
Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348

BRIEF FOR TWENTY-SEVEN U.S. SENATORS AND REPRESENTATIVES FROM TEXAS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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(caption continued)

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK, *Intervenor Plaintiffs-Appellees*,

v.

STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, *Plaintiffs-Appellees*,

v.

CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOZA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED, *Plaintiffs-Appellees*,

v.

STATE OF TEXAS; CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

No. 14-41127, *Marc Veasey, et al. v. Greg Abbott, et al.*

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

U.S. Senators
Hon. John Cornyn
Hon. Ted Cruz

U.S. Representatives
Hon. Brian Babin
Hon. Joe Barton
Hon. Kevin Brady
Hon. Michael C. Burgess, M.D.
Hon. John Carter
Hon. K. Michael Conaway
Hon. John Culberson
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Hon. Kenny Marchant
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Hon. Randy Neugebauer
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Hon. John Ratcliffe
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

INTEREST OF THE *AMICI CURIAE*

Amici curiae are United States Senators and Representatives representing the State of Texas. They support efforts to ensure the integrity of and public confidence in the electoral process through the use of evenhanded and non-burdensome voter identification measures. They strongly believe SB 14 is one such effort that serves an important function in preserving fair elections in the State of Texas.[1]

INTRODUCTION

This case involves challenges by the United States and private parties to Texas's voter identification law, SB 14, which generally requires voters to present certain government-issued photo ID when voting in person. Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. Accepting all of plaintiffs' claims, the district court invalidated SB 14 on the grounds that the law "was enacted with a racially discriminatory purpose, has a racially discriminatory effect, is a poll tax, and unconstitutionally burdens the right to vote." *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015) (citing *Veasey v. Perry*, 71

[1] Some but not all parties to this appeal have consented to the filing of this *amicus* brief. In accordance with Federal Rule of Appellate Procedure 29(a), counsel for *amici* has filed a motion for leave to file this brief. No person or entity other than *amici* or their counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission.

F.Supp.3d 627, 633 (S.D. Tex. 2014)). Like Texas, *Amici* believe the district court erred in accepting any of these claims. *See* Suppl. En Banc Br. for Appellants, at 13-55 (Apr. 15, 2016). This brief focuses, however, on the claim that SB 14 has a discriminatory effect in violation of Section 2 of the Voting Rights Act. *See* 52 U.S.C. § 10301(a) (proscribing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color"). In reaching the conclusion that SB 14 has a discriminatory effect, the panel interpreted Section 2 in a way that departs from its text, misapplies controlling precedent, and would render Section 2 unconstitutional under the Fourteenth and Fifteenth Amendments.

Proper evaluation of SB 14 under the Voting Rights Act must take into account the settled benefits of voter identification laws. As recognized in *Crawford v. Marion County Election Board*, 533 U.S. 181 (2008), voter identification laws provide at least three related benefits that are "unquestionably relevant" to the State's interest in "protecting the integrity and reliability of the electoral process." *Id.* at 191 (plurality op.). First, voter identification laws "improve and modernize"

antiquated and inefficient election procedures, thereby "establishing a voter's qualification to vote," "ensur[ing] that citizens are only registered in one place," and fostering "orderly administration and accurate recordkeeping," by, for instance, cutting down on "inflated voter rolls." *Id.* at 191, 193, 196-97 (plurality opinion) (citing COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS § 2.5 (Jimmy Carter & James A. Baker, III, co-chairs) (2005) ("Carter-Baker Report")). Second, voter identification laws aid in "deterring and detecting voter fraud"—for instance by "counting only the votes of eligible voters" and preventing "in-person voter impersonation at polling places"—and thus help prevent fraud from "'affect[ing] the outcome of a close election.'" *Id.* at 191, 193-94, 195-96 (plurality opinion) (quoting Carter-Baker Report, at §2.5). Third, voter identification laws help "[s]afeguard[ ] voter confidence" and "encourage citizen participation in the democratic process," by "protecting public confidence in the integrity and legitimacy of representative government." *Id.* at 191, 195-96, 197; *see also, e.g., id.* at 230 (Souter, J., dissenting) (agreeing that States have a "legitimate interest in safeguarding public confidence").

Texas's SB 14 is an excellent example of a voter identification law that fosters each of these benefits through evenhanded, race-neutral, and non-burdensome means. Not only does Texas accept an array of state and federal documents to comply with SB 14,[2] but the Texas Legislature mandated that state officials issue one means of complying—a Texas election identification certification ("EIC")—to voters *for free*. *See* Tex. Transp. Code §521A.001(a)-(b) (Department of Public Safety "may not collect a fee" for an EIC); Tex. Health & Safety Code §191.0046(e) (providing that state and local officials "shall not charge a fee" to obtain supporting documents required for an EIC). Simply put, an application of Section 2 of the Voting Rights Act that would invalidate such a commonsense measure cannot be correct. The *en banc* Court should rule that SB 14 does not have a discriminatory effect in violation of Section 2 of the Voting Rights Act.

[2] *See* Tex. Elec. Code §63.0101 ("acceptable form[s] of photo identification" include a Texas driver's license, a Texas election identification certificate, a Texas personal identification card, a Texas handgun license, or a U.S. military identification card, citizenship certificate, or passport that contains the person's photograph).

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, contemplates two types of claims. One is a "vote-dilution" claim—a claim that, despite equal ballot access, districting practices unlawfully dilute minority voting power. The other is a "vote-denial" claim, which targets voting practices that unlawfully deny protected individuals the opportunity to cast ballots. This case only presents a "vote-denial" challenge to SB 14.

In a vote-denial challenge, Section 2 does not require States to maximize minority opportunities by eliminating the usual burdens of voting to overcome socioeconomic disparities. Nor does it invalidate voting practices because they "ha[ve] a disparate effect on minorities." *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). Instead, Section 2 prohibits states from imposing voting practices that actually cause minority voters to be disproportionately *excluded* from the political process. *See* 52 U.S.C. § 10301(b) (a Section 2 violation is shown if a State's political processes are not "equally open" to members of a protected class in that they have "less opportunity" than others to participate).

Given that high bar, it ought to be extremely difficult to mount a viable Section 2 challenge to a race-neutral law that, like SB 14, only defines *how* eligible voters go about voting. A regulation of the time, place, and manner of elections does not deny anyone the "opportunity" to vote, *see id.*; it merely regulates when, where, and how that opportunity must be exercised. For that reason, valid vote-denial challenges aimed solely at the *process* of voting are rare. Plaintiffs in this situation must show that a facially neutral electoral process is somehow not "equally open" and provides minorities "less opportunity" than other voters. *Id.*

The panel here adopted a radically different theory of Section 2. The panel invalidated Texas's race-neutral regulation of the time, place, and manner of voting through its voter ID law. It found that minorities are less likely to possess qualifying IDs because of underlying socioeconomic inequalities, which the panel predicted could lead to a disparity in minority voter participation. *Veasey*, 796 F.3d at 512-13. The panel thus concluded that Texas's race-neutral election process violates Section 2. *Id.* at 513. For several reasons, this novel theory contradicts both Section 2's plain language and Supreme Court and

Circuit precedent identifying the sort of discriminatory "results" proscribed by the statute.

First, Section 2 prohibits a regulation of the time, place, or manner of voting *only* if it "results" in minorities' having "less *opportunity*" to vote because the system is not "equally open" to them. 52 U.S.C. §10301. SB 14 does not do so, because, it does not *deny or abridge* anyone's right to vote; rather, it imposes only the "usual burdens of voting." *Crawford*, 553 U.S. at 198 (Stevens, J.).

Second, and relatedly, if the State's voting system *is* "equally open" and provides equal "opportunity," any relative shortfall in minority participation cannot be the "result" of, or caused by, any voting "practice" "imposed" by the State. As Justice Brennan emphasized in the seminal decision of *Thornburg v. Gingles*, a voting practice has a prohibited "result" only if the practice *itself* "proximately cause[s]" a disproportionate exclusion of minority voters. 478 U.S. 30, 50 n. 17 (1986).

Third, Section 2 plaintiffs must establish that the challenged practice results in less minority opportunity compared to what would result from an "*objective*" "benchmark," not compared to what would

result from a minority-maximizing alternative. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (opinion of Kennedy, J.). Here, however, the panel did not point to any "benchmark" of ID requirements, let alone a benchmark that is *objectively superior* to SB 14.

Finally, the panel's reading of Section 2 would render it unconstitutional. Requiring states not only to refrain from adopting laws that cause minority voters to have less opportunity (which Section 2 clearly does) but also to rearrange their laws to maximize or achieve proportional minority participation (as the panel required) would exceed Congress's power to enforce the Fifteenth Amendment's prohibition on intentional discrimination. Moreover, requiring States to base their laws on what most benefits minority voters, rather than on race-neutral considerations, or to act in a racially biased way to remedy societal disparities, would violate the Equal Protection Clause. The Court should avoid these grave constitutional concerns by rejecting the panel's interpretation of Section 2.

ARGUMENT

I. THE PANEL MISINTERPRETED SECTION 2 OF THE VOTING RIGHTS ACT

As originally enacted, Section 2 prohibited States from "impos[ing] or appl[ying]" any voting practice "to deny or abridge the right . . . to vote on account of race or color." That language paralleled the Fifteenth Amendment. And because the Fifteenth Amendment prohibits only "purposeful" discrimination, the Supreme Court concluded that Section 2 likewise prohibited only purposeful discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (plurality op.).

In 1982, however, Congress revised the law to make a showing of purposeful discrimination unnecessary. It amended what is now subsection (a) to prohibit States from imposing or applying voting practices "in a manner which *results in* a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Congress also added what is now subsection (b), which provides that

> [a] violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to

> participate in the political process and to elect representatives of their choice.

Id. § 10301(b). These changes reflected the belief that requiring Section 2 plaintiffs to show purposeful discrimination leads to "'unnecessarily divisive . . . charges of racism on the part of individual officials or entire communities,' . . . places an 'inordinately difficult' burden of proof on Plaintiffs, and . . . 'asks the wrong question.'" *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28, at 36 (1982)). The right question is whether the law causes minorities to be disproportionately excluded from voting, not why it was enacted. While this legislative change had the effect of expanding the scope of Section 2 liability, in this case the panel went far beyond what Section 2's language can bear.

A. Plaintiffs Must Show That Texas's Voter ID Law Excludes Minority Voters from the Political Process by Imposing Disparate Burdens

The text and history of Section 2 show that, in the vote-denial context at issue here, the law prohibits only those voting practices that disproportionately exclude minority voters from the political process. It does not require States to adopt practices to affirmatively enhance minority voting rates.

First, Section 2(a) provides that a voting practice may not be "*imposed or applied* by any State . . . in a manner which *results* in a denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Section 2 thus applies only when a State "impose[s] or applie[s]" a voting practice that "results in," or *causes*, a forbidden result. *See Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1554-56 (5th Cir. 1992); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989). It must be the *state-imposed voting practice* that causes the forbidden result. Thus, while Section 2 forbids state-imposed practices that disproportionately exclude minority voters, it does not reach disparities in voter participation resulting from other sources. *See, e.g., Frank*, 768 F.3d at 755 (emphasizing that a section 2 vote-denial claim must be supported by evidence of "discrimination by the [government] defendants").

Second, Section 2(b) provides that a challenger may show a violation of Section 2(a) by demonstrating that "the political processes . . . are not *equally open to participation* by members of a [protected class] . . . in that its members have less *opportunity* . . . *to participate* in the political process and to elect representatives of their

choice." 52 U.S.C. § 10301(b) (emphasis added). A political process is "equally open to participation" by members of all races if everyone "has the same opportunity" to vote free from state-created barriers that impose differential burdens. *Frank*, 768 F.3d at 755. As the Supreme Court has emphasized, "the ultimate right of § 2 is equality of *opportunity*." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (emphasis added). It does not require "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009). And, crucially, an opportunity does not become unequal simply because some groups "are less likely to *use* that opportunity." *Frank*, 768 F.3d at 753 (emphasis in original). For this reason, laws that provide an *equal opportunity* satisfy Section 2 regardless of whether they have *proportionate outcomes*.

Third, Section 2(a) prohibits only those voting practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). This language clarifies that Section 2 does not prohibit ordinary race-neutral regulations of the time, place, and manner of elections, because such

regulations do not deny or abridge anyone's right to vote. "Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). States must determine when and where voting must occur, how voters must establish their eligibility, what kind of ballots they must use, how the ballots must be counted, and so on. Shouldering these "usual burdens of voting" is an inherent part of voting. *Crawford*, 553 U.S. at 198 (Stevens, J.). And because such baseline requirements are an inherent part of the right to vote, they cannot be said to *deny or abridge* the right to vote. The same is true of photo ID laws, since they do not "'represent a significant increase over the usual burdens of voting.'" *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 204481, at *10 (M.D.N.C. Jan. 15, 2016) (quoting *Crawford*).

Fourth, for these reasons, Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. If Congress wanted to prohibit *all* disparate effects, it could have simply said so. "[T]here wouldn't have been a need for" subsection (b) to ask whether the political process is "equally open," or whether members of minority races have "less opportunity" to

participate. *Id.* at 753 (emphasis and internal quotations removed). Terms such as "impose," "denial," "abridgement," "equally open," and "less opportunity" show that Section 2 does not target just any disparate result; it targets only the disparate *exclusion* of minority voters caused by the voting practice. Such disparate exclusion can occur only if the state-imposed voting qualification disproportionately "denies" minorities the vote or if the state-controlled processes for voting disparately "abridge" the right to vote by imposing unequal burdens on minorities—such as making polling places relatively inaccessible to them.

Fifth, the legislative history of the 1982 amendments confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring in the judgment); *see*, *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment). The original version of the 1982 amendments proposed by the House of Representatives would have prohibited "all discriminatory 'effects' of voting practices." But "[t]his version met stiff resistance in the Senate." *Miss. Republican*

Exec. Comm. v. Brooks, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). The Senate feared that such a law would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Id.* Senator Dole stepped in with a compromise, which Congress eventually enacted. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). The key to this compromise was that it prohibited states from providing unequal voter *opportunity*, but did not require equality of political *outcomes*. Senate Dole assured his colleagues that, under the compromise, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . , or registering . . . ." 128 Cong. Rec. 14133 (1982). It would do violence to this legislative compromise to invalidate a voting practice that gives everyone equal access to the political process—again, Texas mandates that photo ID cards be provided to the public *for free*—based merely on whether members of some groups may happen to use that access more than others.

At bottom, the panel's theory fundamentally rewrites Section 2. It replaces a ban on *state-imposed barriers* to minority voting with an affirmative duty of *state augmentation* of minority voting. It converts a prohibition on *abridging* minority voters' right to vote into a mandate for *boosting* minority voter turnout. It transforms a guarantee of equal *opportunity* into a guarantee of equal *outcomes*. And it revamps a law about disproportionate *exclusionary* effects into a law about *all* disproportionate effects. None of this is consistent with the statutory text or the legislative compromise underlying its passage.

The consequences of the panel's interpretation vividly illustrate why Congress could not have intended it. If (as the panel says) Section 2 really forbids all voting practices under which majority and minority voters participate at different rates, it would "swee[p] away almost all registration and voting rules"—not just voter ID. *Frank*, 768 F.3d at 754. Indeed, the requirement of registration itself would be invalid if, hypothetically, someone could show that minority voters disproportionately find it difficult to assemble the documents that registration typically requires. Yet the practice of voter registration was ubiquitous in 1982 and dates to the 1800s. *See* Nat'l Conf. of State

Legislators, *The Canvass*, Voter Registration Examined (March 2012). It is unthinkable that, when Congress amended Section 2 in 1982, it meant to prohibit a voting practice such as registration—especially when not a single proponent, opponent, or commentator ever mentioned such an outcome anywhere in the 1982 Amendments' extensive and divisive legislative history. *See Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress'[s] silence in this regard can be likened to the dog that did not bark."). Any reading of Section 2 that would eliminate such a wide swath of hitherto uncontroversial voting laws must be rejected. Congress enacted Section 2 to end discrimination, not to put a stop to ordinary election laws that help ensure the integrity of the entire voting system.

B. Plaintiffs Must Show That Texas's Voter ID Law Proximately Causes the Disparate Burdening of Minority Voters

To violate Section 2, a voting practice must proximately cause harm to minority voters. That is so because Section 2 liability is established only if a voting practice "*imposed* . . . by [the] *State*" "*results in* a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Thus,

if the alleged "abridgement" "results" from something *other* than the *state-imposed practice*, Section 2 does not reach it.

Precedent confirms the force of this textual requirement. In *Thornburg v. Gingles*, Justice Brennan's majority opinion emphasized this requirement. Section 2, the Court stated, "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17. Applying this rule in the vote-dilution context, *Gingles* held that plaintiffs challenging at-large, multi-member districts must show, as a "necessary precondition[]" to establishing a potential Section 2 violation, that it was the state-imposed voting practice—*i.e.*, the multi-member electoral system—that caused the disparate exclusion of minority candidates from the relevant offices. *Id.* at 50. Section 2 plaintiffs accordingly must show that challenged vote dilution is *not* attributable to a general socioeconomic condition—*i.e.*, the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* If they cannot make that showing, then the state-imposed "*multi-member form* of the district cannot be responsible for minority voters' inability to elect its

[*sic*] candidates." *Id.* (emphasis in original). And if the voting procedure "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "*not assure racial minorities proportional representation*"—but only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17 (emphasis in original). It follows that, in the vote denial context, a Section 2 plaintiff must show that the alleged deprivation flows from a state-imposed voting practice rather than some factor not within the State's control.

That is why this Court has already rejected a Section 2 claim that was premised solely upon a statistical disparity in voter turnout. *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992). The Court made clear that Section 2 requires more than proof of a racial disparity; plaintiffs must prove that "the given electoral practice is responsible for" the prohibited discriminatory result. *Id.* at 1554. Likewise, the Fourth Circuit rejected a Section 2 challenge to Virginia's decision to select school-board members by appointment rather than election. Although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the

school boards," there was "no proof that the appointive process caused the disparity." *Irby*, 889 F.2d at 1358 (internal quotations removed). Instead, the disparity was attributable only to the reality that black people were "not seeking school board seats in numbers consistent with their percentage of the population." *Id.* Along similar lines, the Ninth Circuit explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation and quotation marks omitted), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

Here, Plaintiffs have not shown—and the panel did not find—that SB 14 proximately causes the exclusion of minority voters. Nor could it. For one thing, there was no proof that, following SB 14, "participation in the political process is in fact depressed among minority citizens"—a basic requirement of a Section 2 claim. *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993). For another, even if there were such proof, plaintiffs did not establish that SB 14

caused it. Under Texas law, every person has an equal right to vote and an equal right to secure free photo IDs. Even if some persons may choose not to take advantage of these opportunities, that provides no evidence that SB 14 is the proximate cause of this phenomenon. The panel thus erred in finding a Section 2 violation.

C. Plaintiffs Failed To Show—And The Panel Did Not Find—That Texas's Voter ID Law Harms Minorities Relative to an Objective Benchmark

To demonstrate that a voting practice violates Section 2, a challenger must also identify an "objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Holder*, 512 U.S. at 881 (opinion of Kennedy, J.). This requirement of an "objective standard" to select a benchmark follows from Section 2's text. Section 2(a) prohibits practices that result in the "denial or abridgement" of voting rights on account of race or color. The concept of abridgement "necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* In Section 2 cases, "the comparison must be made with . . . what the right

to vote *ought to be*." *Id.* The benchmark for measuring "how hard it should be" must be objective, not one that is purportedly superior only because it enhances minority voting power or participation. *Holder*, 512 U.S. at 880 (opinion of Kennedy, J.). In some cases, "the benchmark for comparison . . . is obvious." *Id.* For example, the effect of a poll tax can be evaluated by comparing a system with a poll tax to a system without one. In other cases, however, there may be "no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Id.* at 881. If that is so, then "the voting practice cannot be challenged . . . under § 2." *Id.*

In *Holder*, the Supreme Court rejected a Section 2 challenge asserting that the use of a single-member commission instead of a five-member commission "resulted" in vote dilution. The five-member alternative clearly would "enhance" minority voting strength because the minority community was large enough to elect one out of five commissioners, *id.* at 878. Nevertheless, there was "no principled reason" why the five-member alternative ought to be the "benchmark for comparison" as opposed to a "3-, 10-, or 15-member body." *Id.* at 881. This establishes that Section 2 plaintiffs must show that the State

has deprived minorities of voting opportunity compared to an "objective" alternative, not merely alternatives that would *enhance* minority participation.

In this case, the panel ignored this requirement altogether. It did not identify any objective benchmarks for the proper form of voter ID. Nor could it. The fifty states have chosen a cornucopia of methods to verify voters' identities. *See* NAT'L CONF. OF STATE LEGISLATURES, VOTER ID, *available at* http://www.ncsl.org/ research/elections-and-campaigns/voter-id.aspx (last visited Apr. 21, 2016). Thirty-three states require voters to show some form of ID at the polls. Of those, seventeen require photo ID; sixteen will accept non-photo ID. When a voter appears without proper ID, eleven states require voters to take additional steps. The remaining twenty-two states require state officials to act in some way. And those steps vary state-by-state. "The wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring in part). There is, in short, "no objective and workable standard for choosing a reasonable benchmark." *Id.* at 881 (opinion of Kennedy, J.).

It is no answer to say that Texas's voting practices harm minorities *relative to a conceivable alternative that would be better for minorities* such as non-photo ID. That is not how Section 2 works. It is always possible to hypothesize an alternative practice that would increase the minority voting rates. For example, one might speculate that a larger number of minority voters would vote if Texas required no ID at all and accepted voters' say-so about where they live. Yet Section 2 does not require Texas to adopt those alternatives for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

Nor do Texas's prior laws provide an appropriate benchmark, because such an approach would conflate Section 2 with Section 5 of the Voting Rights Act. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline of comparison "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—*i.e.*, whether a change

makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used to have* a particular practice in place does not make it the benchmark for a Section 2 challenge. *Holder*, 512 U.S. at 884 (opinion of Kennedy, J.).

At bottom, by ignoring the requirement of an objective benchmark, the panel converted Section 2 into a statute that requires States to adopt whichever voting regime would perfectly equalize the voting rates and voting power of minorities. The Supreme Court rejected this argument in *Holder*, and this Court should reject it here.

D. The Panel's Interpretation of Section 2 Would Violate the Constitution

In addition, the panel's approach raises serious constitutional questions. As Justice Kennedy has repeatedly emphasized, the Supreme Court has never confronted whether Section 2's "results" test complies with the Constitution. *See, e.g.*, *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 . . . is consistent with the requirements of the United States Constitution."); *DeGrandy*, 512 U.S. at 1028–29 (1994) (Kennedy, J., concurring in the judgment) (same). *Cf. Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (it would be a "fundamental

flaw" to require "consideration[] of race" in order to "compl[y] with a statutory directive" under the Voting Rights Act). Justice Kennedy's pointed reminders underscore that Section 2's results test teeters at the edge of constitutionality. Interpreting Section 2 to prohibit Texas's race-neutral and commonsensical voting laws, and to require Texas to adopt new laws for the racial purpose of amplifying minority voting, would surely push it over the ledge.

First, if the panel's interpretation of Section 2 is accepted, the statute would exceed Congress's power to enforce the Fifteenth Amendment. The Fifteenth Amendment prohibits only "purposeful discrimination"; it does not prohibit laws that only "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights v. Metrop. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)). Of course, Congress has power to "enforce" that prohibition "by appropriate legislation." U.S. Const. amend. XV, § 2. This allows Congress to proscribe more than purposeful discrimination, but only if the law is a "congruent and proportional" "means" to "prevent or remedy" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). The enforcement

power does not allow Congress to "alte[r] the meaning" of the Fifteenth Amendment's protections. *Id.* at 519. Accordingly, if Section 2 is not a congruent and proportional effort to weed out *purposeful* discrimination, but instead requires states to alter sensible race-neutral laws to maximize minority voting participation or render their participation perfectly proportional, it is not a legitimate effort to "enforce" the Constitution. Rather, it is a forbidden attempt to "change" the Fifteenth Amendment's ban on purposeful discrimination into a ban on disparate effects. *Id.* at 532.

For this reason, in the vote-dilution context, the Supreme Court has been careful to interpret Section 2's "results" test in a way that prohibits districting efforts only where there is a strong inference of a discriminatory purpose. The very first *Gingles* "pre-condition" requires plaintiffs to establish that minority voters could naturally constitute a "geographically compact" majority in a district adhering to "traditional districting principles, such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997); *see LULAC*, 548 U.S. at 433. Because districts normally encompass identifiable "geographically compact" groups, the failure to draw such a

district when a minority community is involved gives rise to a plausible inference of intentional discrimination. Conversely, the Supreme Court's interpretation of Section 2 does not require States to engage in *biased* treatment by *deviating* from traditional districting principles in order to create majority-minority districts. *LULAC*, 548 U.S. at 434. The same holds true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary race-neutral election regulations in order to enhance minority voting participation. Otherwise, Section 2 would exceed the powers granted to Congress in the Fifteenth Amendment.

Second, interpreting Section 2 to require states to boost minority voting participation would also violate the Constitution's equal-protection guarantee. Subordinating "traditional districting principles" for the purpose of enhancing minority voting strength violates that aspect of the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996). Section 2 thus cannot require States to abandon neutral and commonsensical electoral practices, such as requiring voter ID, for the "predominant" purpose of maximizing minority voter participation. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Yet requiring States to

adjust their race-neutral laws to enhance minority participation rates would require exactly that "sordid business" of "divvying us up by race" through deliberate race-based decision-making. *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). This is especially true under the panel's interpretation since, in its view, any failure to enhance minority voting opportunity constitutes a discriminatory "result," and Section 2's text flatly prohibits all such "results," *regardless* of how strong the State's justification. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (observing that government hiring practices "intentionally designed" to function as racial quotas "would . . . seemingly violate equal protection principles").

Moreover, interpreting Section 2 to require states to remedy the effects of any private actions contravenes the Equal Protection Clause requirement that race-based government action be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added); *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (Roberts, C.J.) ("[R]emedying past societal discrimination does not justify race-conscious government

action"). Requiring States to adjust their voting laws because of private choices would require just that forbidden course.

Because the panel's interpretation raises "serious constitutional question[s]" concerning both Congress's enforcement powers and the Fourteenth Amendment's equal-treatment guarantee, it must be rejected if it is "fairly possible" to interpret Section 2 as outlined above. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). This is particularly true because the panel's interpretation rearranges "the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). Thus, unless Congress's intent to achieve this result has been made "unmistakably clear in the language of the statute," it must be rejected. *Id.* The same conclusion follows from the fact that the Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. If Section 2 truly did authorize the federal judiciary to override state election laws as extensively as the panel claims, Congress, at a minimum, would have needed to say so clearly.

* * *

In sum, the panel's interpretation of Section 2 contradicts its text and history, clashes with binding Supreme Court precedent, and violates the Constitution. It should be rejected, and Texas's reasonable voter ID laws should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **5,974** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 22, 2016

/s/ S. Kyle Duncan
S. Kyle Duncan

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: April 22, 2016

/s/ S. Kyle Duncan
S. Kyle Duncan

EXHIBIT 2

No. 16-393

In the Supreme Court of the United States

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.
PETITIONERS,

v.

MARC VEASEY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS REPRESENTING STATES IN THE FIFTH CIRCUIT SUPPORTING PETITIONERS

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QUESTION PRESENTED

As explained in the petition, the Fifth Circuit held that statistical disparity in the preexisting possession of photo identification by members of different races was sufficient to make Texas' Voter ID law incompatible with section 2 of the Voting Rights Act. This brief addresses the first question presented, specifically:

> Does Texas' Voter ID law result in the abridgment of voting rights on account of race?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative Materials

Constitutional Provisions

Other Authorities

INTRODUCTION AND INTERESTS OF *AMICI*[1]

Like other voting regulations, voter identification requirements not only help prevent voter fraud, but also foster public confidence in elections—thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy. Unfortunately, the decision of the *en banc* Fifth Circuit in this case creates a roadmap for invalidating many such regulations. It does so by basing a violation of Section 2 of the Voting Rights Act—which prohibits certain regulations that have a disparate impact on racial minorities—on little more than the common statistical correlation between race and poverty. Under that rationale, virtually *any* regulation, no matter how beneficial to democratic self-government, that incrementally and indirectly increases the "cost" of voting—in money, time or even inconvenience—is also at risk of invalidation. Accordingly, the decision below will effectively shift to federal judges the People's authority to organize and regulate their own elections.

Amici, a group of elected officials from throughout the Fifth Circuit (and listed in the Appendix), are deeply concerned about the impact of the Fifth Circuit's decision on democratic self-governance in their States, and on the balance of power between the States and the federal government. Accordingly, *amici* respectfully urge the Court to grant the petition and reverse the decision below.

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

STATEMENT

To promote greater confidence in the outcome of elections in Texas, Texans of all political persuasions have been clamoring for tighter voter identification requirements since at least 2004. In 2011, the Texas legislature passed a voter identification law, SB 14, which generally requires voters to present an approved photo identification. S.B. 14, 82d Leg., Reg. Sess., 2011 Tex. Gen. Laws 619. At least one of the acceptable documents is available for free—a Texas election identification certification, or "EIC." See Tex. Transp. Code 521A.001(a)–(b) (Department of Public Safety "may not collect a fee" for an EIC); Tex. Health & Safety Code 191.0046(e) (providing that state and local officials "shall not charge a fee" to obtain supporting documents required for an EIC).

Respondents—plaintiffs below—nevertheless alleged that SB 14 "was enacted with a racially discriminatory purpose, has a racially discriminatory effect, . . . and unconstitutionally burdens the right to vote." Pet. App. 4a (citing *Veasey* v. *Perry*, Pet. App. 255a). The district court took the extraordinary step of granting discovery into potentially privileged internal legislative correspondence. But no evidence among the thousands of pages of correspondence or hundreds of hours of deposition revealed any discriminatory purpose. A majority of the Fifth Circuit panel thus held that the district court erred in finding that SB 14 was enacted with a racially discriminatory purpose.

Despite the lack of discriminatory purpose, and without reaching the constitutional issues presented by its position, the panel nonetheless invalidated SB

14 for having a discriminatory *effect* in violation of Section 2. See 52 U.S.C. 10301(a) (proscribing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color"). The majority's essential rationale was that, because SB 14 imposes some burden (however small) on Texans living in poverty, and because poverty is correlated with race, the law has a racially discriminatory impact. See Pet. App. 285a, 297a.

The Fifth Circuit granted rehearing *en banc* and affirmed the panel's decision, over the dissenting votes of Judges Jones, Jolly, Smith, Owen, Clement, and Elrod. Pet. App. 131a–251a. The *en banc* majority followed the panel's basic rationale—i.e., relying on the correlation between race and poverty to hold that SB 14 has a racially discriminatory impact. Pet. App. 4a, 55a. But in dissent, Judge Jones, joined by Judges Jolly, Smith, Owen, and Clement, explained that the majority's decision departed from the text of Section 2, Pet. App. 195a–204a, and this Court's emphasis in *Thornburg* v. *Gingles,* 478 U.S. 30, 35 (1986), that a violation can only be based on results flowing from the *law* at issue, rather than from pre-existing conditions. Pet. App. 200a. Judge Elrod, joined by Judge Smith, likewise noted that "there is no evidence in this record that any voter has been denied the right to vote on the basis of his or her race because of its voter ID requirements." Pet. App. 232a.

REASONS FOR GRANTING THE PETITION

As the petition convincingly explains, the Fifth Circuit's decision warrants this Court's review because it (along with a recent Fourth Circuit decision from North Carolina, which also merits review) created a circuit split on the appropriate test for Section 2 discriminatory-effect claims. See Pet. 10, 12-19. In addition, as explained below, the decision below warrants review because, first, its reliance on the general correlation between poverty and race represents a serious misinterpretation of Section 2. Second, such an interpretation would make Section 2 unconstitutional. And third, the decision below creates a roadmap for invalidating a host of other voting regulations that have long been considered uncontroversial.

I. In its reliance on the general correlation between poverty and race, the Fifth Circuit's decision seriously misinterprets Section 2.

Originally, Section 2's language paralleled that of the Fifteenth Amendment, meaning that it originally prohibited only purposeful discrimination. *City of Mobile* v. *Bolden*, 446 U.S. 55, 60–62 (1980) (plurality opinion). In 1982, however, Congress amended subsection (a) to prohibit states from imposing or applying voting practices "in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. 10301(a). Congress also added what is now subsection (b), which provides that

> [a] violation of subsection (a) is established if, based on the totality of the circumstances, it is

> shown that the political processes . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. 10301(b). These changes reflected the belief that requiring Section 2 plaintiffs to show purposeful discrimination leads to "'unnecessarily divisive . . . charges of racism on the part of individual officials or entire communities,' . . . and . . . 'asks the wrong question.'" *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28, at 36 (1982)).

Under these provisions, the *right* question is whether the law causes minorities to be disproportionately excluded from voting, not why it was enacted. While these statutory changes expanded Section 2 liability, the Fifth Circuit's reliance upon the general correlation between race and poverty took the it far beyond what Section 2's language can bear. Given the importance of the statute, that error is reason enough for this Court's review.

A. The Fifth Circuit has erroneously interpreted Section 2 to invalidate a voting prerequisite without evidence that it actually "results in" any disparate burden on minority voters.

To establish a violation of Section 2, a challenger must show that the challenged practice proximately caused harm to minority voters. This follows from Section 2's text, which imposes liability only if a voting practice "imposed . . . by [the] State . . . *results in* a

denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. 10301(a) (emphasis added). The phrase "results in" indicates that the alleged abridgement must be caused by the state-imposed practice alone, not from disparities in voter participation resulting from other sources. See, *e.g.*, *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014) (Section 2 does not reach disparities possibly caused by socioeconomic inequalities). Likewise, the concept of "abridgement" "necessarily entails a comparison" with an objective benchmark, because "[i]t makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). The Fifth Circuit's violation of these fundamental principles warrants this Court's review.

1. Proximate cause. First, the Fifth Circuit refused to require a showing of proximate cause as reflected, for example, in Justice Brennan's majority opinion in *Thornburg* v. *Gingles*. Section 2, the Court stated there, "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17.

Applying this rule in the vote-dilution context, *Gingles* held that plaintiffs challenging at-large, multi-member districts must show, as a "necessary precondition[]" to establishing a Section 2 violation, that it was the state-imposed voting practice that caused the disparate exclusion of minority candidates from the relevant offices. *Id.* at 50 (involving a multi-

member electoral system). Section 2 plaintiffs accordingly must show that any alleged vote dilution is *not* attributable to a general socioeconomic condition—in that case the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* If plaintiffs cannot make that showing, the arrangement at issue—in that case the state-imposed "multi-member form of the district"—"cannot be responsible for minority voters' inability to elect its [*sic*] candidates." *Id.* And if the voting procedure "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "not assure racial minorities proportional representation"—only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17. It follows that, in the vote denial context, a Section 2 plaintiff must show that the alleged deprivation flows from a state-imposed voting practice rather than some factor not within the State's control.

That is why the Fourth Circuit rejected a Section 2 challenge to Virginia's decision to select school-board members by appointment rather than election. Although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the school boards," there was "no proof that the appointive process caused the disparity." *Irby* v. *Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 2015) (internal quotations removed). Instead, the disparity was attributable only to the reality that blacks were "not seeking school board seats in numbers consistent with their percentage of the population." *Id.* Similarly, the Ninth Circuit

explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez* v. *Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation and quotation marks omitted), *aff'd sub nom. Arizona* v. *Inter Tribal Council of Arizona, Inc.*,133 S.Ct. 2247 (2013).

Here, Plaintiffs have not shown—and the Fifth Circuit did not find—that SB 14 proximately causes the exclusion of minority voters. See also generally *N.C. State Conf. of the NAACP* v. *McCrory*, 831 F.3d 204 (4th Cir. 2016) (similarly ignoring the issue of proximate cause). At most the Fifth Circuit's analysis shows that *poverty* can sometimes limit voting opportunities. But that is not sufficient under Section 2, especially in the context of a law such as SB 14 that guarantees *free* IDs. [2] And even if there were proof that some minority voters were excluded from the political process—which there is not—plaintiffs did not establish that SB 14 caused the exclusion. Again, under Texas law, every person has an equal right to vote and an equal right to free photo IDs. If some persons freely choose not to take advantage of these opportunities, those private decisions do not implicate Section 2.

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[2] As with Texas, North Carolina offers all citizens free voter IDs to assist them in complying with the law there. *McCrory*, 831 F.3d at 235.

2. Objective benchmark. The Fifth Circuit's failure to apply an objective benchmark is likewise grounds for this Court's review. As part of the proximate causation inquiry, "the comparison must be made with . . . what the right to vote *ought to be*." *Bossier II*, 528 U.S. at 334. Moreover, the benchmark for measuring "how hard it should be" must be "objective," not one that is purportedly superior only because it enhances minority voting power or participation. *Holder* v. *Hall*, 512 U.S. 874, 880 (2008) (Kennedy, J.).

In some cases, "the benchmark for comparison . . . is obvious." *Id.* For example, the effect of a poll tax can be evaluated by comparing a system with a poll tax to a system without one. In other cases, however, there may be "no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Id.* at 881. If that is so, then "the voting practice cannot be challenged . . . under § 2." *Id.*

This reading of Section 2 is confirmed by *Holder.* There, the Court rejected a Section 2 challenge asserting that use of a single-member commission instead of a five-member commission resulted in vote dilution. *Id.* at 877–879. The five-member alternative clearly would enhance minority voting strength because the minority community was large enough to elect one out of five commissioners. *Id.* at 878. Nevertheless, the Court held there was "no principled reason why" the five-member alternative ought to be the "benchmark for comparison" as opposed to a "3-, 10-, or 15-member

body." *Id.* at 881. In other words, there was no "objective" benchmark for determining the proper number of commissioners, and hence no basis for a Section 2 violation. In the wake of *Holder,* then, Section 2 plaintiffs must show that the State has deprived minorities of voting opportunity compared to an "objective" alternative, not merely alternatives that would enhance minority participation.

In this case, the Fifth Circuit ignored this requirement. It based its finding of a Section 2 violation entirely on the general correlation between poverty and race. See Pet. App. 4a, 55a. Accordingly, it did not identify—or find it necessary to identify—any objective benchmark for the proper form of voter ID. See also *McCrory*, 831 F.3d at 218 (relying on the same correlations).

Nor could it. The fifty states have chosen a cornucopia of methods to verify voters' identities. *See* Nat'l Conf. of State Legislatures, *Voter ID Laws*, NCSL (Sept. 26, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. Thirty-three states require voters to show some form of ID at the polls. Of those, seventeen require photo ID, while sixteen will accept non-photo ID. When a voter appears without proper ID, moreover, eleven states require voters to take additional steps. The remaining twenty-two states require state officials to act, and the steps required vary state-by-state. Accordingly, "[t]he wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring in part). In assessing voter ID requirements, then, there simply is "no objective

and workable standard for choosing a reasonable benchmark." *Holder*, 512 U.S. at 881 (Kennedy, J.).

It is no answer to say that Texas's voting practices harm minorities relative to a *conceivable* alternative that would be better for them, such as non-photo ID or no ID at all. That is not how Section 2 works. It is always possible to hypothesize an alternative practice that would increase minority voting rates.

For example, one might speculate that a larger number of minority voters would vote if Texas required no ID and accepted voters' say-so about where they live. Yet Section 2 does not require those alternatives—which would obviously enhance opportunities for voter fraud—for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson* v. *De Grandy*, 512 U.S. 997, 1017 (1994).

Nor do Texas's *prior* laws provide an appropriate benchmark, because such an approach would conflate Section 2 with Section 5. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—whether a change makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used* to have a particular practice in place does not make it the benchmark for a Section 2 challenge. *Holder*, 512 U.S. at 884 (Kennedy, J.) (emphasis added); see also

McCrory, 831 F.3d at 226 (incorrectly criticizing legislative decision to return law to its previous state) .

By ignoring the requirement of an objective benchmark, the Fifth Circuit converted Section 2 into a statute that requires states to adopt *whichever* voting regime would most increase the voting rates and voting power of minorities. This Court rejected this very argument in *Holder*, and it should grant the petition to reiterate its rejection of that corrosive idea.

B. The Fifth Circuit's decision erroneously interprets Section 2 to invalidate a voting prerequisite without any evidence of diminished minority political participation.

Review is also warranted because there was no evidence of decreased political participation by minorities. In vote-denial cases, Section 2's text and history show that only those voting practices that disproportionately exclude minority voters from the political process are prohibited. It does not require states to affirmatively enhance minority voting rates, as the Fifth Circuit's decision assumes. See*, e.g.*, Pet. App. 75a ("We find no clear error in the district court's finding that the State's lackluster educational efforts resulted in additional burdens on Texas voters.").

First, a violation of Section 2(a) is established when "the political processes . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity . . . to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). A political process is "equally open to participation" by members

of all races if everyone "has the same opportunity" to vote free from state-created *barriers* that impose differential burdens. *Frank*, 768 F.3d at 755; see also *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 428 (2006) ("[T]he ultimate right of § 2 is equality of opportunity."). It does not require "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *Bartlett* v. *Strickland*, 556 U.S. 1, 20 (2009). And an opportunity does not become unequal simply because some groups "are less likely to *use* that opportunity." *Frank*, 768 F.3d at 753. For this reason, laws that provide an equal opportunity satisfy Section 2 regardless of whether they have proportionate outcomes.

Second, Section 2(a) prohibits only voting practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race." 52 U.S.C. 10301(a) (emphasis added). This language clarifies that states may enact ordinary race-neutral regulations concerning the time, place, and manner of elections, such as what kind of ballots are used or how voters establish their eligibility. Shouldering these "usual burdens of voting" is an inherent part of democracy. *Crawford*, 553 U.S. at 198 (Stevens, J.). And because such baseline requirements are inherent in the right to vote, they cannot be said to deny or abridge that right.

The same is true of photo ID laws, which, to quote *Crawford,* do not "'represent a significant increase over the usual burdens of voting.'" *N.C. NAACP* v. *McCrory*, No. 1:13-cv-658, 2016 WL 204481, at *10

(M.D.N.C. Jan. 15, 2016) (quoting *Crawford*), *reversed in McCrory, supra*. This Court should grant review to reiterate *Crawford's* fundamental holding that asking all voters to assume "the usual burdens of voting" does not violate Section 2.

Third, Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. If Congress wanted to prohibit all disparate effects, it could have said so. As the Seventh Circuit noted, "there wouldn't have been a need for" subsection (b) to ask whether the political process is "equally open," or whether minorities have "less opportunity" to participate. *Id.* at 753 (emphasis and internal quotations removed). Instead, Congress chose terms such as "impose," "denial," "abridgement," "equally open," and "less opportunity" to show that Section 2 targets only the disparate *exclusion* of minority voters caused by the voting practice.

Fourth, the legislative history of the 1982 amendments confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring in the judgment); see, *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Thornburg* v. *Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment). The original version of the 1982 amendments proposed by the House would have prohibited "all discriminatory 'effects' of voting practices," yet "[t]his version met stiff resistance in the Senate." *Miss. Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). The Senate

feared that such a law would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Id.* Senator Dole stepped in with a compromise, which Congress eventually enacted. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). The key to the compromise was that it prohibited states from providing unequal voter opportunity, but it did not require equality of political outcomes. Senator Dole assured his colleagues that, under the compromise, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . or registering . . . ." 128 Cong. Rec. 14133 (1982). Since SB 14 provides voters a choice of IDs that includes one available for free, it would do violence to this legislative compromise to invalidate a voting practice that allows members of all races to have equal "access" to the political process simply because factors that are beyond the control of the government might lead to uneven racial results in voter turnout. Here, moreover, there is no proof that "participation in the political process is depressed among minority citizens" under SB 14—a basic requirement of a Section 2 claim. *League of United Latin Amer. Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993).

The Fifth Circuit's theory thus fundamentally rewrites Section 2. It replaces a ban on state-imposed barriers to minority voting with an affirmative duty of state facilitation of minority voting. It converts a prohibition on abridging minority voters' right to vote

into a mandate for boosting minority voting. It transforms a guarantee of equal opportunity into a guarantee of equal outcomes. And it revamps a law about disproportionate exclusionary effects into a law about *all* disproportionate effects. None of this is consistent with the text or the legislative compromise underlying its passage.[3] That too is ample reason to grant the petition and reverse.

[3] The Fourth Circuit decision in the North Carolina case is similarly flawed: The record in that case "contains no evidence as to how the amended voter ID requirement affected voting in North Carolina." *McCrory*, 831 F.3d at 242 (Motz, J., dissenting in part). Like the Fifth Circuit, the Fourth Circuit has ignored Section 2's requirement that a challenged law hinder actual participation.

II. Under the Fifth Circuit's interpretation, Section 2 would violate the Constitution.

The Fifth Circuit's approach would also make Section 2 unconstitutional—another powerful reason to grant review. As Justice Kennedy has repeatedly emphasized, this Court has never confronted whether Section 2's "results" test complies with the Constitution. See*, e.g.*, *Chisom* v. *Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 . . . is consistent with the requirements of the United States Constitution."); cf. *Georgia* v. *Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (it would be a "fundamental flaw" to require "consideration[] of race" in order to "compl[y] with a statutory directive" under the Voting Rights Act). Justice Kennedy's pointed reminders underscore that Section 2's results test already teeters at the edge of constitutionality. Interpreting Section 2 to prohibit Texas's (and North Carolina's) race-neutral voting laws and to require Texas and other states to adopt new laws for the racial purpose of enhancing minority voting—as the Fifth Circuit's reliance on the general correlation between poverty and race implies—pushes Section 2 over the constitutional ledge.

1. If the Fifth Circuit's interpretation of Section 2 were allowed to stand, the statute would exceed Congress's power to enforce the Fifteenth Amendment. The Fifteenth Amendment prohibits only "purposeful discrimination"; it does not prohibit laws that only "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights*

v. *Metrop. Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977)). And this is true whether that disproportionate impact is the result of poverty—as the Fifth Circuit assumed—or other factors.

Of course, Congress has power to "enforce" that prohibition "by appropriate legislation." U.S. Const. amend. XV, § 2. This allows Congress to proscribe more than purposeful discrimination, but—just as with the Fourteenth Amendment—this proscription applies only if the law is a "congruen[t] and proportiona[l]" "means" to "prevent[] or remedy[]" the unconstitutional "injury" of intentional discrimination. *City of Boerne* v. *Flores*, 521 U.S. 507, 519–520 (1997). The enforcement power does not allow Congress to "alte[r] the meaning" of the Fifteenth Amendment's protections. *Id.* at 519.

Accordingly, if Section 2—as interpreted by the courts—is not a congruent and proportional effort to weed out purposeful discrimination, but instead requires states to alter race-neutral laws to maximize minority voting participation or render their participation proportional, then Section 2 is not a legitimate effort to "enforce" the Constitution. Rather, it is a forbidden attempt to "change" the Fifteenth Amendment's ban on purposeful discrimination into a ban on disparate effects. *Id.* at 532.

For this reason, in the vote-dilution context, this Court has been careful to interpret Section 2's "results" test in a way that prohibits redistricting efforts *only* where there is a strong inference of a discriminatory purpose. For example, the first *Gingles* "pre-condition" requires plaintiffs to establish that minority

voters could naturally constitute a "geographically compact" majority in a district adhering to "traditional districting principles, such as maintaining communities of interest and traditional boundaries." *Abrams* v. *Johnson*, 521 U.S. 74, 91-92 (1997); see *LULAC*, 548 U.S. at 433. Because districts normally encompass identifiable "geographically compact" groups, the failure to draw such a district when a minority community is involved gives rise to a plausible inference of intentional discrimination. Conversely, the Court's interpretation of Section 2 does *not* require states to engage in preferential treatment by deviating from traditional districting principles in order to create majority-minority districts. *LULAC*, 548 U.S. at 434.

The same holds true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary race-neutral election regulations in order to enhance minority voting participation. Otherwise Section 2 would exceed the powers granted to Congress in the Fifteenth Amendment. And that is true whether the existing disparity is the result of poverty or other non-purposeful factors.

2. Interpreting Section 2 to require states to boost minority voting participation—under the guise of economic differences among races—would also violate the Fourteenth Amendment's equal-treatment guarantee. As This Court has held, subordinating "traditional districting principles" for the purpose of enhancing minority voting strength violates that aspect of the Constitution. See *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996).

Section 2 thus cannot require states to abandon neutral electoral practices, such as requiring voter ID, for the "predominant" purpose of maximizing minority voter participation. *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). Yet requiring states to adjust their race-neutral laws to enhance minority participation rates would require exactly that "sordid business" of "divvying us up by race" through deliberate race-based decision-making. *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part).

This is especially true of the Fifth Circuit's interpretation since, in its view, any failure to enhance minority voting opportunity constitutes a discriminatory "result." Yet Section 2's text flatly prohibits the pursuit of all such "results," regardless of how strong the State's justification. Cf. *Ricci* v. *DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring)

Interpreting Section 2 to require states to remedy the effects of private choices or societal disparities—including income and wealth differentials—also contravenes the Equal Protection Clause requirement that race-based government action be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added); see *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (Roberts, C.J.) ("[R]emedying past societal discrimination does not justify race-conscious government action."). Requiring states to adjust their voting laws be-

cause of private choices—including choices that resulted in disparities of income or wealth—would require just that forbidden course.

3. Because the Fifth Circuit's interpretation thus raises, at a minimum, "serious constitutional question[s]" concerning both Congress's enforcement powers and the Fourteenth Amendment's equal-treatment guarantee, it must be rejected if it is "fairly possible" to interpret Section 2 as outlined above. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). This is particularly true because the Fifth Circuit's interpretation rearranges "the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). Thus, unless Congress's intent to achieve this result has been made "unmistakably clear in the language of the statute," that interpretation must be rejected. *Id.*

The same conclusion follows from the fact that the Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. See *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. If Section 2 truly did authorize the federal judiciary to override state election laws as extensively as the Fifth Circuit claims, Congress, at a minimum, would have needed to say so clearly.

In short, the Court should grant review and reverse the Fifth Circuit's interpretation of Section 2 to ensure that the statute's operation remains within constitutional bounds.

III. By relying upon the general correlation between race and poverty, the Fifth Circuit's approach jeopardizes a wide variety of heretofore uncontroversial voting regulations.

The majority's approach—especially its reliance on the correlation between race and poverty—not only distorts Section 2 and exceeds constitutional bounds, it also threatens a wide range of voting regulations.

1. As the Seventh Circuit emphasized in *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014), conflating race with poverty under section 2 threatens to "sweep[] away almost all registration and voting rules." *Id.* at 754. As Judge Jones put it in her dissent below, "[v]irtually any voter regulation that disproportionately affects minority voters can be challenged successfully under the majority's rationale: polling locations; days allowed and reasons for early voting; mail-in ballots; time limits for voter registration; language on absentee ballots; the number of vote-counting machines a county must have; … [and] holding elections on Tuesday." Pet. App. 194a & n.54; see also Petition 26-27.

2. These concerns are not merely theoretical. As Judge Jones noted, the uncontroversial regulations she identified are *currently* being challenged in courts across the country, precisely based on the general correlation between poverty and race. Pet. App. 194a & n. 54.

Judge Jones's list is just the tip of the iceberg. For example, the Sixth Circuit recently applied the Fifth Circuit's reasoning to invalidate a Michigan law eliminating straight-party voting, which allows a voter to

indicate a strictly partisan vote for all candidates of a particular political party, rather than selecting each candidate individually. Only nine states currently provide this option, and Michigan had removed straight-party voting from its ballots in 2015. But the Sixth Circuit held that this change violated Section 2. *Michigan State A. Philip Randolph Institute* v. *Johnson*, 833 F.3d 656 (6th Cir. 2016). The court speculated that removing the straight-party option might potentially increase wait times and, because of their poverty, discourage some black voters from voting.

Putting aside the potential for bigotry inherent in the suggestion that minority voters are incapable of enduring a mild delay to vote, or that they are not capable of selecting candidates individually, such rulings threaten to force unnecessary and sweeping change on other states. Following the reasoning in the Sixth Circuit's decision, which mirrors the reasoning of the court below, the forty-one states that do not offer straight-party voting options could also be said to be discriminating against minority voters and violating Section 2.

In another recent case, *One Wisconsin Institute* v. *Thomsen*, 2016 U.S. Dist. LEXIS 100178 (W.D. Wisc. Jul. 29, 2016), the court invalidated on the basis of Section 2 a regulation that reduced early voting from twenty days to ten. But under this reasoning, the states that have never allowed early voting are also impermissibly discriminating.

3. The Fifth Circuit's logic would also put into question many States' voter registration systems. For example, only a few states currently offer same-day

registration. But under the Fifth Circuit's reasoning, the vast majority of States that do *not* offer same-day registration are in violation of Section 2—simply because the absence of such a system imposes some (very modest) cost on voters and arguably burdens poor (and hence minority) voters disproportionately.

Indeed, under the Fifth Circuit's reasoning, the requirement of registration itself would be invalid if someone could show that poor voters disproportionately find it difficult to assemble the documents that registration typically requires. Yet the practice of voter registration was ubiquitous in 1982, when Section 2 was amended, and dates to the 1800s. Nat'l Conf. of State Legislators, *The Canvass*, Voter Registration Examined (March 2012). It is unthinkable that, when Congress amended Section 2 in 1982, it meant to prohibit a voting practice such as registration—especially when such a prohibition is never mentioned anywhere in the 1982 Amendments' extensive legislative history. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress'[s] silence in this regard can be likened to the dog that did not bark.").

4. Any reading of Section 2 that would threaten such a wide swath of hitherto uncontroversial voting laws at least deserves this Court's review. Congress enacted Section 2 to end discrimination, not to upend ordinary election laws.

As Justice Harlan once observed in another context, "[a]ll that [the State] has done here is fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." *Griffin v. Illinois*, 351 U.S. 12, 34 (1956). So

too here: According to the Fifth Circuit, Texas has violated Section 2 simply by failing to remedy pre-existing economic disparities. But a Section 2 violation cannot be based solely on pre-existing statistical disparities and general socioeconomic inequalities.

Judge Jones correctly warned in her dissent below that this flawed analysis will take us "another step down the road of judicial supremacy by potentially subjecting virtually every voter regulation to litigation in federal court," even as it "disable[s] the working of the democratic process." Pet. App. 211a (Jones, J., dissenting). The Fifth Circuit's decision richly warrants this Court's review.

CONCLUSION

By relying on the general correlation between race and poverty, the Fifth Circuit's decision provides a roadmap for invalidating many voting regulations that not only prevent voter fraud but also enhance confidence in the outcome of elections—a necessary condition of democratic government. In so doing, the decision below unconstitutionally turns Section 2 on its head, undermining the fundamental right of *all* citizens to organize and regulate their elections free from unauthorized micromanagement by unelected federal judges.

The petition should be granted.

Respectfully submitted,

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October 27, 2016

Appendix

APPENDIX: List of Amici

Senator John Coryn
Texas

Senator Ted Cruz
Texas

Senator David Vitter
Louisiana

Representative Joe Barton
Texas

Representative Kevin Brady
Texas

Representative Kevin Brady
Texas

Representative Michael C. Burgess, M.D.
Texas

Representative John Carter
Texas

Representative K. Michael Conaway
Texas

Representative John Culberson
Texas

Representative Blake Farenthold
Texas

Representative John Fleming, M.D.
Louisiana

Representative Bill Flores
Texas

Representative Louie Gohmert
Texas

Representative Kay Granger
Texas

Representative Garrett Graves
Louisiana

Representative Jeb Hensarling
Texas

Representative Will Hurd
Texas

Representative Ted Poe
Texas

Representative Sam Johnson
Texas

Representative John Ratcliffe
Texas

Representative Kenny Marchant
Texas

Representative Pete Sessions
Texas

Representative Michael McCaul
Texas

Representative Lamar Smith
Texas

Representative Randy Neugebauer
Texas

Representative Mac Thornberry
Texas

Representative Pete Olson
Texas

Representative Randy Weber
Texas

Representative Steven Palazzo
Mississippi

Representative Roger Williams
Texas

EXHIBIT 3

Nomination of Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit Questions for the Record
December 6, 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?

As a judge, I would be bound by oath to interpret the United States Constitution by applying all precedents of the Supreme Court and the Fifth Circuit. *See, e.g., Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (observing that "the Court of Appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions"); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016) (noting that courts of appeals "decline to get ahead of the Supreme Court"); *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999) (explaining a "panel is bound by the precedent of previous panels absent an intervening Supreme Court case explicitly or implicitly overruling that prior precedent"). If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and the Fifth Circuit, regardless of my own views about the merits of any particular precedent.

In my understanding, an "originalist" approach seeks to interpret constitutional provisions according to their original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 581-87 (2008) (interpreting Second Amendment terms "Arms," "keep," and "bear" by using founding-era dictionaries and other sources); *id.* at 576-77 (observing that "[t]he Constitution was written to be understood by the voters," and that constitutional interpretation therefore "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation") (internal quotations omitted). Where the Supreme Court has interpreted specific constitutional provisions by seeking to discern their original public meaning, I would fully and faithfully follow those precedents. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (interpreting Sixth Amendment's Confrontation Clause according to founding-era understanding of English common law).

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?

   It is never appropriate for lower courts—including federal circuit courts—to depart from binding Supreme Court precedent. Please also see my response above to Question 1.

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?

In rare circumstances, it may be proper for a circuit judge to question Supreme Court precedent in a separate opinion, provided that the opinion makes clear that the judge is nonetheless bound to follow all binding Supreme Court precedent regardless of the judge's view of its merits. For instance, it may be proper in an appropriate case for a circuit judge to write a separate opinion pointing out legal doctrines the Supreme Court might choose to develop or lower-court conflicts the Supreme Court might choose to resolve. *See, e.g., Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring) (questioning Supreme Court's then-controlling two-step requirement in qualified immunity cases); *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of *en banc* rehearing) (in light of "diametrically opposing" circuit court decisions, stating that "the Supreme Court should exercise its certiorari jurisdiction and resolve this circuit split"). In any event, it is the Supreme Court's prerogative to develop its own jurisprudence; circuit courts, by contrast, are always duty bound to follow it.

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

In the Fifth Circuit, a panel of circuit judges may not overrule a precedent of a previous panel. Consequently, the only circumstance in which the Fifth Circuit may overrule its own precedent is by taking the "extraordinary" step of hearing a case *en banc*. *See, e.g., United States v. Castillo-Rivera*, 853 F.3d 218, 227 (5th Cir. 2017) (Higginbotham, J., concurring) (explaining that, under the "'rule' of orderliness … one panel may not overrule another," but that "[a] panel's application of the *stare decisis* rule is always reviewable by an *en banc* proceeding"); 5th Cir. I.O.P., Petition for Rehearing *En Banc* (explaining that "[a] petition for rehearing *en banc* is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent").

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 what circumstances might justify the Supreme Court in overturning its own precedent. The Supreme Court has "the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484.

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 circuit judge must treat all Supreme Court precedent as "superprecedent," in the sense that all of the Supreme Court's decisions—including *Roe v. Wade* and *Planned Parenthood v. Casey*—are binding on all lower federal courts.

b. Is it settled law?

Please see my response above 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?

I have not studied this particular issue. Regardless, my personal views would have no bearing on my role in deciding the constitutionality of any particular government regulation of firearms. As with any other issue that might come before me, my role would be to decide such questions based on a full and faithful application of controlling precedent. With respect to the interpretation of the Second Amendment, *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully.

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

Heller expressly stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited"; it emphasized that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

conditions and qualifications on the commercial sale of arms"; and, finally, it explained that "the sorts of weapons protected [by the Second Amendment] were those in common use." 554 U.S. at 626-27 (internal quotations omitted).

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

I have not studied that question, and I understand that the majority and dissent in that case had different views of it. Regardless, *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully, just as I would apply all binding Supreme Court precedent.

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 "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). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

6. At your nomination hearing, Senator Leahy asked you a number of questions about an article you wrote in which you argued that the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), had "imperil[ed] civic peace." You responded that you were simply making a "plea" for civic peace between those on the both sides of the same-sex marriage issue. While your article does highlight the importance of civic discourse and the "robust, free, and open exchange of ideas on controversial topics," the conclusion you draw about *Obergefell* as an "abject failure" is plain: "[T]he decision imperils civic peace." (*Obergefell Fallout*, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE (ABC-CLIO 2016)

a. In the more than two years since the Supreme Court held that there is a nationwide right to same-sex marriage, has *Obergefell* "imperil[ed] civic peace"? If your answer is "yes," please describe how it has done so.

In the referenced article, I discussed the value of civic peace in terms of fostering mutual respect for both sides in any sensitive public debate. I expressed concern that such civility could be diminished by dismissing one side's view in a harsh manner, as in my view certain pre-*Obergefell* lower court opinions appeared to do. *See Obergefell Fallout*, *supra*, at 135-36. The article went on to recognize that *Obergefell* did affirm the "decent and honorable" character of those holding traditional views of marriage, but the article expressed the view that the Court could have done more to defuse the strong feelings on both sides. *Id.* at 136-37.

Regardless of any views expressed as a legal commentator, however, my role as a judge would be to apply all Supreme Court precedents fully and faithfully

(including *Obergefell*).

b. Have you expressed similar concerns about "imperil[ed] civil peace" regarding any other pending litigation you have worked on?

Not that I recall. For the context of that quotation, please see my response to Question 6(a) above. Whenever I have litigated sensitive legal issues over my twenty-year career, I have striven as an officer of the court to treat parties and counsel on the other side with respect, to avoid touching on political or personal matters, and to focus solely on the legal issues in the case. If I were confirmed as a judge, I would have an even greater duty to treat both sides of any dispute fairly and impartially and to decide cases based on objective legal rules and not my own personal preferences.

7. You delivered a speech in December 2014 to Brigham Young University's chapter of the Federalist Society. According to speech notes that you provided to the Committee, you asked whether a trio of Supreme Court cases — *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safely* — together established a fundamental right to marry. You also wrote: "Do these cases add up to a right to marry someone of the same-sex? Well, ask yourselves this: do they add up to a right to marry your first cousin? A thirteen year old? If you say yes to the same-sex marriage question, don't you also have to say yes to these other ones?

a. In what way is granting LGBT couples the right to marry equivalent to allowing someone to marry a thirteen-year-old or their first cousin?

The referenced speech was one given to law students in which I discussed the analysis in the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), which requires courts to articulate a "careful description" of an asserted fundamental right and to ask whether that asserted right is "objectively, deeply rooted in this Nation's history and tradition." The rhetorical questions in my speech notes were merely designed to illustrate how a court might apply the *Glucksberg* analysis to the question eventually decided in *Obergefell*, namely whether a "careful" description of the fundamental "right to marry" recognized in previous decisions encompassed same-sex couples. The questions were not designed to suggest any answer one way or the other but instead simply to illustrate how the substantive due process analysis works.

In any event, *Obergefell* subsequently held that "same-sex couples may exercise the fundamental right to marry in all States." 135 S. Ct. at 2607. That is a precedent of the Supreme Court that, if confirmed, I would apply fully and faithfully.

b. Do you believe that in light of *Obergefell*, state laws prohibiting individuals of a certain age from getting married or laws prohibiting certain family members from marrying each other are not constitutionally sound?

While *Obergefell* did not address such laws, the Supreme Court stated in *Windsor v. United States*, 133 S. Ct. 2675, 2691-92 (2013), that the marriage laws vary in some respects from State to State," such as laws concerning "the required minimum age" as well as "the permissible degree of consanguinity." To the extent that such laws touch on the meaning of *Obergefell*, such matters could potentially come before me if I were confirmed as a judge. Therefore, I am ethically precluded from offering any opinion under the canons of judicial ethics applicable to judicial nominees.

8. In 2015, you submitted an amicus brief in *Obergefell v. Hodges* on behalf of fifteen states, including Louisiana. You urged the Court to reject the argument that the Fourteenth Amendment provides a right to same-sex marriage nationwide. Among other arguments, you claimed that defining marriage in "man-woman terms . . . rationally structure[s] marriage around the biological reality that the sexual union of a man and woman — unique among all human relationships — produces children."

a. In light of the arguments you advanced in your amicus brief, do you believe that only people who can have children should be legally able to get married?

In representing clients I do not advance my personal views, but the interests of my clients. The arguments advanced in the referenced *amicus* brief were the arguments of the *amici* States concerning possible justifications for those States' marriage laws.

In any event, regardless of the arguments I made on behalf of clients in that case, the Supreme Court has now decided in *Obergefell* 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. at 2607-08. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully as a judge.

b. Do you believe that fewer heterosexual couples have gotten married or have had children as a result of the legalization of same-sex marriage nationwide?

I have not studied the matter and have no basis to opine on it.

9. At your nomination hearing, I asked you about an amicus brief you submitted in *Abbott v. Veasey*, which involved a Texas law imposing a stricter voter ID requirement. In responding about your work on *Abbott*, you mentioned your work on another voting rights case as well—*North Carolina v. North Carolina State Conference of the NAACP*. Representing the state of North Carolina, you sought to defend a number of restrictive voting regulations, including a voter ID requirement, that the Fourth Circuit had found "target[ed] African Americans with almost surgical precision." (*North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016)) The Fourth

Circuit likewise concluded that "the General Assembly enacted legislation restricting all — and only — practices disproportionately used by African Americans." (*Id.* at 230)

a. Do you believe it is lawful and legitimate for states to enact electoral laws that target voting practices disproportionately used by members of one race?

The Supreme Court has made clear that the Constitution and numerous federal laws, including the Voting Rights Act, limit state regulation of elections. In both the *Veasey* and *North Carolina* cases, I represent or represented clients arguing that certain state election laws—including voter identification requirements—did not run afoul of these federal constraints. The arguments I made in those cases are good-faith arguments about facts and law, and, as with any legal representation, did not necessarily reflect my personal views on any particular voting or election laws. If confirmed, I would apply the binding precedents of the Supreme Court and the Fifth Circuit governing those issues, quite apart from any personal policy views I hold or any argument I previously made as an attorney representing a client. (Additionally, the *Veasey* case is still pending, and so it would be inappropriate for me to comment further on it as an attorney for an *amicus*).

b. At your hearing, I asked whether you believed that voter fraud was a problem, and you replied that you did not have a "personal view" on the matter, but that "ID laws can act prophylactically to prevent voter fraud." In light of your claim, what evidence do you have that voter ID requirements can help "prevent voter fraud"?

In my answer, I was referring to the Supreme Court's decision upholding Indiana's voter identification law in *Crawford v. Marion County Election Board* against an Equal Protection challenge. *See* 553 U.S. 181 (2008). Justice Stevens' plurality opinion explained that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," and that "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196. Justice Stevens' opinion also remarked that, whereas "[t]he record contains no evidence of any such [voter] fraud actually occurring in Indiana at any time in its history," nonetheless "[i]t remains true … that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists[.]" *Id.* at 194-95.

c. In *Abbott*, you also argued that voter ID requirements "foster public confidence in elections — thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy." In your view, is the "peaceful, orderly transfer of power" possible <u>without</u> voter ID requirements?

Given that *Veasey v. Abbott* remains pending and I am counsel for an *amicus* in

the case, it would be inappropriate for me to express a personal opinion on this matter.

d. How did you come to represent the state of North Carolina in *North Carolina v. North Carolina State Conference of the NAACP*?

I already represented the leaders of the North Carolina General Assembly in other litigation when they retained my firm to file a petition for writ of certiorari in this matter in the United States Supreme Court.

10. When you served as Louisiana's Solicitor General, you defended the state in *Connick v. Thompson*, 563 U.S. 51 (2011). The facts of that case are quite troubling — a prosecutor deliberately withheld physical evidence that would have exonerated Thompson, who had been convicted of robbery and capital murder. After that exculpatory evidence was disclosed—and Thompson's execution stayed—he sued the District Attorney's (DA's) Office. A jury awarded Thompson $14 million on the theory that the DA had been "deliberately indifferent" to training prosecutors on their *Brady* obligations. The Fifth Circuit upheld the jury's award, and Fifth Circuit, *en banc*, affirmed the panel decision.

You urged the Supreme Court to reverse, and argued that the DA's office could not be held liable on this failure-to-train theory "absent a history of violations." You also argued that as "trained professionals," prosecutors in the DA's Office were already "subject to a licensing and ethical regime designed to reinforce their duties as officers of the court," and "absent powerful evidence to the contrary, a district attorney is entitled to rely on prosecutors' adherence to these standards." In a 5-4 opinion, the Court sided with you. In dissent, Justice Ginsburg wrote, "What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the [DA's] Office bears responsibility under § 1983."

a. If you are confirmed as a judge serving on the Fifth Circuit, you will consider appeals by individuals who allege that prosecutors committed *Brady* violations. What evidence can you offer the Committee that you take *Brady* violations seriously?

A prosecutor's failure to disclose material exculpatory or impeaching evidence as required by the Supreme Court's landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963), is a grave violation of a prosecutor's ethical duties and seriously compromises an accused's due process rights under the Constitution. There is no question that the facts of *Connick v. Thompson* were "quite troubling"—indeed, in the opening moments of my oral argument to the Supreme Court, I noted that Mr. Thompson had suffered "terrible injuries" because of prosecutorial misconduct. Tr. of Oral Arg. in *Connick v. Thompson*, No. 09-571 (U.S. Oct. 6, 2010), at 3:14. As your question points out, however, the *Brady* violation was not the legal issue before the Supreme Court, and the Court ultimately ruled in my client's favor.

Connick was an extremely difficult case, and my experience in that case only reinforced for me the importance of a prosecutor's *Brady* obligations to the fair administration of our criminal justice system. Since *Connick*, I have taught a Continuing Legal Education course to Louisiana prosecutors emphasizing the importance of *Brady* obligations, and I have provided those materials to the Committee. If confirmed as a judge, I would conscientiously apply *Brady* to claims that prosecutors may have failed in their constitutional obligations to disclose all material exculpatory and impeaching evidence to the accused.

b. The full Fifth Circuit upheld the jury's award to Thompson, yet Louisiana chose to appeal that decision to the Supreme Court. Did you make the decision to seek Supreme Court review even after the Fifth Circuit had affirmed en banc? If so, what was your rationale? If not, whose decision was it?

The decision to seek certiorari in *Connick* was made by my client, the Orleans Parish District Attorney's Office, in conjunction with my employer, the Louisiana Attorney General.

c. A brief filed on behalf of the respondent in the case on behalf of former DOJ civil rights officials from both Democratic and Republican Administrations stated that "Petitioners' suggestion that no training is necessary because prosecutors are educated professionals blinks reality." Do you still believe that prosecutors' offices should <u>not</u> be required to train prosecutors specifically in the requirements of *Brady*, simply because prosecutors are officers of the court?

My client's argument in *Connick* was never that a district attorney's office has no obligation to provide its prosecutors with *Brady* training. Rather, the argument was that, where a rogue prosecutor deliberately buries obviously exculpatory evidence, the district attorney's office cannot be vicariously liable for that malfeasance unless a pattern of similar *Brady* violations puts the office on notice. The Supreme Court agreed with my client's argument. But the arguments I made on behalf of my clients in this case, like any other case, do not necessarily reflect my own personal views. Nor would they have any bearing on my role as a judge. If confirmed, I would fully and fairly apply *Brady*, *Connick*, and any other binding precedents of the Supreme Court.

d. On what basis did you conclude that the New Orleans District Attorney's Office did not have a "history of [*Brady*] violations"?

I argued on behalf of my client that the record evidence in the case did not reveal the requisite pattern of previous *Brady* violations by the office required to put the district attorney on notice of a deficient training regime, an argument which the Supreme Court accepted in ruling for my client.

e. The miscarriage of justice in *Connick* very nearly led the state to execute a man who had not in fact committed murder. In your view, is it appropriate to provide financial remuneration for those who face such a monumental miscarriage of justice at the hands of a prosecutor's office?

That is a policy question on which it would be inappropriate for me to comment as a nominee to federal judicial office. I am aware of a Louisiana statute providing compensation in such circumstances, and my understanding is that Mr. Thompson received compensation under the version of that statute in force at the time.

f. If you are confirmed, what steps will you take to ensure that all prosecutors understand—and fulfill—their obligations under *Brady*?

Please see my response above to Question 10(a).

11. At your nomination hearing, I asked you about your defense of Texas and Louisiana laws severely limiting women's access to reproductive healthcare. Our exchange focused on those statutes' admitting privileges provision, and I asked how admitting privileges enhance the safety of women. But the Louisiana law also had provisions concerning informed consent and reporting requirements for medication abortions. In defending this statute, you argued that these provisions also made clear the law "focused on enhancing the safety of women seeking abortion."

a. How do these informed consent and reporting requirement provisions enhance the safety of women seeking access to reproductive healthcare?

The litigation to which your question refers is still pending in federal court, and so it would be inappropriate for me to comment on it given that I remain counsel to a party in the case.

12. Beginning in 2016, you represented the North Carolina General Assembly in *United States v. North Carolina*, defending the state's anti-transgender bathroom bill, known as HB2. In a brief that you submitted in that case, you made a number of claims about the dangers posed by allowing transgender individuals to use the restroom that corresponds to their gender identity. You wrote, for instance, that preventing HB2 from taking effect "would inflict upon North Carolina's citizens a substantially increased risk of privacy violations and sex crimes that, in various ways, would invade their legitimate expectations of privacy and bodily security."

a. How does allowing transgender individuals to use the bathroom that corresponds to their gender identity cause an increased risk of sex crimes?

The litigation to which your question refers is still pending in federal court, and so it would be inappropriate for me to comment on it given that I remain counsel

to a party in the case.

b. What evidence did you rely on to support this argument?

Please see my response above to Question 12(a).

c. Do you continue to hold this belief?

Please see my response above to Question 12(a). In addition, I am acting as counsel for a party in that case, advancing not my own personal beliefs but legal arguments on behalf of my client's interests, just as I have done in every case to the best of my ability.

13. You also represented the Gloucester County School Board before the U.S. Supreme Court after it implemented a discriminatory policy that required transgender individuals to use separate facilities—a policy that was struck down by the Fourth Circuit. In your brief, one of the rationales you provided for interpreting Title IX to prohibit treating transgender individuals in accordance with their gender identity is to preserve sex separation in athletics; your brief argued that "[s]ex separation in athletics only works, however, if 'sex' means physiological sex; if it means 'gender identity,' nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women." **Are you aware of any cases where an individual has pretended to be transgender for the purpose of obtaining a competitive advantage?**

Because the litigation to which your question refers is still pending in federal court, it would be inappropriate for me to comment on it given that I remain counsel to a party in the case. However, I can state that the sentence you quote from the Supreme Court brief in that case referenced a CBS news story from 2016 reporting that an "18-year old runner … [who] was born male and identifies as female" competed in "Class 3A girls' sprints." Petitioner's Br. in *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273 (U.S. Jan. 3, 2017), at 41 (citing *Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships*, CBS New York, June 8, 2016).

14. As Louisiana Solicitor General, you filed amicus briefs in *Graham v. State of Florida*, in which the Supreme Court considered the constitutionality of life without the possibility of parole (LWOP) sentences for juvenile offenders who commit non-homicide crimes, and *Schwarzenegger v. Entertainment Merchants Association*, which concerned a California law prohibiting the sale or rental of "violent video games" to minors. You also submitted amicus briefs in *Davenport v. American Atheists*, which urged the Court to decide whether to abandon the "endorsement test," used to determine violations of the Establishment Clause, and joined an amicus brief in *Brown v. Plata*, arguing that a three-judge panel had violated the Prison Litigation Reform Act (PLRA) by ordering the release of prisoners form California's overcrowded prisons. In short, you have submitted many amicus briefs that pertained to other states' statutes, or to matters that

did not directly implicate Louisiana.

a. As a general matter, how did you decide which amicus briefs to join or lead as Solicitor General of Louisiana?

The decision to join or lead in any multi-state amicus brief was ultimately made by the Louisiana Attorney General, based on his assessment of whether the issues presented in a particular case could potentially implicate the institutional interests of the State. As I recall, the briefs that Louisiana filed or joined during my tenure were virtually always joined by many other states and often by attorneys general from across the political spectrum. For instance, the amicus brief your question references in the *Brown v. Plata* case involving the California prison system was joined by five Democrat Attorneys General, including Delaware Attorney General Joseph Biden, III, Massachusetts Attorney General Martha Coakley, and Ohio Attorney General Richard Cordray. Similarly, the amicus brief your question references in the *Schwarzenegger* case involving California's violent video games law was joined by six Democrat Attorneys General, including Senator Blumenthal when he was Connecticut Attorney General.

b. Why did you decide to file or join amicus briefs in each of the cases listed in this question?

Please see my response above to Question 14(a).

15. You were the lead lawyer for Hobby Lobby when it challenged the Affordable Care Act's contraceptive coverage requirement. Your Supreme Court brief argued, in part, that the requirement ran afoul of the Religious Freedom Restoration Act (RFRA), as applied to your clients, in part because the federal government had created an accommodation for other religious entities. Your brief stated that "the exceptions for the religious exercise of other groups and grandfathered plans are devastating to the government…. They are devastating because RFRA itself demands that the government consider the feasibility of making exceptions to otherwise general rules in order to accommodate religious exercise." Shortly thereafter, you represented the Eternal Word Television Network in *Zubik v. Burwell*, where you claimed that the accommodation itself was a violation of RFRA.

a. Do you see any tension between the position you advanced in *Hobby Lobby* and the position you advanced in *Zubik*?

No. RFRA requires an analysis of the burden imposed by the government on the religious exercise of the specific religious adherent. To my recollection, as a for-profit corporation my client in *Hobby Lobby* was never offered an accommodation with respect to the mandate, and so whether any accommodation would have removed the burden on its religious exercise was never presented or decided in that case. By contrast, my client in the *Zubik* litigation was offered an accommodation by the federal government, but had a religious objection to that specific

accommodation and, accordingly, took the position that RFRA required something different.

b. Do you dispute that women's access to preventative health services—including contraception—is a compelling state interest?

This is an open question. In *Hobby Lobby* the Supreme Court assumed without deciding that the federal government has a compelling interest in furthering women's access to contraceptives through the mandate. Given that the issue is one that could come before me if confirmed as a judge, it would be inappropriate for me to express an opinion.

c. The *Zubik* petitioners advocated a very broad theory of RFRA. As the Government's brief stated, "Under petitioners' view of RFRA, all such accommodations—indeed, any systems that require religious objectors to register their objections—could be reframed as substantial burdens on religious exercise. A conscientious objector to the draft could claim that 'the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then 'trigger' the draft of a fellow selective service registrant in his place. An employee who objects to working on the Sabbath could object to a requirement that he request time off in advance because the request would 'facilitate… someone else working in his place.'" Do you disagree that the arguments you advanced in *Zubik* would have allowed virtually any religious accommodation to be reframed as a substantial burden on religious exercise?

I do not agree with that characterization of the RFRA arguments made on behalf of my clients in that case. In any event, regardless of the arguments I made on behalf of clients concerning RFRA (or any other statute), as a judge I would follow all binding precedents of the Supreme Court and the Fifth Circuit concerning RFRA (or any other statute).

16. At your hearing, you told Senator Leahy that you were not on any of the Supreme Court shortlists that President (or candidate) Trump have issued. Of course, the President also issued an updated Supreme Court shortlist on November 17, 2017, adding five new judges to the original list of 20 judges or justices that were on his 2016 shortlists.

a. Has anyone at the White House or the Department of Justice spoken with you about potentially naming you to a Supreme Court vacancy?

No.

b. Has anyone at the White House or the Department of Justice spoken with you about adding your name to a subsequent shortlist?

No.

c. Have you spoken with anyone at the Federalist Society or the Heritage Foundation about being named to a Supreme Court vacancy, or adding your name to a subsequent shortlist?

No.

17. 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 was 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.

It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

c. 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.

It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

d. 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.

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

My understanding is that, according to governing Supreme Court precedent, courts may have recourse to legislative history when the relevant statutory text is ambiguous. As a judge, I would fully and faithfully follow any binding precedents that relied on legislative history to construe a statutory provision.

19. According to your Senate Questionnaire, you have been a member of the Federalist Society since 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. When I was in law school at Louisiana State University and Columbia University, and when I subsequently taught at the University of Mississippi Law School, I encountered a broad array of viewpoints on a variety of subjects from both law professors and students.

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 that statement and am not aware of what its author meant by it. My understanding is that the Federalist Society takes no position on specific issues but rather serves as a forum to encourage the informed presentation of a variety of viewpoints on matters such as the rule of law, the role of judges in our Constitutional system, and the separation of powers.

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

I did not author that statement and am not aware of what its author meant by it. In my experience, the Federalist Society takes no position on specific issues but instead encourages informed debate and discussion of matters such as the rule of law, the role of judges in our Constitutional system, and the separation of powers.

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

I received the questions from the Justice Department in the evening of Wednesday, November 6. I personally drafted answers to all of the questions, solicited comments from the Justice Department attorneys working on my nomination, and revised my draft answers as I deemed appropriate in light of those comments.

Written Questions for Stuart Kyle Duncan
Submitted by Senator Patrick Leahy
December 6, 2017

1. **Chief Justice Roberts wrote in *King v. Burwell* that**

> **"oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions?'"**

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

I agree with the Chief Justice that well-accepted rules of statutory construction require judges to read statutory provisions in the context of their overall place in the statutory scheme and not as isolated provisions. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (explaining this approach to statutory interpretation). If confirmed as a judge, I would fully and faithfully follow all binding precedents of the Supreme Court and the Fifth Circuit concerning the rules of statutory interpretation, including *King v. Burwell*.

2. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

   (a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

   As a judicial nominee, it would be inappropriate for me to comment on a political matter under the canons of judicial ethics. As a general matter, I strongly believe that an independent federal judiciary is critical to preserving our constitutional system of individual rights and separation of powers, and provides an indispensable check on legislative and executive power at both the Federal and State levels.

   (b) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

   Please see my response above to Question 2(a).

3. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and*

will not be questioned." (Emphasis added.)

(c) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

I am not aware of any such provision or precedent, but one should be extremely cautious in offering general statements about the complex area of national security law. No one, not even the President, is above the law. If confirmed, I would decide cases implicating national security like all other cases—namely by carefully considering the arguments of both sides, by listening to my judicial colleagues, and by fully and faithfully applying all applicable laws and precedents.

4. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

My understanding is that litigation concerning these kinds of issues remains pending in the federal courts, and so it would be inappropriate for me to comment on them under the canons of judicial ethics. If confirmed, I would decide cases concerning the First Amendment and immigration like all other cases—namely by carefully considering the arguments of both sides, by listening to my judicial colleagues, and by fully and faithfully applying all applicable laws and precedents.

5. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

(d) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?

The question is a grave one, but impossible to answer outside the context of a specific legal dispute. Generally speaking, if such a situation presented itself in federal litigation, a court would be bound to fully and faithfully apply any applicable precedent to resolve the situation within the bounds of its jurisdiction, including all applicable tools available to federal courts to enforce compliance with their orders. Full and prompt compliance with federal court orders is indispensable to the proper functioning of our legal system.

6. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(e) **Do you agree that the Constitution provides Congress with its own war**

powers and Congress may exercise these powers to restrict the President– even in a time of war?

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

The Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States[.]" U.S. Const., art. II, § 2 cl. 1. But the Constitution also vests Congress with powers concerning war, such as the power "[t]o declare War," *id.* art. I, § 8, cl. 11, "[t]o raise and support Armies," *id.* art. I, § 8, cl. 12, "[t]o provide and maintain a Navy," *id.* art. I, § 8, cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14. If called upon to decide an issue in litigation concerning the relationship between Congress's and the President's authority in this area, I would fully and faithfully apply all applicable precedent, including *Hamdan*.

(f) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

Please see my response above to Question 6(e).

7. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(g) Do you agree with that view? Does the Constitution permit discrimination against women?

I am not familiar with the referenced statement and so cannot comment on what was meant by it. The Supreme Court has long held that laws discriminating on the basis of sex are subject to "intermediate" scrutiny under the Equal Protection Clause and therefore demand an "exceedingly persuasive justification" to survive judicial review. *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

8. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

I am not familiar with the referenced statement and so cannot comment on what was meant by it. If a case involving the Voting Rights Act came before me, I would fully

and faithfully apply applicable Supreme Court and Fifth Circuit precedent.

9. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

   The Constitution provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind what ever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. My understanding is that the meaning of this Clause is the subject of pending federal litigation (*see, e.g., Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. 2017), and I therefore am precluded from any further comment.

10. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

    (h) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

    As a nominee to a lower federal court, it would be inappropriate for me to offer any opinion on how the Supreme Court should treat Congress's factual findings. If confirmed, I would fully and faithfully follow *Shelby County* and all other binding precedent.

11. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

    Those amendments grant Congress the "power to enforce [them] by appropriate legislation." *See* U.S. Const. amend. XIII, § 2; *id.* amend. XIV, §5; *id.* amend. XV, § 2. If faced with an issue in litigation concerning the extent of Congress's authority to enforce those amendments, I would fully and faithfully follow any applicable Supreme Court and Fifth Circuit precedent.

12. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

    (i) Do you believe the Constitution protects that personal autonomy as

a fundamental right?

Lawrence v. Texas, 539 U.S. 558 (2003), is a binding precedent of the Supreme Court and, if confirmed, I would follow it fully and faithfully.

13. In the confirmation hearing for Justice Gorsuch earlier this year, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(j) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

This matter could not be clearer: lower federal judges, include circuit judges, are bound to fully and faithfully follow *all* binding Supreme Court precedent. That obligation does not vary whether the question is one of statutory or constitutional interpretation. Additionally, if confirmed as a Fifth Circuit judge, I would be bound to follow all binding circuit precedent.

14. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(k) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

I would follow the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. For instance, pursuant to those rules I would be required to recuse myself "[w]here in private practice [I] served as lawyer in the matter in controversy, or a lawyer with whom [I] previously practiced law served in such association as a lawyer concerning the matter[.]" 28 U.S.C. § 455(b)(2). Furthermore, as a safeguard against acting "in any proceeding in which [my] impartiality might reasonably be questioned," *id.* § 455(a), I would voluntarily recuse myself for a period of time in any matter in which my current law partners will serve as lawyers, even if I would not be otherwise recused from the matter under section 455(b)(2), *supra*.

15. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the

constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

(l) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Federal courts have a solemn obligation to vindicate the civil rights of individuals protected by the Constitution or federal statutes**.** As a lawyer in private practice, I have repeatedly advocated for the civil rights of individual litigants—including the poor, minorities, and prisoners—on the basis of the First Amendment and federal civil rights statutes such as the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. If confirmed as a judge, I would be vigilant in protecting the civil rights of all persons, and in doing so fulfill my oath to "administer justice without respect to persons, and do equal right to the poor and the rich." 28 U.S.C. § 453.

16. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

(m) **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

I agree that our constitutional system of checks and balances is an indispensable means of ensuring that all three branches of the Federal government remain in their appropriate spheres of authority. That system provides a critical protection for all Americans' freedom from the arbitrary abuse of government power.

17. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Article I, section 8 of the Constitution enumerates Congress's powers in seventeen separate

clauses and additionally grants Congress authority "[t]o make all laws which shall be necessary and proper for carrying into Execution [those] Powers[.]" U.S. Const. art. I, § 8, cl. 1-17, 18. The interpretation of the scope of those powers has been perennially addressed by the Supreme Court, going back to Chief Justice Marshall's seminal opinion in *M'Culloch v. Maryland*, where in discerning whether Congress had the authority to charter a national bank, he famously remarked that "we must never forget that it is a *constitution* we are expounding." 17 U.S. 316, 407 (1819). The Court has often had occasion to interpret the scope of Congress's authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian tribes," U.S. Const. art. I, § 8, cl. 3, in decisions such as *Gibbons v. Ogden*, 22 U.S. 1 (1924); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 898 (1964); *United States v. Lopez*, 514 U.S. 549 (1995); and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Finally, the Court has held that Section 5 of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzebach v. Morgan*, 384 U.S. 641, 651 (1966). The Court has subsequently interpreted the scope of Section 5 in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); and *Tennessee v. Lane*, 541 U.S. 509 (2004). I would fully and faithfully follow these precedents of the Supreme Court and any applicable precedents of the Fifth Circuit, if confirmed.

Senator Dick Durbin
Written Questions for David Stras, Kyle Duncan, and Andre Iancu
December 6, 2017

For questions with subparts, please answer each subpart separately.

Questions for Kyle Duncan

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). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

2. In 2016, you wrote an article entitled "*Obergefell* Fallout" in which you said "I find *Obergefell* to be an abject failure" in terms of the grounds on which the Supreme Court decided the case. You said that the *Obergefell* decision "repudiated more than a century of precedent recognizing states as the central source of family law;" that it "sweeps away the value of the democratic process;" and that it "imperils civic peace" because "the grounds of the decision effectively marginalize the views of millions of Americans at exactly the wrong time, when standards of civic discourse are rapidly degenerating."

   Do you still believe that the *Obergefell* decision was an "abject failure" in terms of the way the case was decided?

   For a discussion of the context of these quotations, please see my response to Senator Feinstein's Question 6. In any event, the views I expressed in the referenced article were in my capacity as a legal commentator and would have no bearing on how I would apply *Obergefell* if confirmed to the Fifth Circuit. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

3. In a 2015 article entitled "Marriage, Self-Government and Civility," you wrote about the *Obergefell* case, which was then pending before the Supreme Court, and said "the plaintiffs are same-sex couples who assert that the Fourteenth Amendment removes same-sex marriage from democratic deliberation and compels all fifty states to adopt it. They are profoundly mistaken." **Does this statement still reflect your views?**

   The views expressed in the referenced article were adapted from an amicus brief I filed on behalf of fifteen states. The arguments I made in the course of that representation would have no bearing on how I would apply *Obergefell* if confirmed to the Fifth Circuit. *Obergefell* is a

precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

4. You also wrote in your article "Marriage, Self-Government and Civility" that "[i]t is often asked by proponents of same-sex marriage what 'harms' would flow from judicial recognition of their claims. From the perspective of democratic self-government, those harms would be severe, unavoidable, and irreversible."

   a. **Do you stand by this statement?**

      Please see my response above to Question 3.

   b. **Has the *Obergefell* decision created any harms that are severe, unavoidable or irreversible? If so, please discuss these harms.**

      Please see my response above to Question 3.

5. In a 2014 speech to the Brigham Young University Federalist Society about the Supreme Court's right-to-marry cases in *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safely*, you said "[w]ell, ask yourselves this: do they add up to a right to marry your first cousin? A thirteen year old? If you say yes to the same-sex marriage question, don't you also have to say yes to these other ones?" **Does this statement still reflect your views post-*Obergefell?***

   Please see my response to Senator Feinstein's Question 7.

6. **Do you believe sexual orientation is an immutable characteristic or does someone choose to be gay or lesbian?**

   I have not studied this matter, nor am I an expert on this subject. If I were required to decide any case touching on this issue, I would carefully review the arguments of parties and *amici*, consult with my judicial colleagues, and fully and faithfully apply any applicable precedent of the Supreme Court and the Fifth Circuit.

7. **Is being transgender something that someone chooses, or is it an aspect of their identity that cannot be changed?**

   Please see my answer above to Question 6. Additionally, I remain counsel to a party in pending federal litigation that may involve such issues and, as such, it would be inappropriate for me to comment on them.

8. **Do you believe that families formed by LGBTQ couples are less legitimate than other families?**

   No.

9.

a. **Was the Supreme Court's decision in *Obergefell* rightly decided?**

As a legal commentator, I have offered measured criticisms of the legal grounds on which the Supreme Court decided this case, while expressly taking no position on the policy question of whether the law should recognize same-sex marriage. *See, e.g.*, *Obergefell Fallout*, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE (ABC-CLIO 2016). However, my views as a legal commentator would have no bearing on how I would apply *Obergefell* if confirmed to the Fifth Circuit. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

b. **Do you pledge, if you are confirmed, that you will not take steps to undermine the Court's decision in *Obergefell*?**

Please see my response above to Question 9(a).

10. You joined with North Carolina District Court nominee Thomas Farr to author a cert petition on behalf of North Carolina in *North Carolina v. North Carolina State Conference of the NAACP* seeking review of the 4th Circuit's decision to strike down the state's 2013 voting reform law. The 4th Circuit held that this law's provisions "targeted African Americans with almost surgical precision" and concluded that the law was enacted with discriminatory intent.

Your brief argued that the 4th Circuit's decision "is an affront to North Carolina's citizens and their elected representatives and provides a roadmap for invalidating election laws in numerous States." The Supreme Court denied your petition.

Can you please explain what you meant when you said that the 4th Circuit's decision was an "affront to North Carolina's citizens."

As counsel for the North Carolina General Assembly in that case, I advanced my client's sincere belief that the laws at issue were sensible election reform laws that—as the district court found—resulted in an *increase* in African-American voter participation in North Carolina elections and were not intended to discriminate against minority voters. *See* Petition for Writ of Certiorari, *State of North Carolina v. North Carolina State Conference of the NAACP*, No. 16-833 (U.S. Dec. 27, 2016), at 1, 4-13. My client viewed it as an affront to North Carolina's citizens and elected representatives to suggest otherwise. As counsel for a party, it was my obligation to zealously advance my client's position. Furthermore, in an unusual statement regarding the denial of certiorari in that case, Chief Justice Roberts wrote that "it is important to recall our frequent admonition that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." 137 U.S. 1399 (Mem.) (statement of C.J. Roberts respecting the denial of certiorari).

11. In the 1886 case *Yick Wo v. Hopkins,* the Supreme Court said that "the political franchise of voting…is regarded as a fundamental political right, because preservative of all rights." **Do you agree that voting is a fundamental political right?**

The Supreme Court has held in numerous cases that voting is a fundamental right. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). If confirmed, I would apply all voting rights precedents of the Supreme Court and the Fifth Circuit fully and faithfully.

12. **Are you troubled by President Trump's claim that 3 to 5 million people voted illegally in the 2016 election – a claim that is wholly unsubstantiated?**

    As a federal judicial nominee, I am constrained by the canons of judicial ethics from commenting on political matters.

13. You have taken positions in litigation in opposition to DACA (Deferred Action for Child Arrivals) and DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents). **Did the litigation positions you advocated in these cases represent your personal views or the positions of your clients?**

    In representing clients, I do not advance my personal views but the interests of my clients. I regard that as a fundamental value in our adversarial litigation system.

14. In 2001 when you were Assistant Solicitor General in Texas, you co-authored a cert petition in the case *Cockrell v. Burdine*. This case involved the question of whether prejudice should be presumed when a defense counsel in a capital case "intermittently dozed and actually fell asleep during portions of trial." The 5th Circuit had held that prejudice was presumed under the circumstances of this case because such deficient performance amounted to an actual denial of counsel. Your brief argued that the Supreme Court should grant certiorari and clarify that "an actual conflict of interest is the only instance of deficient attorney performance that merits a presumption of prejudice. Intermittent episodes of an attorney sleeping are indistinguishable from other kinds of impaired attorney performance that, while lamentable, are subject to a general requirement that the defendant affirmatively prove prejudice." **Can you please discuss the facts of this case and your role in it?**

    I was an Assistant Solicitor General in the Texas Attorney General's Office, working under the direction of the Deputy Solicitor General and the Solicitor General. As a government attorney representing the State of Texas (and particularly as one of the junior attorneys on the brief), it was my obligation as a lawyer to present the best arguments for my client's position. My recollection of that case is that it involved a highly unusual example of deficient attorney performance, namely an attorney who intermittently slept during a capital murder trial. No party disputed that the attorney's conduct was egregiously deficient. The dispute was whether this kind of attorney misconduct should be evaluated under the usual "prejudice" standard of *Strickland v. Washington*, 466 U.S. 668 (1984), or the "presumption of prejudice" standard of *United States v. Cronic*, 466 U.S. 648 (1984). The Fifth Circuit *en banc* held that it should be evaluated under the latter standard, and the Supreme Court denied a writ of certiorari. If confirmed to the Fifth Circuit, I would fully and faithfully apply the Fifth Circuit's *en banc* decision in *Burdine*, as well as all other Supreme Court and Fifth Circuit precedents concerning claims of ineffective assistance of counsel.

15.

a. **Is waterboarding torture?**

I have not had occasion to study the matter, but my understanding is that Congress enacted legislation for the express purpose of clarifying that waterboarding is illegal under U.S. law.

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

Please see my response above to Question 15(a).

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

Please see my response above to Question 15(a).

16. 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 President Trump's Circuit Court nominees.

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 federal judicial nominee, I am constrained from commenting on political or policy matters by the canons of judicial ethics.

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

As a federal judicial nominee, I am constrained from commenting on political or policy matters by the canons of judicial ethics.

c. **If you learn of any such donations, will you commit to call for any such 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?**

As a federal judicial nominee, I am constrained from commenting on political or policy matters by the canons of judicial ethics.

17.

a. **Can a president pardon himself?**

I have not had any occasion to study this question. If confirmed and such case were to come before me, I would carefully study the text of the Constitution and any relevant federal statutes or precedents, consider the briefs and arguments of the parties, discuss the matter with my judicial colleagues and clerks, and render a decision based on the facts and law before me.

b. **Can an originalist view of the Constitution provide the answer to this question?**

I have not had any occasion to study 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?**

A lower court judge should always look first to applicable Supreme Court or circuit precedent, which he or she would be bound to apply. If precedent does not resolve the question, the judge should then have recourse to other interpretive guidance such as the original public meaning of the applicable constitutional text; the place of that text within the constitutional structure; and any relevant historical practices, both at the time of the framing and thereafter.

18. **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?**

Judges are human and having empathy for others—especially for those who suffer—is a natural and praiseworthy human response. It cannot, however, lead a judge to privilege one side of a legal dispute over the other, because that would violate the judge's oath to "administer justice without respect to persons, and do equal right to the poor and the rich, and … [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453.

19. 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 because it provided a forum for hearing expert debate and discussion of important topics such as the rule of law, the role of judges in our Constitutional republic, and the separation of powers.

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 federal judicial nominee, I am constrained by the canons of judicial ethics from commenting on political or policy matters.

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

To the best of my recollection, I attended the 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?**

I did not attend the speech in person, but I saw parts of it on television. I do not remember whether I had any reaction to the referenced comments.

Nomination of Kyle Duncan to the
United States Court of Appeals for
the Eighth Circuit
Questions for the Record
Submitted December 6, 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?

      I agree with the metaphor to the extent it means that judges must resolve disputes before them according to objective rules of law and not the judges' 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?

      If the legal doctrine governing a particular case requires a judge to take into account the practical consequences of a ruling, then the judge must do so. 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?

      Under well-settled principles, a court must find that "[a] genuine dispute as to a material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *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)). That is an objective standard. Which facts are material is determined by the underlying substantive law. *Anderson*, 477 U.S. at 248. And the Supreme Court has 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." *Id.* 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?
b. What role, if any, should a judge's personal life experience play in his or her decision-making process?
c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

My answer to all three of these related questions is the same. Judges are human and having empathy for others—especially for those who are marginalized or suffering or mistreated—is a natural and praiseworthy human response. It cannot, however, lead a judge to privilege one side of a legal dispute over the other, because that would violate the judge's oath to "administer justice without respect to persons, and do equal right to the poor and the rich, and … [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453.

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. Given your work on the *Hobby Lobby* case, your amicus brief in *Obergefell*, and your defense of transgender bathroom bills, how can you assure women and the LGBTQ community that you will defend their constitutionally recognized rights?

If confirmed, I would be duty bound to fully and faithfully apply all binding Supreme Court and Fifth Circuit precedents, including *Hobby Lobby* and *Obergefell*. I would do so unflinchingly, and without regard to any positions I previously took as counsel for a party in litigation or as a legal commentator. That is the essence of the judicial oath.

5. As a circuit judge, how would you weigh any potentially competing considerations between religious liberty and the equal protection clause?

As I attempted to explain at my hearing, the guarantees of religious liberty in the First Amendment and various federal civil-rights statutes are not absolutes. There are well-known limitations on the constitutional right of religious exercise requiring compliance with neutral laws of general applicability (*see, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990)), and federal statutes—such as RFRA and RLUIPA—expressly provide that even substantial burdens on religious exercise may be justified by laws narrowly tailored to further compelling government interests (*see, e.g., Holt v. Hobbs*, 135 S. Ct. 853 (2015)). As a circuit judge, I would fully and faithfully apply all binding precedents and laws concerning the scope of a claimant's religious liberty.

6. What do you understand to be the holding of *Obergefell*? As a circuit court judge, would you be bound by that decision? When, if ever, would it be appropriate for you to disregard

that decision?

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). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully. It would never be appropriate to disregard *Obergefell* or any binding precedent of the Supreme Court or the Fifth Circuit.

7. In reference to North Carolina's transgender bathroom bill HB2, you argued that enjoining HB2 "would subject the people of North Carolina — and especially women and girls — to serious safety and privacy risks."
    a. What "serious safety and privacy" risks arise from allowing transgender individuals to use the bathroom consistent with their gender identity?

        Because this matter remains pending in federal court and I am counsel for a party, it would be inappropriate for me to comment on it.

    b. Do you personally know anyone who is transgender? If so, have your views about issues affecting transgender Americans changed at all as a result of these relationships?

        Please see my response above to Question 7(a). Additionally, as an attorney for a client, I do not advance my own personal views but my client's interests.

8. In a piece you wrote for the Federalist Society, you described your views on statutory interpretation, saying, "How a court interprets statutes is a bellwether of its restraint. This is so because, under the guise of technical 'rules' of statutory construction, activist courts may subtly rewrite laws to further the judges' own policy preferences. Such favored approaches include the search for laws' 'spirit' or 'purposes' that override the purposes gathered from the plain terms of the laws themselves."
    a. What did you mean by that?

        As a legal commentator, I was expressing the view that judges should not misuse the rules of statutory interpretation to reach a preferred result at odds with the plain terms of a statute. By doing so, judges would usurp from the legislature its authority to choose from among competing policy preferences.

    b. What influence do policy preferences play in statutory interpretation? Is such bias avoidable?

        As a general matter, choosing among competing policy preferences is the job of legislators, not judges. That is especially true of federal judges, who are granted judicial, not legislative, power by the Constitution. Thus, judges should strive to interpret statutes in accordance with the policy preferences of the enacting

legislature as expressed by the plain terms of the statute.

c. When, if ever, is it permissible for a judge to interpret a statute by looking beyond its plain text?

When the plain text of a statute is ambiguous, the Supreme Court has explained that judges should look to other interpretive tools—such as the place of the statute in the overall statutory structure, accepted canons of statutory construction, and legislative history.

9. Throughout your career, you have defended restrictive voting regulations, such as those in North Carolina that the Fourth Circuit found "targeted African Americans with almost surgical precision" and those in Texas that the district court concluded were discriminatory. Given this background, how can you assure this committee that you will protect and defend the voting rights of all individuals, especially those who have historically been disenfranchised?

In two cases throughout my twenty-year career, I served as counsel for clients whose election laws were challenged under the Voting Rights Act and the Equal Protection Clause. In those cases, my role was to make the best arguments possible for my clients' interests. If confirmed as a judge, my role would be entirely different: to impartially apply binding precedents, regardless of the parties before the Court. I grasp that fundamental distinction between advocate and judge and, if confirmed, I would unflinchingly abide by it. With respect to voting and election cases, I would fully and faithfully apply all binding precedents of the Supreme Court and the Fifth Circuit.

Nomination of Kyle Duncan, to be United States Circuit Judge for the Fifth Circuit
Questions for the Record
Submitted December 6, 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?

   I would apply the governing framework from the most closely applicable decision of the Supreme Court, which has addressed this question in a variety of settings over a long period of our history. *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 instructed *Glucksberg*, a court would "examin[e] our Nation's history, legal traditions, and practices," 521 U.S. at 710, as evidenced for instance by long-established state legislative and judicial practices, *id.* at 710-11, by the "Anglo-American common law tradition," *id.* at 711-12, and by American colonial practices, *id.* at 712-16.

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

      Yes, as a Fifth Circuit judge I would be bound by a previous recognition of the asserted right by the Supreme Court or the Fifth Circuit. If the issue were not settled by Supreme Court or Fifth Circuit precedent, I would consider precedent from other circuits for its persuasive value.

   d. Would you consider whether a similar right has previously 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?

I would consider any other factors that appear relevant under applicable Supreme Court or Fifth Circuit precedent.

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 black-letter law that the Equal Protection Clause of the Fourteenth Amendment applies to discrimination on the basis of gender as well as race. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996).

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?

In my role as a judge, I would respond that this is a purely academic question. If confirmed, I would be bound to apply Supreme Court precedent governing gender discrimination.

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 do not know why the litigation that led to the Supreme Court's decision 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?

I currently represent a party in pending litigation that addresses questions of this nature and accordingly cannot ethically opine on this issue.

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

Yes, as enunciated by the Supreme Court in decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, as enunciated by the Supreme Court in decisions such as *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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

Yes, as enunciated by the Supreme Court in decisions such as *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

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

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "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 (2013), 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?

As a lower court judge, my role would be to fully and faithfully apply binding

Supreme Court and Fifth Circuit precedents as well as the rationales governing those precedents. Consequently, where applicable precedent considers evidence of changing societal understandings, I would follow that analysis.

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

Generally speaking, 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. You are a member of the Federalist Society, which advocates an "originalist" interpretation of the Constitution.

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

My understanding is that this question has been the subject of scholarly dispute. *Compare, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995), *with* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995). As a judge, I would view the question as purely academic, given the binding force of *Brown*.

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 5, 2017).

I would agree that discerning the original public meaning of certain provisions of the Constitution can be a difficult endeavor. *Compare, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (Thomas, J., concurring), *with id.* at 371 (Scalia, J., dissenting) (disagreeing on original meaning of First Amendment concerning anonymous pamphleteering). Furthermore, applying that original public meaning to modern circumstances unforeseen by the framing generation requires a careful exercise of judgment. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33-34

(2001) (applying Fourth Amendment to infrared heat imaging of home and observing that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology").

6. In the amicus brief you filed in *Obergefell v. Hodges*, you argued that finding a constitutional right to marriage equality would "undermine the democratic process."

   a. Do you agree that the purpose of enshrining rights in the Constitution is to protect those rights from infringement by the government?

      Yes. At the time I made those arguments in litigation, a constitutional right to same-sex marriage had not yet been recognized by the Supreme Court in *Obergefell*. It is now axiomatic that the right recognized in *Obergefell* is not subject to legislative revision through the democratic process.

   b. Objectors made the same argument when the Supreme Court struck down laws banning interracial marriage, which a majority of states had when *Loving* was decided. Do you agree that it a federal court's job to strike down laws that violate due process and equal protection?

      Yes, I strongly agree that "[i]t s emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and that in fulfilling that duty in cases and controversies, federal judges are obligated to invalidate laws that violate the Constitution's guarantees of due process and equal protection.

7. In the petition for certiorari you filed in *Schaefer v. Bostic*, you suggested that finding a right to marriage equality would require the Court to also find a "fundamental right to marry a 13- year-old or a first cousin." Does this remain your view?

   In that certiorari petition, which I filed as a lawyer representing a client, I was making arguments under the *Glucksberg* analysis concerning the scope of the fundamental right to marry recognized by previous Supreme Court cases. The Supreme Court has now decided in *Obergefell* that "same-sex couples may exercise the fundamental right to marry in all States." 135 S. Ct. 2584, 2607-08 (2015). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

8. In *United States v. North Carolina*, you submitted a motion arguing against a preliminary injunction that would have blocked portions of North Carolina's HB2 law. Your motion argued that allowing transgender individuals to use the bathroom corresponding with their gender identities would "ignore potential criminal activity." What data, if any, demonstrates that criminal activity due to transgender individuals using the bathroom matching their gender is a widespread problem?

That litigation—in which I represent the North Carolina General Assembly and make legal arguments to further my client's interests in defending duly enacted North Carolina laws—remains pending in federal court and, as such, it would be ethically inappropriate for me to comment on it as a federal judicial nominee.

9. On several occasions, 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 for various parties in that litigation, I advanced my clients' interests, not my personal views. If this issue were to come before me as a judge, I would fully and faithfully apply all governing laws and precedents.

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

      Please see my response above to Question 9(a).

10. As both a former solicitor general and in private practice, you have represented the state of Louisiana. Those representations include writing an amicus brief for the state in *Obergefell*; defending Louisiana's same-sex marriage ban before the Fifth Circuit; defending the state's restrictive abortion law in *June Medical Services v. Gee*; and representing the state before the Supreme Court in *Montgomery v. Louisiana*.

    a. If confirmed, do you agree there are circumstances under which it may be appropriate to recuse yourself from cases in which the state of Louisiana is a party?

       Yes. If confirmed I would follow the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. Pursuant to those rules, I would be required to recuse myself "[w]here in private practice [I] served as lawyer in the matter in controversy, or a lawyer with whom [I] previously practiced law served in such association as a lawyer concerning the matter[.]" 28 U.S.C. § 455(b)(2). Furthermore, I would be required to recuse myself "in any proceeding in which [my] impartiality might reasonably be questioned." *Id.* § 455(a). As a former lawyer for the State of Louisiana in both government and private practice, I anticipate that there may be cases in which I would be required to recuse myself, and I would do so.

    b. Do you commit to following all applicable judicial ethics rules in determining whether to recuse yourself in cases where former clients are parties?

       Yes.

11. In 2009, you wrote a law review article titled "Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence" that argued that the Establishment Clause

"originally served to quarantine church-state issues at the state level" and does not contain a "theory of substantive church-state relationships."

a. Does the First Amendment contain a substantive right to the free exercise of religion, or does it merely bar the federal government from regulating religion?

The First Amendment contains a substantive, judicially-enforceable right that "Congress shall make no law … prohibiting the free exercise [of religion]," U.S. Const. amend. I, which applies against the States. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940). If confirmed as a judge, I would fully and faithfully apply all precedents of the Supreme Court and the Fifth Circuit concerning the free exercise of religion.

b. Does the First Amendment limit the types of laws that states can pass restricting the exercise of religion?

Yes. Please see my response above to Question 11(a).

12. In the amicus brief you filed in *Obergefell v. Hodges*, you argued that marriage is "rationally structure[d] around the biological reality that the sexual union of a man and a woman – unique among all human relationships – produces children."

a. Do you view marriage to provide any benefits to society beyond procreation?

In the referenced amicus brief, I was advancing legal arguments on behalf of State clients, not my own views. In any event, *Obergefell* has now held that same-sex couples may exercise the fundamental right to marry in all States, which is a binding precedent of the Supreme Court that I would apply fully and faithfully, if confirmed.

b. Could a state require heterosexual couples to state an intention to have children in order to get married?

My understanding of the governing canons of judicial ethics is that, as a federal judicial nominee, I should refrain from opining on hypothetical cases.

Questions for the Record for Stuart Kyle Duncan
Submitted by Senator Richard Blumenthal
December 6, 2017

1. In a February 2012 presentation at Belmony Abbey College on "Legal Challenges to Religious Liberty," you responded to an audience member who expressed concerns about preventative health care such as birth control supposedly being used to induce abortions. In response, you said:

> You're absolutely right. Of course when the government says preventative they mean preventing illness or disease. They apparently also mean preventing pregnancy. Which I suppose the government regards as a disease, just judging from their actions. Right so they have this world view about what women's health means and it's a world view that is profoundly at odds with the world view of people at Belmont Abbey and others. And you know what can you do about that? We can get the law changed. We can have a different President, we can get a different Congress. Or we can go forward with lawsuits and say your world view about what preventative health means stops at the First Amendment.

a. What do you see as the "world view" of the government with regard to women's health?

In the referenced presentation I was speaking as a lawyer representing Belmont Abbey College (among other plaintiffs) in challenges to the federal regulatory mandate that required health plans to include all FDA-approved contraceptives in their health insurance plans. Numerous plaintiffs challenged that requirement under, *inter alia*, the First Amendment and the Religious Freedom Restoration Act on the grounds that the mandate violated their right to refrain from performing acts forbidden by their religious faith. By referring to the "world-view" of the federal government in the presentation, I was referring to the position the government advanced in those cases that it could require private employers to provide contraceptive coverage regardless of any sincerely-held religious objections to such coverage.

There is a profound difference between serving as a counsel for a party in litigation—which was the capacity in which I was representing Belmont Abbey College when I made that presentation—and serving as a federal judge. If confirmed as a judge, I would assiduously and unflinchingly apply all governing precedents of the Supreme Court and the Fifth Circuit concerning religious liberty, the First Amendment, and the Affordable Care Act.

b. You said, "We can get the law changed." How would you like to see the law changed?

Please see my response above to Question 1(a) for the context of this presentation. My client sought an exemption from the contraceptive coverage mandate.

c. We have a different President and different Congress than we did in 2012. What changes do you expect to see?

Please see my response above to Questions 1(a) and 1(b).

2. In an article you wrote for CNS News in 2013, you referred to the Affordable Care Act's contraceptive coverage requirement as "the HHS abortion-drug mandate," claiming that it "severely burden[s] the religious liberty of millions of Americans." In a 2012 article, you also attacked the exemption for religious employers as "a pitifully small fig leaf." And, in a 2013 article in EWTN News, you were quoted attacked the government for "treat[ing] contraceptives as 'the sacrament of our modern life,' necessary for 'the good life,' health and economic success of society, particularly women."

a. Do you believe that the contraceptive coverage mandate is a severe burden on religious liberty?

All of the statements referenced above were made in my capacity as a lawyer representing clients who were challenging the contraceptive coverage mandate. In that litigation, I argued on behalf of clients that the mandate violated their religious liberty under the Religious Freedom Restoration Act (RFRA) by substantially burdening their religious exercise. As with any legal representation, those arguments were made on behalf of my clients' interests, not my personal policy preferences.

If confirmed to the federal bench, I would fully and faithfully apply any applicable Supreme Court and Fifth Circuit precedent, without regard to my personal views or any arguments on these matters I may have made when representing clients in litigation. That is the essence of the judicial duty, and if confirmed I would embrace it unflinchingly.

b. Do you support the DOJ and HHS guidance allowing employers to refuse to provide contraceptive coverage?

This guidance is currently being litigated before the federal courts, and therefore as a federal judicial nominee, I am precluded by the canons of judicial ethics from commenting.

c. Do you believe a business should be able to decline to serve gay customers?

Aspects of that question are currently being litigated before the Supreme Court and other federal courts, and therefore as a federal judicial nominee, I am precluded by the canons of judicial ethics from commenting.

Questions for the Record for Stuart Kyle Duncan

Senator Mazie K. Hirono

1. After *Shelby County v. Holder*, 570 U.S. 2 (2013), several states passed laws, including voter ID laws, that were challenged as discriminatory. In reference to your participation in a case involving the Texas voter ID law that was challenged as discriminatory, Senator Feinstein asked you at the hearing about what evidence you had that voter fraud is a widespread problem. You responded that you had participated in two cases involving challenges to voter ID laws in North Carolina and Texas, and that in those cases, you had in mind voter ID laws as a prophylactic measure based on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). But in the North Carolina case, the U.S. Court of Appeals for the Fourth Circuit found that North Carolina's voter ID law and other voting laws "were enacted with racially discriminatory intent" and targeted African-American voters with "almost surgical precision."

   a. Do you believe that even if there is no significant evidence of voter fraud, all voter ID laws are valid as a prophylactic measure?

   I have never taken that position on behalf of a client in litigation, and I certainly did not mean to convey that view in my answer to Senator Feinstein's question. In my answer to Senator Feinstein, I was referring to the Supreme Court's decision upholding Indiana's voter identification law in *Crawford v. Marion County Election Board* against an Equal Protection challenge. *See* 553 U.S. 181 (2008). Justice Stevens' plurality opinion explained that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," and that "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196. In that case, although "[t]he record contain[ed] no evidence of any such [voter] fraud actually occurring in Indiana at any time in its history," Justice Stevens' opinion stated, "It remains true … that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists[.]" *Id.* at 194-95.

   If confirmed as a judge, I would fully and faithfully apply *Crawford* and any other governing precedents of the Supreme Court and the Fifth Circuit concerning voter identification or other election laws.

   b. To determine whether a voting law is discriminatory, do you believe it is important to look at the context in which the law was passed and the impact that the law has?

   My understanding of governing Supreme Court precedent under the Voting Rights Act is that, in assessing whether a voting or election law is discriminatory, courts must consider factors such as the context in which the law was passed and the law's

impacts on minority voters, among numerous other factors. *See, e.g.*, *Thornburgh v. Gingles*, 478 U.S. 30 (1986). If confirmed, I would fully and faithfully apply all binding Supreme Court and Fifth Circuit precedents under the Voting Rights Act.

2. At the hearing, I noted that you had expressed a lot of concern regarding the decision in *Obergefell v. Hodges*, 576 U.S. (2015), which affirmed the right of same-sex couples to marry. In a piece titled Obergefell *Fallout*, for instance, you wrote that the *Obergefell* decision was "an abject failure" that "imperil[ed] civic peace" and "marginalize[d] the views of millions of Americans," based on your concerns that the decision undermined democratic processes.

a. How did the *Obergefell* decision imperil civic peace and marginalize the views of millions of Americans? Please be specific.

Please see my response to Senator Feinstein's Question 6(a).

b. What types of rights do you think should be subject to democratic vote by States or voters instead of courts?

Constitutional rights are, by definition, not subject to democratic vote because the people have removed them from the majoritarian process. As Justice Jackson eloquently observed, "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Va. State Bd. of Elections v. Barnette*, 319 U.S. 624, 638 (1943).

c. Does the Supreme Court have to wait until States agree by democratic vote to recognize a constitutional right?

No. Please see my response above to Question 2(b).

d. How do you determine whether the Supreme Court has overstepped its bounds in recognizing a constitutional right that has not yet been recognized by States?

As a nominee to a lower federal court, I would not presume to instruct the Supreme Court on when it has overstepped its bounds in reaching any particular decision. My role as a circuit judge would be to fully and faithfully apply all binding Supreme Court precedents, regardless of my personal view of the merits of those precedents.

e. Do you think the Court undermined democratic processes in *Brown v. Board of Education*?

No.

f. In your view, what makes *Obergefell* different from *Brown*?

Brown held that the Fourteenth Amended prohibits *de jure* racial segregation in public schools. *Obergefell* held that the Fourteenth Amendment guarantees to same-sex couples the fundamental right to marry. Both *Brown* and *Obergefell* are binding precedents of the Supreme Court that I would fully and faithfully apply if confirmed to the Fifth Circuit.

g. Do you believe that the right of same-sex couples to marry is not a constitutional right?

Obergefell held that same-sex couples have the fundamental right to marry in all States. It is a binding precedent of the Supreme Court that, if confirmed, I would apply fully and faithfully.

3. You stated at the hearing that you agree that "gay marriage . . . [is] settled law." And yet, after the Supreme Court's ruling in *Obergefell v. Hodges*, 576 U.S. (2015), you wrote a two-page letter to the U.S. Court of Appeals for the Fifth Circuit indicating that *Obergefell* was wrongly decided. In the letter, you conceded that, in light of the Supreme Court's ruling, the Louisiana same-sex marriage ban had to be overturned, but you made it a point to say that "Appellees agree with the four dissenting justices in *Obergefell* that it is wrongly decided," noting that the right recognized in *Obergefell* "has no basis in the Constitution or [the Supreme] Court's precedent."

a. What was your purpose or intent in highlighting the view that *Obergefell* was wrongly decided? Were you hoping or implying that the Fifth Circuit should adopt the same view, even as it technically complied with *Obergefell*?

No. The letter referenced by your question was written on behalf of my client, the State of Louisiana, in response to an order directing it to advise the Fifth Circuit how it should proceed with Louisiana's case in light of the Supreme Court's decision in *Obergefell*, which was issued while Louisiana's case was pending in the Fifth Circuit. Because my client had been defending its traditional marriage laws for several years—including in briefs filed in the Supreme Court—my client reiterated its support for its previous litigation position. But the letter could not have been clearer regarding Louisiana's and the Fifth Circuit's obligations in the matter: it stated that *Obergefell* "compel[ed]" the licensing and recognition of same-sex marriages in Louisiana.

b. What do you believe is the role of a federal circuit court judge in deciding whether or not the Supreme Court got a case wrong?

It is not the role of a federal circuit court judge to decide whether or not the Supreme Court got a case wrong. It is the role of a federal circuit judge to fully and faithfully apply binding Supreme Court precedent to the best of his or her ability.

c. Do you think it is appropriate for a circuit court judge to point out that a Supreme Court case is wrongly decided?

Generally speaking, I do not think that is appropriate for a federal circuit judge to do

so. In limited cases, circuit judges may write separate opinions pointing out areas of Supreme Court jurisprudence that, in the judge's view, may be developed or clarified, provided the separate opinion makes clear that circuit courts are bound to apply Supreme Court precedent regardless of a circuit judge's view of the merits of such precedent. Please also see my response to Senator Feinstein's Question 2(b).

d. In the letter you wrote to the Fifth Circuit, you seemed to hold the *Obergefell* dissents in high regard. In your view, what weight should judges give dissenting opinions in Supreme Court cases?

None. Dissenting opinions in Supreme Court cases are not the law.

e. Should federal circuit court judges seek to narrow the Supreme Court decisions with which they disagree or should they always seek to apply the decisions as narrowly or broadly as the Court intends in its controlling opinions?

It is not appropriate for a circuit judge to "seek to narrow" Supreme Court decisions with which the judge may disagree. Circuit judges are duty bound to fully and faithfully apply all Supreme Court precedents.

f. Are there any other cases that you believe were wrongly decided, like *Obergefell,* that you think should be scaled back or narrowed?

I have never taken the position, either as an advocate or commentator, that *Obergefell* should be "scaled back or narrowed." If confirmed as a circuit judge, I would fully and faithfully apply all Supreme Court precedents, including *Obergefell*.

4. At the hearing, I asked you about your statement you made in a publication by the Institute on Religion and Public Life after the Tenth Circuit ruled in your client's favor in *Hobby Lobby*. In the article, you had argued that "[t]his is a watershed moment in American religious liberty," and predicted that this case could affect coverage of "all manner of controversial practices from surgical abortion to euthanasia to sex-change surgery." You were unable to answer my question at the hearing, stating that you did not remember the context of that statement. I hope you have had a chance to refresh your recollection.

a. Do you believe that the "religious liberty" rights for closely held corporations recognized in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), should be applied to other areas?

I wrote the article referenced in your question in my capacity as General Counsel for the Becket Fund. As a federal judicial nominee, I am precluded by the canons of judicial ethics from offering opinions on hypothetical cases and issues that might come before me if confirmed.

b. Do you believe private hospitals could refuse to perform abortions or sex-change surgeries, or insurance companies could deny coverage to same-sex spouses, based on the *Hobby Lobby* decision?

Please see my response above to Question 4(a).

c. If so, where would you draw the line?

Please see my response above to Question 4(a).

5. As General Counsel for The Becket Fund for Religious Liberty, you argued in *Hobby Lobby* that for-profit corporations have religious rights that can override the government's interest in ensuring gender equality in health care. Specifically, you advocated for a position that placed a company's religious rights over women's right to access contraceptives through their employer healthcare plan.

a. Is your work for the Becket Fund for Religious Liberty representative of your views on religious liberty?

As a lawyer representing clients, my role was to advance my clients' interests, not my own views. If confirmed as a judge, my role would be entirely different: to impartially apply the law and all governing precedents to disputes before me, without regard to the parties involved or any previous arguments I may have made as a lawyer for clients.

b. How does your view on religious liberty inform your views on the law and constitutional rights?

Please see my response above to Question 5(a).

c. How do you think courts should balance the need to protect religious exercise with other constitutional rights?

Courts should impartially apply the law and all governing precedents to such cases. Please also see my response to Senator Whitehouse's Question 5.

6. You noted that you were lead counsel and appellate counsel for the North Carolina General Assembly in defending North Carolina's law restricting transgender people's ability to access public restrooms (known as HB2). In arguing against a motion for a preliminary injunction, you relied on a former federal agent's declaration to argue that "'[a]llowing a man to use [a] woman's rest room, locker room, dressing room, shower, or dormitory room simply because he says he feels like a woman would seem to be reckless, to ignore thousands of years of human experience, and to ignore potential criminal activity.'"

a. What evidence did you have that allowing a transgender person to use a women's restroom, locker room, dressing room, shower, or dormitory room leads to

criminal activity? Please be specific and itemize in as much detail as you can each piece of evidence.

Because I continue to represent a party in this litigation that is still pending in federal court, I cannot opine on the question posed.

b. Why would allowing a transgender person to use a women's restroom be "reckless"?

Please see my response above to Question 6(a).

7. In your Senate Judiciary Questionnaire, you commit to recusing yourself from "any litigation where [you] have ever played a role." You also commit to recusing yourself from all cases where your firm represents a party for a "period of time."

a. When you say you'll recuse yourself from cases where your firm "represents a party," does that include amici?

Yes.

b. How long is this period of time for which you would recuse yourself from cases involving your firm, if you are confirmed?

I have not decided on a specific period of time. If confirmed, I would consult with my colleagues and any other resources available to Fifth Circuit judges about the typical recusal practices for lawyers taking the bench from private practice. In all events, I would faithfully follow the requirements of the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and any other relevant recusal rules and guidelines.

EXHIBIT 4

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Stuart Kyle Duncan

2. **Position**: State the position for which you have been nominated.

   United States Court of Appeals for the Fifth Circuit

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Schaerr Duncan LLP
   1717 K Street N.W., Suite 900
   Washington, District of Columbia 20006

   Residence: McLean, Virginia

4. **Birthplace**: State year and place of birth.

   1972; Baton Rouge, Louisiana

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   2002 – 2004, Columbia University School of Law; L.L.M., 2004

   1994 – 1997, Paul M. Hebert Law Center, Louisiana State University; J.D., 1997

   1990 – 1994, Louisiana State University; B.A., 1994

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2016 – present

Schaerr Duncan LLP
1717 K Street N.W., Suite 900
Washington, District of Columbia 20006
Co-founder and Managing Partner

2014 – 2016
Duncan PLLC
[Now part of Schaerr Duncan LLP]
1629 K Street N.W., Suite 300
Washington, District of Columbia 20006
Founder and managing partner

2012 – 2014
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue, Suite 700
Washington, District of Columbia 20036
General Counsel

2008– 2012
Office of the Attorney General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, Louisiana 70802
Appellate Chief

2004 – 2008
The University of Mississippi School of Law
481 Chucky Mullins Drive
University, Mississippi 38677
Assistant Professor of Law

2002 – 2004
Columbia Law School
435 West 116th Street
New York, New York 10027
Associate-in-Law

2001 – 2002
Weil, Gotshal & Manges LLP
700 Louisiana Avenue, Suite 1700
Houston, Texas 77002
Associate (worked out of transitional office in Austin, TX)

1999 – 2001
Office of the Attorney General
State of Texas

300 West 15th Street
Austin, Texas 78701
Assistant Solicitor General

1998 – 1999
Vinson & Elkins LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002
Associate

1997 – 1998
Hon. John M. Duhé, Jr.
U.S. Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130
Law Clerk (worked out of chambers in Lafayette, LA)

Summer 1996
Thompson & Knight LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Summer Law Clerk

Summer 1996
Vinson & Elkins LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002
Summer Law Clerk

Summer 1995
McGlinchey Stafford PLLC
301 Main Street, Suite 1400
Baton Rouge, Louisiana 70801
Summer Law Clerk

Summer 1995
Kean Miller LLP
400 Convention Street, #700
Baton Rouge, Louisiana 70802
Summer Law Clerk

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I did not serve in the military. I registered for the selective service upon turning 18.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Louisiana Family Forum – Gladiator Award (2011).

   Louisiana District Attorneys Association – Award for outstanding service to Louisiana's prosecutors and the Office of the District Attorney in *Thompson v. Connick* (2010).

   National Association of Attorneys General – "Best Brief" awards for U.S. Supreme Court written advocacy (2000, 2009).

   Columbia Law School, Associates-in-law Program (2002 – 2004).

   Paul M. Hebert Law Center, Louisiana State University – Order of the Coif (1997).

   Paul M. Hebert Law Center, Louisiana State University – Hall of Fame (1997).

   Louisiana Law Review – Executive Senior Editor (1996 – 1997).

   Louisiana State University – *Summa cum laude* (1994).

   Junior Year Abroad, University of Siena, Siena, Italy (1993 – 1994).

   Università per Stranieri, Siena, Italy – Diploma in advanced Italian language and literature (1993).

   Louisiana State University – Chancellor's Scholarship (1990).

   Louisiana State University – National Merit Scholarship (1990).

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   Louisiana Bar Association (1997 – present).

   D.C. Bar Association (2012 – present).

   American Bar Association
   Committee on the Relationship of the Legislative, Executive and Judicial Branches (2016 – present).

10. **Bar and Court Admission**:

    a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

       Louisiana, 1997
       Texas, 1999

District of Columbia, 2012

I have taken inactive status in the Texas bar since 2002, when I stopped practicing frequently in that State.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2001
U.S. Court of Appeals for the Fourth Circuit, 2016
U.S. Court of Appeals for the Fifth Circuit, 1998
U.S. Court of Appeals for the Sixth Circuit, 2016
U.S. Court of Appeals for the Ninth Circuit, 2014
U.S. Court of Appeals for the Tenth Circuit, 2012
U.S. Court of Appeals for the Eleventh Circuit, 2014
U.S. Court of Appeals for the D.C. Circuit, 2012
U.S. District Court for the Eastern District of Louisiana, 2009
U.S. District Court for the Middle District of Louisiana, 2009
U.S. District Court for the District of Columbia, 2016

My membership in the bar of the United States Court of Appeals for the Fifth Circuit lapsed through nonuse. I was readmitted in 2009.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

To my recollection:

Member, D.C. Board of Regents, Thomas Aquinas College (2016 – present)

Federalist Society for Law and Public Policy Studies (2012 – present)

Knights of Columbus (2005 – present)

Louisiana State Legislature, *Ad hoc* Study Committee on Proposed Religious Freedom Amendment to Louisiana Constitution (representative of Louisiana Attorney General's Office) (2010)

University of Mississippi Law School (2004 – 2008)
Scholarship Committee (2004 – 2008)
Curriculum Committee (2004 – 2008)
Ad-Hoc Committee on Non-Academic Disciplinary Matters (2004 – 2008)
Coach, ABA National Appellate Advocacy Competition Moot Court Team (2007, 2008)
Faculty Advisor, Catholic Student Association (2004 – 2008)

Louisiana Law Review, Executive Senior Editor (1996 – 1997)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

The Knights of Columbus is a Catholic fraternal organization limited to men, although there is a corresponding organization for women. To the best of my knowledge, none of the other organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Kyle Duncan, Schaerr Duncan LLP, in WINNING ON APPEAL (3d ed. 2017) (Tessa L. Dysart, Leslie H. Southwick, Ruggero J. Aldisert, Eds.). Copy supplied.

Obergefell Fallout, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE (ABC-CLIO 2016) (David Newton, Ed.). Copy supplied.

Hobby Lobby *Spells Doom for Mandate 2.0*, RELIGIOUS FREEDOM INSTITUTE, June 30, 2016. Copy supplied.

Supplemental Briefs in Zubik v. Burwell, Federalist Society for Law & Public Policy Studies, Apr. 15, 2016. Copy supplied.

Trinity Lutheran Church v. Pauley, Federalist Society for Law & Public Policy Studies, Feb. 04, 2016. Copy supplied.

Symposium: Overruling Windsor, SCOTUSblog, June 27, 2015. Copy supplied.

Marriage, Self-Government, and Civility, PUBLIC DISCOURSE, Apr. 23, 2015. Copy supplied.

Coming up at the Supreme Court, Becket Fund for Religious Liberty, Nov. 5, 2013. Copy supplied.

How Fares Religious Freedom?, FIRST THINGS, Oct. 2013. Copy supplied.

Law, Not Theology, Becket Fund for Religious Liberty, Aug. 22, 2013. Copy supplied.

Abortion-Drug Mandate Unaffected By Delay of Obamacare's Employer Mandate, CNSNEWS, July 3, 2013. Copy supplied.

What EEOC gets and HHS doesn't, Becket Fund for Religious Liberty, June 13, 2013. Copy supplied.

Fighting the Stupid Public Square, Becket Fund for Religious Liberty, Feb. 28, 2013. Copy supplied.

HHS Threat Undiminished: Election Analysis, NAT'L CATHOLIC REGISTER, Nov. 8, 2012. Copy supplied.

One HHS Mandate Case Dismissed, Don't Read Too Much Into It, NAT'L REV. ONLINE, July 17, 2012. Copy supplied.

The Other Health-Care Mandate: Good Samaritan Turned Upside Down, NAT'L CATHOLIC REGISTER, Jan. 21, 2012. Copy supplied.

The Establishment Clause and the Limits of Pure History, in THE AMERICAN EXPERIMENT RELIGIOUS FREEDOM (Univ. of Portland 2008) (Hogan & Frederking, Eds.). Copy supplied.

Misunderstanding Freedom From Religion*: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32 (2008). Copy supplied.

Bringing Scalia's Decalogue Dissent Down from the Mountain, 2007 UTAH L. REV. 287 (2007). Copy supplied.

Subsidiarity and Religious Establishments in the United States Constitution, 52 VILLANOVA L. REV. 67 (2007). Copy supplied.

Can the Doctrine of Subsidiarity Help Courts Interpret the Establishment Clause? 12 CATHOLIC SOCIAL SCIENCE REV. 83 (2007). Copy Supplied.

Child Pornography and First Amendment Standards, 76 MISS. L.J. 677 (2007). Copy supplied.

With Ronald J. Rychlak, *Wrong Turn:* The Purpose-Driven Life *Gives Bad Directions*, CatholicCulture.Org (2005). Copy supplied.

Secularism's Laws: State Blaine Amendments and Religious Persecution, 72 FORDHAM L. REV. 493 (2003). Copy supplied.

Duty, Risk & The Spectre of Solidarity in Louisiana Tort Law, 57 LA. L. REV. 239 (1996). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

On the Side of the Angels?: Updating the Mississippi Supreme Court's View of the Judicial Role, 2004-2008, Federalist Society for Law & Public Policy Studies (2008) (white paper). Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Testimony as Appellate Chief of Louisiana Department of Justice to Louisiana House Health and Welfare Committee on H.B. 60 (May 12, 2009). Recording supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

September 27, 2017: Panelist, Supreme Court Preview: What Is in Store for October Term 2017?, Federalist Society for Law & Public Policy Studies, Washington, District of Columbia. Recording supplied.

July 13, 2017: Speaker, Supreme Court Review Webinar, State & Local Legal Center, Washington, District of Columbia. Recording supplied.

July 6, 2017: Panelist, "Scholars and Scribes on 2016-17 Supreme Court Term, Heritage Foundation, Washington, District of Columbia. Recording supplied.

February 16, 2017: Presenter, "Gloucester County School Board v. G.G.," Federalist Society Louisiana State Student Chapter, Baton Rouge, Louisiana. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

January 9, 2017: Presenter, "Gloucester County School Board v. G.G.," Federalist Society, Administrative Law & Regulation Practice Group Podcast, Washington, District of Columbia. Recording supplied.

July 7, 2016: Panelist, "Obama's Edict on School Showers, Lockers and Bathrooms: Challenges and Legal Responses," Heritage Foundation, Washington, District of Columbia. Notes and press coverage supplied.

June 2, 2016: Panelist, "*Zubik v. Burwell* Supreme Court Seminar," SCOTUSblog and the District of Columbia Bar, Washington, District of Columbia. Recording supplied.

February 23, 2016: Presenter, "Justice Scalia and Religious Liberty," Legatus, Tysons Corner, Virginia. I have no notes, transcript, or recording. The address of Legatus is P.O. Box 444, Ann Arbor, Michigan 48106.

October 27, 2015: Debater, "At the Intersection of Church & State: Chaos, Contraceptives, & Creeds," Federalist Society, Louisiana State Student Chapter, Baton Rouge, Louisiana. Notes supplied.

June 25, 2015: Panelist, "Must the states recognize same sex marriages?," Federalist Society, Washington, District of Columbia. Recording supplied.

June 25, 2015: Panelist, "How could the Supreme Court affect marriage?, Federalist Society, Washington, District of Columbia. Recording supplied.

June 12, 2015: Debater, "The Great Debate: Gay Marriage," Louisiana State Bar Association Annual Meeting, Destin, Florida. I have no notes, transcript, or recording. The address of the Louisiana State Bar Association is 601 Saint Charles Avenue, New Orleans, Louisiana 70130.

May 6, 2015: Presenter, "Religious Liberty at Home and Abroad," Leonine Forum, Catholic Information Center. I have no notes, transcript, or recording. The address of the Catholic Information Center is 1501 K Street, N.W., Suite 175, Washington, District of Columbia 20005.

December 4, 2014: Debater, "Gay Marriage," Federalist Society for Law & Public Policy Studies, Brigham Young University J. Reuben Clark School of Law Chapter, Provo, Utah. Notes supplied.

November 6, 2014: Presenter, "*Hobby Lobby* and Religious Freedom Assessing the Supreme Court's Decision," Federalist Society for Law & Public Policy Studies, Cincinnati Lawyers Chapter, Cincinnati, Ohio. Notes supplied.

September 16, 2014: Debater, "Full Faith & Due Process: Same-Sex Marriage in Louisiana," Federalist Society for Law & Public Policy Studies, Louisiana State University Law Chapter, Baton Rouge, Louisiana. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, District of Columbia 20006.

August 6, 2014: Presenter, "Professor, Solicitor, General Counsel: Lessons From and For Being a Flexible Advocate," Blackstone Legal Fellowship Program, Scottsdale, Arizona. Notes supplied.

July 1, 2014: Presenter, "Update on *Brady v. Maryland*," Louisiana District Attorneys' Association, Baton Rouge, Louisiana. Notes supplied.

June 26, 2014: Presenter, "Obamacare, Hobby Lobby and the Liberty of Conscience," Federalist Society for Law & Public Policy Studies, Baton Rouge Lawyers Chapter, Baton Rouge, Louisiana. Notes supplied.

May 30, 2014: Presenter, "*Sebelius v. Hobby Lobby Stores, Inc.*," Federalist Society for Law & Public Policy Studies, Montgomery Lawyers Chapter, Montgomery, Alabama. Notes supplied.

May 14, 2014: Panelist, "The Contraceptive Mandate," Federalist Society, Second Annual Executive Branch Review Conference, Washington, District of Columbia. Recording supplied.

May 5, 2014: Presenter, "*Sebelius v. Hobby Lobby Stores, Inc.*," Federalist Society for Law & Public Policy Studies, Dallas Lawyers Chapter, Dallas, Texas. Notes supplied.

April 9, 2014: Debator, "Can a Corporation Exercise Religion?," Debating Law & Religion Series, Yale Law School, New Haven, Connecticut. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

April 2, 2014: Presenter, "Religious Liberty at Home and Abroad," Leonine Forum, Catholic Information Center, Washington, District of Columbia. I have no notes, transcript, or recording. The address of the Catholic Information Center is 1501 K Street, N.W., Suite 175, Washington, District of Columbia 20005.

March 24, 2014: Panelist, "*Hobby Lobby Stores v. Sebelius*," C-SPAN, Washington, District of Columbia. Recording supplied.

February 27, 2014: Presenter, "*Hobby Lobby* and Religious Liberty," Legatus, Baton Rouge, Louisiana. I have no notes, transcript, or recording. The address of Legatus is P.O. Box 444, Ann Arbor, Michigan 48106.

February 4, 2014: Presenter, "*Sebelius v. Hobby Lobby Stores, Inc.*: Religious Small Business Owners Challenge the HHS Mandate that Businesses Must Provide Contraception Coverage," Federalist Society for Law & Public Policy Studies, Miami Lawyers Chapter, Miami, Florida. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

November 20, 2013: Panelist, "Religious Liberty and Conflicting Moral Visions," Federalist Society, National Lawyers Convention, Washington, District of Columbia. Recording supplied.

October 3, 2013: Panelist, "*Hobby Lobby* & Obamacare," Federalist Society for Law & Public Policy Studies, Louisiana State University Law Chapter, Baton Rouge, Louisiana. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

August 22, 2013: Presenter, "Religious Liberty," Legatus, New Orleans, Louisiana. I have no notes, transcript, or recording. The address of Legatus is P.O. Box 444, Ann Arbor, Michigan 48106.

August 17–18, 2013: Panelist, "Religious Liberties Roundtable," EWTN Global Catholic Network, Birmingham, Alabama. Recording supplied.

August 10, 2013: Presenter, "The Status of Conscience Protection in the U.S. and Current Topics in Bioethics" and "Legal Issues in a Culture of Life Practice," Annual Meeting of American Academy of FertilityCare Professionals, New Orleans, Louisiana. I have no notes, transcript, or recording of the first talk. Recording of second talk supplied. The address of the American Academy of FertilityCare Professionals is 11700 Studt Avenue, Suite C, St. Louis, Missouri 63141.

July 11, 2013: Presenter, "Obamacare, the HHS Mandate, and Liberty of

Conscience," Federalist Society for Law & Public Policy Studies, South Carolina Lawyers Chapter, Columbia, South Carolina. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

April 18, 2013: Presenter, "Obamacare's HHS Mandate and Religious Liberty," Federalist Society for Law & Public Policy Studies, Charlotte Lawyers Chapter, Charlotte, North Carolina. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

February 28, 2013: Panelist, "Life, Liberty, and the Pursuit of Happiness," Catholic Information Center, Washington, District of Columbia. I have no notes, transcript, or recording. The address of the Catholic Information Center is 1501 K Street, N.W., Suite 175, Washington, District of Columbia 20005. Press coverage supplied.

February 21, 2013: Presenter, "A Hobby Lobby Exception to Religious Freedom? The Business Challenges to the HHS Mandate," Federalist Society for Law & Public Policy Studies, Milwaukee Lawyers Chapter, Milwaukee, Wisconsin. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

February 20, 2013: Presenter, "Henry Forum Lecture: The HHS Mandate and Challenges to Religious Liberty," The Becket Fund for Religious Liberty, Capitol Hill Baptist Church, Washington, District of Columbia. Recording supplied.

February 9, 2013: Presenter, "Religious Liberty / HHS Mandate Litigation," Legatus 2013 Annual Summit, Scottsdale, Arizona. I have no notes, transcript, or recording. The address of Legatus is P.O. Box 444, Ann Arbor, Michigan 48106.

November 6, 2012: Panelist, "European and American Models of Religious Freedom: The Future of Religious Autonomy," Berkley Center for Religion, Peace, and World Affairs, Georgetown University, Washington, District of Columbia. Recording supplied.

October 25, 2012: Presenter, "HHS Contraceptive Mandate: Litigation Update," Federalist Society Religious Liberties Practice Group Podcast. Recording supplied.

October 24, 2012: Presenter, "Religious Liberty," Legatus, Mobile, Alabama. I have no notes, transcript, or recording. The address of Legatus is P.O. Box 444, Ann Arbor, Michigan 48106.

October 11, 2012: Panelist, "European and American Models of Religious Freedom: The Future of Religious Autonomy," Berkeley Center for Religion,

Peace & World Affairs Religious Freedom Project and Brigham Young University's School of Law International Center for Law and Religion Studies, Washington, District of Columbia. Recording supplied.

September 28, 2012: Presenter on Religious Liberty Issues and HHS Mandate Litigation, Fellowship of Catholic Scholars Convention, Washington, DC. I have no notes, transcript, or recording. The address of the Fellowship of Catholic Scholars is P.O. Box 495, Notre Dame, Indiana 46556.

August 14, 2012: "The HHS Mandate and the Proper Role of Religious Groups in Civil Society," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, District of Columbia 20006.

July 2, 2012: Participant, "Roundtable: When you really want to read and hear the truth, where do you go?," Festival for Freedom, Roman Catholic Diocese of Rochester, Canandaigua, New York. I have no notes, transcript, or recording. The address of the Diocese of Rochester is 1150 Buffalo Road, Rochester, New York 14624. Press coverage supplied.

July 2, 2012: Presenter, "The Becket Fund's Role in the Pursuit of Religious Freedom," Festival for Freedom, Roman Catholic Diocese of Rochester, Canandaigua, New York. I have no notes, transcript, or recording. The address of the Diocese of Rochester is 1150 Buffalo Road, Rochester, New York 14624.

June 22, 2012: Presenter, "When Church and State Collide," Chicago Bar Association, Chicago, Illinois. I have no notes, transcript, or recording. The address of the Chicago Bar Association is 321 South Plymouth Court, Chicago, Illinois 60604.

June 12, 2012: Presentation on Religious Liberty issues to San Antonio Catholic Lawyers' Guild, San Antonio, Texas. I have no notes, transcript, or recording. The address of the San Antonio Catholic Lawyers' Guild is Northbrook Drive, Suite 200, San Antonio, Texas 78232.

February 29, 2012: Panelist, "Religious Liberty & Healthcare," DeSales University, Center Valley, Pennsylvania. I have no notes, transcript, or recording. The address of DeSales University is 2755 Station Avenue, Center Valley, Pennsylvania 18034. Press coverage supplied.

February 11, 2012: Presenter, "Legal Challenges to Religious Liberty," Belmont Abbey College, Charlotte, North Carolina. Recording supplied.

February 8, 2012: Panelist, "Health Care Law Contraceptive Rule," C-SPAN, Washington, District of Columbia. Recording supplied.

January 14, 2012: Panelist, "Connick v. Thompson, Santa Barbara Bench & Bar Conference, Santa Barbara, California. I have no notes, transcript, or recording. The address of the Santa Barbara County Bar Association is 15 West Carrillo Street, Suite 106, Santa Barbara, California 93101.

September 20, 2011: Presenter: "Appellate Practice," Louisiana Department of Justice Continuing Legal Education Seminar, Baton Rouge, Louisiana. Recording supplied.

January 12, 2011: Presenter, "Absolute Prosecutorial Immunity," Louisiana District Attorneys Association Capital Litigation Seminar, Lafayette, Louisiana. I have no notes, transcript, or recording. The address of the Louisiana District Attorneys Association is 1645 Nicholson Drive, Baton Rouge, Louisiana 70802.

November 2, 2010: Panelist, "*Schwarzenegger v. Entertainment Merchants Ass'n* (U.S. No. 08-1448)," SCOTUSblog Podcast, http://www.scotusblog.com/2010/11/argument-day-podcasts-schwarzenegger-v-entertainment-merchants/.

November 12, 2009: Speaker, "Cert Petitions / Oppositions in the U.S. Supreme Court," Louisiana District Attorneys Association, New Orleans, Louisiana. I have no notes, transcript, or recording. The address of the Louisiana District Attorneys Association is 1645 Nicholson Drive, Baton Rouge, Louisiana 70802.

August 4, 2009: Panelist, "The Road to Passionate and Principled Service in the Academy," Blackstone Legal Fellowship Program, Scottsdale, Arizona. I have no notes, transcript, or recording. The address of the Alliance Defending Freedom is 15100 North 90th Street, Scottsdale, Arizona 85260.

October 15, 2008: Panelist, "Election Law," Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Chapter, University, Mississippi. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

September 17, 2008: Panelist, "Powers of the Executive Branch Under the U.S. Constitution," University of Mississippi, University, Mississippi. I have no notes, transcript, or recording. The address of the University is P.O. Box 1848, University, Mississippi 38677.

September 4, 2008: Panelist, "What *Roe* Wrought: Abortion & the Supreme Court," Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Chapter, University, Mississippi. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

July 1, 2008: Presenter, "Free Exercise and the Roberts Court: Emerging Trends," National Litigation Academy, Alliance Defending Freedom, Half Moon Bay, California. I have no notes, transcript, or recording. The address of the Alliance Defending Freedom is 15100 North 90th Street, Scottsdale, Arizona 85260.

April 17, 2008: Debater, "The Constitution: Christian, Secular, or Neither?," Federalist Society for Law & Public Policy Studies, Lewis & Clark Law School Chapter, Portland, Oregon. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

October 11, 2007: Presenter, "Hot Topics and the Roberts Court: Making Sense of Religious Liberty," National Litigation Academy, Alliance Defending Freedom, Laguna Beach, California. I have no notes, transcript, or recording. The address of the Alliance Defending Freedom is 15100 North 90th Street, Scottsdale, Arizona 85260.

March 21, 2007: Presenter, "Structure of Power in the Constitution," Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Chapter, University, Mississippi. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Suite 300, Washington, District of Columbia 20006.

April 19, 2006: Presenter, Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Chapter, University, Mississippi. I have no recollection of the topic of my presentation, nor any notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, District of Columbia 20006.

April 4, 2006: Speaker, Prosecutorial Responses to Internet Victimization Symposium, National Association of Attorneys General and the National Center for Justice and the Rule of Law, Oxford, Mississippi. I have no notes, transcript, or recording. The address of the National Association of Attorneys General is 12th Floor, 1850 M Street N.W., Washington, District of Columbia 20036, and the National Center for Justice and the Rule of Law is P.O. Box 1848, University, Mississippi 38677. Press coverage supplied.

January 18, 2006: Panelist, "Religion in the Public Square," Federalist Society for Law & Public Policy Studies, Memphis Lawyers Chapter, Memphis, Tennessee. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, District of Columbia 20006.

October 11, 2005: Panelist, "Ten Commandments Cases," American Civil Liberties Union, American Constitution Society, and Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Chapter,

University, Mississippi. I have no notes, transcript, or recording. The address of the American Civil Liberties Union is 125 Broad Street, 18th Floor, New York, New York 10004. The address of the American Constitution Society is 1333 H Street N.W., 11th Floor, Washington, District of Columbia 20005. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, District of Columbia 20006.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Mark Sherman, *Supreme Court Won't Say if Trans Teen Can Pick Bathroom*, ASSOCIATED PRESS, Mar. 7, 2017. Copy supplied (reprinted in multiple outlets).

Lydia Wheeler, *Transgender Fight Now in Supreme Court's Hands*, THE HILL, Feb. 25, 2017. Copy supplied.

Sandhya Somashekhar & Robert Barnes, *Court Weighs Bathroom Case In Light of Trump Decision*, WASH. POST, Feb. 24, 2017, at A04. Copy supplied (reprinted in multiple outlets).

Sheryl Gay Stolberg, *Teenage Voice Leads the Fight on Restrooms*, N.Y. TIMES, Feb. 24, 2017, at A1. Copy supplied.

Richard Wolf, *Supreme Court Could Pull Plug on Transgender Case*, COURIER-J., Feb. 24, 2017, at B3. Copy supplied.

David Saleh Rauf, *Voter ID Lawsuits Live on Despite Likely Trump Policy Shift*, NBC, Jan. 26, 2017. Copy supplied.

David Greene, *Supreme Court Will Hear Transgender Bathroom Case*, NAT'L PUB. RADIO, Nov. 2, 2016. Recording supplied.

Joan Frawley Desmond, *'Gender Identity': A Complex Battleground for Religious Freedom*, NAT'L CATHOLIC REG., June 1, 2016. Copy supplied.

Julie Rovner, *The Muddled Future of Reproductive Rights*, ATLANTIC ONLINE, Feb. 19, 2016. Copy supplied (reprinted in multiple outlets).

Juvenile Justice Information Exchange, *Louisiana Inmate Wins Case Against Mandatory Life Sentences for Juveniles*, LOUISIANA WEEKLY, Feb. 1, 2016. Copy supplied.

Jess Bravin, *Supreme Court Allows Lesbian Adoptive Mother to See Children in Alabama Case*, WALL ST. J., Dec. 14, 2015. Copy supplied (reprinted in multiple outlets).

Interview with Nina Totenberg, NAT'L PUB. RADIO, Oct. 13, 2015. Recording supplied.

Tony Mauro, *Docket Chat: October Arguments Draw Veterans Advocates*, NAT'L L. J., Sept. 30, 2015. Copy supplied.

Interview with Raymond Arroyo, WORLD OVER, EWTN Global Catholic Network, July 02, 2015. Recording supplied.

Andy Grimm, *5th Circuit: Enforce Marriage Ruling Now*, TIMES-PICAYUNE, July 2, 2015. Copy supplied (reprinted in multiple outlets).

Janet McConnaughey, *Federal Judge to Louisiana: Make Gay Marriage Changes Now*, ASSOCIATED PRESS, July 2, 2015. Copy supplied (reprinted in multiple outlets).

Andy Grimm, *State to Appeals Court: Same-Sex Marriage Ruling Is Wrong, But Louisiana's Ban Must Be Overturned*, TIMES-PICAYUNE, July 1, 2015. Copy supplied (reprinted in multiple outlets).

Marsha Shuler, *Judge to Eye La. Abortion Clinic Case*, THE ADVOCATE, June 30, 2015. Copy supplied.

Maya Lau, *If the Supreme Court Rules in Favor of Same-Sex Marriage, How Soon Could Louisiana Couples Marry?*, THE ADVOCATE, June 14, 2015. Copy supplied.

Sue Lincoln, *Admitting Privileges Law on Trial*, WRKF, June 24, 2015. Copy supplied.

Janet McConnaughey, *Louisiana: Texas Abortion Ruling Reopens Question in La Case*, ASSOCIATED PRESS, June 11, 2015. Copy supplied (reprinted in multiple outlets).

Janet McConnaughey, *Judge Throws Out Part of Suit Against Louisiana Abortion Law*, ASSOCIATED PRESS, May 12, 2015. Copy supplied (reprinted in multiple outlets).

Amy Jeffries, *On Same-Sex Marriage, Louisiana Says It's for the State to Decide*, May 1, 2015, available at http://wrkf.org/post/same-sex-marriage-louisiana-says-its-state-decide#stream/0.

Interview with Raymond Arroyo, WORLD OVER, EWTN Global Catholic Network, Apr. 30, 2015. Recording supplied.

Legal Battle Over Gay Marriage Hits the Supreme Court Tuesday, NAT'L PUB. RADIO, Apr. 27, 2015. Recording supplied.

Robert Barnes, *Telling the Justices What They Meant*, WASH. POST, Apr. 6, 2015. Copy supplied (reprinted in multiple outlets).

Andy Grimm, *Supreme Court Won't Hear La. Marriage Case*, TIMES-PICAYUNE, Jan. 13, 2015. Copy supplied (reprinted in multiple outlets).

Lauren McGaughy, *Issue of Gay Marriage Has Eyes on a Pair of Courtrooms Today*, SAN ANTONIO EXPRESS-NEWS, Jan. 9, 2015, at A1. Copy supplied (reprinted in multiple outlets).

Andrew Vanacore, *Federal Court Hearing Gives Hope to Foes of La. Ban on Gay Marriages*, ACADIANA ADVOCATE, Jan. 9, 2015. Copy supplied (reprinted in multiple outlets).

Andy Grimm, *N.O. Federal Court To Hear Same-Sex Marriage Cases*, TIMES-PICAYUNE, Jan. 8, 2015, at A02. Copy supplied (reprinted in multiple outlets).

Robert Barnes, *Gay Couples Wed in Miami*, WASH. POST, Jan. 6, 2015, at A01. Copy supplied (reprinted in multiple outlets).

Robert Barnes, *Will This Be the Supreme Court Term for Same-Sex Marriage?*, WASH. POST, Dec. 19, 2014. Copy supplied (reprinted in multiple outlets).

Janet McConnaughey, *La Asks US Supreme Court To Hear Gay Marriage Case*, ASSOCIATED PRESS, Dec. 4, 2014. Copy supplied (reprinted in multiple outlets).

Kevin McGill, *Supreme Court Asked To Look at La. Marriage Ban*, ASSOCIATED PRESS, Nov. 20, 2014. Copy supplied (reprinted in multiple outlets).

Lauren McGaughy, *Texas Gay Marriage Advocates Disappointed with 2015 Hearing Date*, HOUSTON CHRONICLE, Oct. 28, 2014. Copy supplied (reprinted in multiple outlets).

Analysis: Focus on the 5th in Gay Marriage Case, ASSOCIATED PRESS, Oct. 12, 2014. Copy supplied (reprinted in multiple outlets).

Richard Burgess, *Justices' Punt on Gay Marriage Could Put La. Cases in Spotlight*, ACADIANA ADVOCATE, Oct. 7, 2014. Copy supplied.

Guillermo Contreras, *Outcome Thrills Pair of Couples*, SAN ANTONIO EXPRESS-NEWS, Oct. 7, 2014, at A1. Copy supplied.

Lamar White Jr., *Righteous and Holy*, THE INDEPENDENT, Sept. 29, 2014. Copy supplied.

Richard Burgess, *Judge Rules La.'s Gay Marriage Ban Unconstitutional*, THE ADVOCATE, Sept. 23, 2014, at A01. Copy supplied (reprinted in multiple outlets).

Marcia Coyle, *More Than a Case – a Mission*, NAT'L L. J., Sept. 22, 2014, at 1. Copy supplied.

Ryan Broussard & Marsha Sills, *Federal Judge Issues Restraining Order*, THE ADVOCATE, Sept. 1, 2014. Copy supplied (reprinted in multiple outlets).

Janet McConnaughey, *US Judge Blocks Enforcement of New La Abortion Law*, ASSOCIATED PRESS, Sept. 1, 2014. Copy supplied (reprinted in multiple outlets).

Cole Avery, *Abortion Law Negotiations Fizzle*, TIMES-PICAYUNE, Aug. 31, 2014. Copy supplied (reprinted in multiple outlets).

La. Abortion Law Ruling Expected Before Monday, ASSOCIATED PRESS, Aug. 30, 2014. Copy supplied (reprinted in multiple outlets).

Janet McConnaughey, *Judge: Rule Friday if No Abortion Law Agreement*, ASSOCIATED PRESS, Aug. 28, 2014. Copy supplied (reprinted in multiple outlets).

Andrew Vanacore, *Louisiana Same-Sex Marriage Ruling Nears*, The Advocate, Aug. 8, 2014, at A01. Copy supplied (reprinted in multiple outlets).

Lauren McGaughy, *Abbott's Tactics Against Gay Marriage Questioned*, HOUSTON CHRONICLE, July 31, 2014, at A1. Copy supplied (reprinted in multiple outlets).

Interview with Raymond Arroyo, WORLD OVER, EWTN Global Catholic Network, July 3, 2014. Recording supplied.

Paul Purpura, *Gay Marriage Debate Hits Louisiana*, TIMES-PICAYUNE, June 25, 2014, at A01. Copy supplied (reprinted in multiple outlets).

Andrew Vanacore, *Couples Fight for State To Honor Marriages*, THE ADVOCATE, June 22, 2014, at A01. Copy supplied (reprinted in multiple outlets).

Interview with Raymond Arroyo, WORLD OVER, EWTN Global Catholic Network, Mar. 27, 2014. Recording supplied.

Greg Stohr, BLOOMBERG NEWS, Mar. 22, 2014. Copy supplied (reprinted in multiple outlets).

Business Challenge to Health Care Law's Contraception Mandate Heads to High Court, CONGRESSIONAL QUARTERLY, Mar. 20, 2014. Copy supplied.

Defending Religious Freedom, CHRISTIAN UNION, Feb. 11, 2014. Copy supplied.

Press briefing for *Sebelius v. Hobby Lobby Stores, Inc.*, Becket Fund for Religious Liberty (Feb. 10, 2014). Press coverage supplied.

Press Release, Becket Fund for Religious Liberty, Hobby Lobby Supreme Court Brief Counters Government "Divide and Conquer" Attempt to Violate Business Owners' Religious Rights (Feb. 10, 2014). Copy supplied (reprinted in multiple outlets).

Interview with Raymond Arroyo, WORLD OVER, EWTN Global Catholic Network, Jan. 02, 2014. Copy supplied.

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Bryan Doyle, *Supreme Court Nominee Gains Ground*, DAILY MISSISSIPPIAN, July 22, 2005. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

i. Of these, approximately what percent were:

jury trials:	___%
bench trials:	___% [total 100%]
civil proceedings:	___%
criminal proceedings:	___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys

who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not held judicial office.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte; n/a

b. a brief description of the asserted conflict of interest or other ground for recusal; n/a

c. the procedure you followed in determining whether or not to recuse yourself; n/a

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal. n/a

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have never been a candidate for or held an elective public office. Since law school, I have held one appointed position:

Appellate Chief, Louisiana Department, 2008 – 2012. Appointed in 2008 by then-Louisiana Attorney General James D. Caldwell, Jr.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Poll watcher, Mitt Romney Presidential Campaign (2012).

Member, Religious Liberty Advisory Board, Marco Rubio Presidential Campaign (2016).

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 1997 to 1998, I served as a law clerk to the Honorable John M. Duhé, Jr., Circuit Judge of the United States Court of Appeals for the Fifth Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I was a solo practitioner in the firm of Duncan PLLC from 2012 to 2014. The firm was located at 1629 K St. NW, Suite 300; Washington, DC 20006. I primarily represented state governments, agencies, and officials in constitutional litigation in federal and state trial and appellate courts, including the U.S. Court of Appeals for the Fifth Circuit and the Supreme Court of the United States.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1998 – 1999
Vinson & Elkins LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002
Summer Law Clerk; Associate

1999 – 2001
Office of the Attorney General
State of Texas
300 West 15th Street
Austin, Texas 78701
Assistant Solicitor General

2001 – 2002
Weil, Gotshal & Manges LLP
700 Louisiana Avenue, Suite 1700
Houston, Texas 77002
Associate (worked out of transitional office in Austin, TX)

2009 – 2012
Office of the Attorney General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, Louisiana 70802
Appellate Chief

2012 – 2014
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue, Suite 700
Washington, District of Columbia 20036
General Counsel

2016 – present
Schaerr Duncan LLP
1717 K Street N.W., Suite 900
Washington, District of Columbia 20006
Co-founder and Managing Partner

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Over the past twenty years, my law practice has focused primarily on appellate litigation and on issues of federal constitutional and statutory law. To a lesser extent, I have also engaged in trial-level litigation, and in litigation concerning state-law issues.

From approximately 1998 to 2001, I worked as an appellate lawyer both in private practice (Vinson & Elkins LLP) and in government practice (Texas Solicitor General's Office). In private practice, I worked on appeals concerning commercial disputes between private parties. In government practice, I worked primarily on statutory and constitutional challenges to state laws and policies.

From approximately 2002 to 2008, the focus of my career shifted to the legal academy. I was an Associate-in-law at Columbia Law School from 2000 to 2004, participating in an LL.M. program designed to allow aspiring law professors to obtain experience in legal scholarship and teaching. As a result of my studies at Columbia, I was hired as an Assistant Professor of Law at the University of Mississippi Law School, where I worked from 2004 to 2008. The principal focus of my teaching and scholarship during that time was the U.S. Constitution and the First Amendment, including both the religion clauses and the free speech clause.

In 2008, I shifted back to appellate practice when I was appointed the first Appellate Chief of the Louisiana Department of Justice. In that role, I fulfilled the functions of a state solicitor general, advising the Attorney General on general legal matters concerning appeals and taking the lead on briefing and argument of selected appeals. From 2008 to 2012, I handled a variety of civil and criminal constitutional matters, arguing cases in the U.S. Fifth Circuit, the Louisiana Supreme Court, and the Supreme Court of the United States.

In 2012, I was recruited by the Becket Fund for Religious Liberty to become its General Counsel. There, I lead the litigation team, which brings constitutional and statutory challenges around the country in defense of the free exercise of religion and often weighs in at the appellate level as an amicus curiae in favor of the free exercise of religion.

In 2014, I formed my own law firm in Washington, District of Columbia, a firm that has now become Schaerr Duncan LLP. The matters I handle in private practice are in the same genre as the ones I handled while in government practice and at Becket—namely, civil and criminal litigation,

typically concerning federal constitutional issues and primarily, but not exclusively, at the appellate level.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

The typical clients I have represented are state government entities and officials; however, I have also represented private persons and entities in litigation. I represented primarily commercial entities during my first year of practice at Vinson & Elkins, before switching to the exclusive representation of Texas, its government entities and officials as an Assistant Solicitor General. I also exclusively represented Louisiana, its government entities and officials during my time as the Appellate Chief in the Louisiana Department of Justice. When I joined Becket, I returned to representing private persons and entities, often religious individuals, businesses, and institutions (such as religious colleges and universities) seeking to defend their rights to the free exercise of religion. Since starting my own firm, I have had a mix of government and private clients, but primarily governmental entities and officials.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Virtually all of my law practice has been in litigation, and most of that has been in appellate litigation. Because my practice typically involved appellate matters, I have appeared in court regularly, but not frequently.

i. Indicate the percentage of your practice in:
   1. federal courts: 80%
   2. state courts of record: 20%
   3. other courts: 0%
   4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95%
   2. criminal proceedings: 5%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Although the primary focus of my law practice has been appellate practice, I have acted as lead counsel in three trial-level matters: The first of those matters was resolved on summary judgment. The second went to final verdict after a bench

trial and is presently on appeal. The third is ongoing.

i. What percentage of these trials were:
   1. jury: 0%
   2. non-jury: 100%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have had a fairly extensive practice before the Supreme Court of the United States.

I have argued two cases in that Court:

Montgomery v. Louisiana, 135 S. Ct. 718 (2016).
Connick v. Thompson, 563 U.S. 51 (2011).

I have filed briefs as Counsel of Record for a party or amicus curiae in the following cases:

North Carolina v. North Carolina State Conference of the NAACP, No. 16-833 (May 15, 2017).
Gloucester County Sch. Bd. v. G.G., No. 16-273 (Mar. 6, 2017).
Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
V.L. v. E.L., 136 S. Ct. 1017 (2016).
Zubik v. Burwell, 136 S. Ct. 1557 (2016).
Robicheaux v. George, No. 14-596 (Dec. 2, 2014).
Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
Schaefer v. Bostic, No. 14-225 (Oct. 6, 2014).
Corr v. Metropolitan Wash. Airports Auth., No. 13-1559 (Oct. 5, 2015).
Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
Wagenfeald v. Gusman, No. 12-85 (Oct. 1, 2012).
Adar v. Smith, No. 11-46 (Oct. 11, 2011).
Perry v. New Hampshire, 565 U.S. 228 (2012).
Davenport v. American Atheists, Inc., No. 10-1297 (Oct. 31, 2011).
Thomas v. Louisiana Dept. of Soc. Servs., No. 10-1171 (June 27, 2011).
Quinn v. Judge, No. 10-821 (June 6, 2011).
S & M Brands, Inc. v. Caldwell, No. 10-622 (Mar. 7, 2011).
Pitre v. Cain, No. 09-9515 (Oct. 18, 2010).
Graham v. Florida, 560 U.S. 48 (2010).
Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011).

I have been supporting counsel in the following cases:

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, No. 16-712 (case

pending)
Marilley v. Bonham, No. 16-1391 (Oct. 10, 2017).
Brewer v. Arizona Dream Act Coalition, No. 16-1180 (case pending).
Trinity Lutheran Church of Columbia Inc. v. Comer, 137 S. Ct. 2012 (2017).
Ravalli Cnty. Repub. Central Comm. v. McCulloch, No. 16-806 (May 15, 2017).
Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).
Abbott v. Veasey, No. 16-393 (Jan. 23, 2017).
Stormans, Inc. v. Wiesman, No. 15-862 (June 28, 2016).
United States v. Texas, 136 S. Ct. 2271 (2016).
United States v. Bryant, 136 S. Ct. 1954 (2016).
Elmbrook Sch. Dist. v. Doe, No. 12-755 (June 16, 2014).
Big Sky Colony, Inc. v. Montana Dept. of Labor & Indus., No. 12-1191 (Oct. 07, 2013).
Brown v. Plata, 563 U.S. 493 (2011).
Padilla v. Kentucky, 559 U.S. 356 (2010).
Montejo v. Louisiana, 556 U.S. 778 (2009).
Boudreaux v. Louisiana, No. 08-1212 (June 29, 2009).
Cockrell v. Burdine, No. 01-0495 (June 3, 2002).
Alabama v. Shelton, 535 U.S. 654 (2002).
Texas v. Cobb, 532 U.S. 162 (2001).
Neinast v. Texas, No. 00-0263 (Feb. 26, 2001).

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1). *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)

I served as lead counsel for Plaintiffs-Appellants Hobby Lobby Stores, Mardel Christian, and the Green family in the U.S. Court of Appeals for the Tenth Circuit. My clients sought a preliminary injunction against enforcement of a federal mandate requiring their insurance to cover all FDA-approved contraceptive methods, based on the contention that the mandate violated their rights under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the

Constitution. I was the principal author of the briefs, and I argued the case before the en banc court [Briscoe (C.J.), Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Matheson, and Bacharach]. I successfully obtained a decision from that court recognizing the rights of a closely held business to challenge the mandate under RFRA. I continued as counsel of record for those parties in the Supreme Court of the United States, serving as the principal author of the briefs at both the certiorari and merits stages. The Supreme Court [Roberts (C.J.), Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan] affirmed the entry of the preliminary injunction in a 5-4 decision.

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(2). *Thompson v. Connick*, 131 S. Ct. 1350 (2011)

I served as counsel of record for Petitioner Orleans Parish District Attorney's Office when it sought reversal of a $20 million jury verdict on a failure-to-train theory of liability under 42 U.S.C. § 1983 for a single *Brady* violation by prosecutors in the office. I was the principal author of the Petitioner's briefs at both the certiorari and merits stages, and I argued the case. The Supreme Court [Roberts (C.J., Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan] reversed the jury verdict in a 5-4 decision.

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(3). *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)

I represented the State of Louisiana as counsel of record in this U.S. Supreme Court case addressing the retroactivity of *Miller v. Alabama*'s rule forbidding life sentences without parole for juveniles who commit murder. I was the principal author of Louisiana's briefs, and I argued the case on behalf of the State. The Court [Roberts (C.J.), Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan] decided 6-3 that *Miller* is to be applied retroactively.

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(4). *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (Mar. 6, 2017)

I represented Petitioner Gloucester County School Board in this case concerning the deference due to guidance issued by an administrative agency interpreting Title IX to include discrimination on the basis of gender identity. As principal author of the School Board's briefs at the stay, certiorari, and merits stages in the U.S. Supreme Court, I obtained an emergency stay and a grant of certiorari. The Court [Roberts (C.J.), Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, and Kagan] unanimously vacated the underlying decision before argument in light of changed administrative guidance.

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(5). *Texas v. Cobb*, 532 U.S. 162 (2001)

As an attorney in the Office of the Solicitor General of Texas, I was given the opportunity to serve as counsel in this U.S. Supreme Court case concerning the circumstances under which the Sixth Amendment right to counsel attaches to police questioning of a suspect in a related but uncharged crime. Working under then-Solicitor General Gregory S. Coleman, I was the principal drafter of Texas's briefs at the certiorari and merits stages, arguing that the Sixth Amendment right to counsel is offense-specific and had not attached to the crime at issue. The Supreme Court [Rehnquist (C.J.), Stevens, O'Connor, Scalia, Kennedy, Thomas, Souter,

Ginsburg, Breyer] agreed and reversed the decision of the Texas Court of Criminal Appeals, in a 5-4 decision.

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(6). *United States v. North Carolina* (M.D.N.C. No. 16-cv-425); *Carcaño v. McCrory* (M.D.N.C. No. 16-cv-236) (2016-present)

I serve as lead trial and appellate counsel for Intervenor-Defendant North Carolina General Assembly in challenges by the U.S. Department of Justice and private plaintiffs to North Carolina's Public Facilities and Privacy Protection Act (commonly known as "HB2"). The cases concern whether North Carolina's HB2 law is valid under various federal statutes (such as Title VII, Title IX, and the Violence Against Women Act) and the federal Constitution (the Equal Protection and Due Process Clauses). The United States has voluntarily dismissed its case, but the suit by private plaintiffs is still pending before United States District Judge Thomas D. Schroeder in the Middle District of North Carolina.

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(7). *In re Katrina Canal Breaches Litigation*, 63 So.3d 955 (La. 2011), *on certification from U.S. Fifth Circuit*, 613 F.3d 504 (5th Cir. 2010).

I represented the State of Louisiana on appeal in this dispute involving the underpayment of billions of dollars in Hurricane Katrina-related insurance claims to persons who lost homes and property in the disaster. The appeal involved the key issue in the case—namely, whether the State could enforce thousands of individual property insurance claims by assignment from homeowners, which the State obtained in connection with its distribution of federal disaster relief funds through Louisiana's "Road Home" program. The U.S. Court of Appeals of the Fifth Circuit [Fifth Circuit Judges Jones and Prado; Northern District of Texas Judge O'Connor, by designation] certified the question to the Louisiana Supreme Court. That court [Kimball (C.J.), Johnson, Guidry, Clark, Weimer, Victory, Knoll] accepted the certification and agreed with Louisiana that the State could enforce those claims against the insurance companies.

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(8). *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. 2014), *rev'd*, 791 F.3d 616 (5th Cir. 2015)

I represented the State of Louisiana at trial and on appeal in this constitutional challenge to Louisiana's marriage law. United States District Judge Martin L.C. Feldman of the Eastern District of Louisiana initially granted summary judgment in favor of Louisiana, but the U.S. Court of Appeals for the Fifth Circuit [Smith, Higginbotham, and Graves] reversed that judgment in light of the intervening decision of the Supreme Court in *Obergefell v. Hodges*.

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(9). *State of North Carolina v. North Carolina NAACP*, U.S. No. 16-833 (petition for cert. filed Dec. 27, 2016), *cert. denied*, ___ S. Ct. __, 2017 WL 2039439 (May 15, 2017)

I was counsel of record on a petition for writ of certiorari on behalf of the State of North Carolina in this challenge to various election reforms (including a photo identification law) enacted by the State in 2013. The U.S. Court of Appeals for the Fourth Circuit had invalidated those laws under section 2 of the Voting Rights Act and the Equal Protection Clause. The Supreme Court [Roberts (C.J.), Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch] denied the petition on May 15, 2017, with an accompanying statement from Chief Justice Roberts.

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(10). *June Medical Services v. Gee*, (M.D. La. No. 14-cv-525) (2014-present)

I represent the Louisiana Department of Health and Hospitals in this constitutional challenge to a Louisiana law requiring abortion providers to have

admitting privileges at local hospitals. I conducted all phases of documentary and witness discovery, six-day bench trial, and post-trial and appellate proceedings. The case has been handled by United States District Judge John de Gravelles in the Middle District of Louisiana, the U.S. Court of Appeals for the Fifth Circuit [Clement, Elrod, Southwick], and the U.S. Supreme Court [Roberts (C.J.), Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan]. Louisiana's appeal from the entry of a permanent injunction against the law is presently pending before the Fifth Circuit.

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18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In my law practice I have been a full-time litigator, and consequently I have not typically pursued significant legal activities that did not involve litigation or litigation that did not proceed to trial or appeal. (Here I am omitting teaching activities, which are covered elsewhere). However, in my capacity as Appellate Chief of the Louisiana Department of Justice, I was occasionally asked to advise the Louisiana Attorney General and his staff with respect to proposed legislation. To my recollection, the most significant of those matters involved a proposed amendment to the Louisiana Constitution modeled on the federal Religious Freedom Restoration Act. At the Attorney General's request, I served on a committee that considered the proposed amendment.

I have never performed lobbying activities.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I was an Assistant Professor of Law at the University of Mississippi School of Law from 2004 to 2008. During that time, I taught the following courses:

Admiralty Law (spring 2007, spring 2008). This course considered various topics in the law of admiralty, including admiralty jurisdiction, maritime tort law, the Jones Act, remedies for maritime workers, maritime liens, and limitation of liability. Syllabi supplied.

Comparative Law (fall 2006, fall 2007, fall 2008). This course considered civilian and common law legal systems from a comparative perspective, including the history, culture, and procedures of those systems. The course sometimes used the Louisiana Civil Code as a case study of a mixed legal system. Syllabi supplied.

Constitutional Law I (spring 2008). This course considered introductory subjects in the law of the United States Constitution, including the theory of judicial review, the structure of the federal court system and its relationship to the state court system, the structure of the federal government (including separation of powers), and the powers of the federal Congress under Article I. Syllabus supplied.

Constitutional Law II (fall 2004, summer 2005, spring 2006, spring 2007, summer 2007). This course considered various topics in the law of the First Amendment to the United States Constitution, including freedom of express, freedom of association, and freedom of religion. Syllabi supplied.

European Communities Law (fall 2008). This course considered the history, structure, and law of the European Union. Syllabus supplied.

Individual Study I (spring 2007, fall 2007, spring 2008). This course involved one-on-one work with a student in a constitutional law topic of the student's choosing,

culminating in a research paper. To my recollection, no syllabus was involved in this course.

Law and Economics (spring 2005). This course considered various topics in the economic analysis of legal rules and decisions. Syllabus supplied.

Legal Profession (spring 2005, spring 2006). This course considered various topics in the ethical and constitutional rules governing lawyers, including the formation of the attorney-client relationship, conflicts of interest, and freedom of speech principles as applied to the regulation of lawyers. Syllabi supplied.

Structures and Powers in the U.S. Constitution (fall 2005, fall 2006, fall 2007). This course considered the structure of the federal government under the United States Constitution through in-depth study of primary source documents and judicial decisions, culminating with a research paper on a topic of the student's choosing. Syllabus supplied.

UCC Sales (summer 2004; fall 2004). This course considered the law of sales under Article II of the Uniform Commercial Code. I have been unable to locate the syllabus for this course.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    My current firm represents a putative plaintiff class in litigation against the Metropolitan Washington Airports Authority. *Kerpen et al. v. MWAA et al.* (E.D. Va. No. 16-cv-01307), *appeal filed* (4th Cir. No. 17-1735). In the event the plaintiff class were to be certified and prevail, I would be contractually entitled to a percentage of the class award.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    I have no plans, commitments, or agreements to pursue outside employment during my service with the court.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       If confirmed, I will recuse in any litigation where I have ever played a role. For a period of time, I anticipate recusing in all cases where my current firm, Schaerr Duncan LLP, represents a party. I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case by case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

       If confirmed, I will carefully review and address any real or potential conflicts by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

    I have always endeavored to fulfill the standard discussed in Canon 2, consistent with my other obligations. Notably, I was ethically precluded from taking on *pro bono* litigation while at the Texas Attorney General's Office from 1999 to 2001, and I was generally restricted by my superiors in doing so while at the Louisiana Attorney General's Office from 2008 to 2012.

    While an Assistant Professor of Law at the University of Mississippi Law School from 2004 to 2008, however, I did work on behalf of the University while teaching which, in my view, constitutes work to improve the legal system recognized as important by the American Bar Association's Model Rule 6.1(b)(3). For example, I served on the Scholarship Committee, the Curriculum Committee, and the Ad-Hoc Committee on Non-

Academic Disciplinary Matters. I also served as a faculty advisor to the Catholic Student Association. Finally, in 2007 and 2008, I coached moot court teams in the ABA National Appellate Advocacy Competition, accompanying those teams to regional competitions in New York City and Boston.

Moreover, from 2012 to 2014, I served as General Counsel of a non-profit law firm, the Becket Fund for Religious Liberty, and while there both personally provided and also supervised the delivery of legal services to protect the civil rights of the disadvantaged within the meaning the American Bar Association's Model Rule 6.1(b)(1) and (b)(2). Although I was paid a salary while working there, Becket does not charge clients for legal services. As an example of Becket's services to the disadvantaged beyond those discussed elsewhere on this Questionnaire, I would point to three cases:

First, *Rich v. Secretary, Florida Department of Corrections*, 716 F.3d 525 (11th Cir. 2013), involved a challenge by a Jewish prison inmate to the Florida Department of Correction's failure to provide him with a Kosher diet in violation of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Becket attorneys represented the inmate on appeal and convinced the Eleventh Circuit to reverse the lower court decision, leading to a judgment in favor of the inmate and subsequently to a broad reform of Florida's system for providing Kosher meals to Jewish prisoners. I was closely involved in the litigation in a supervisory and strategic role.

Second, *Islamic Center of Murfreesboro v. Rutherford County*, No. 03:12-0737 (M.D. Tenn. 7/18/2012), involved a county land-use regulation that discriminated against the building and approval of a mosque. Becket Fund attorneys stepped in to represent the mosque and its imam, obtaining a temporary restraining order under RLUIPA that allowed the mosque to proceed with inspection and approval in time for the Ramadan holiday. Becket continued to represent the plaintiffs on appeal. This high-profile case attracted a letter of support from over 100 religious leaders, scholars, and advocates from a diverse array of faiths and political views (http://s3.amazonaws.com/becketpdf/MM-FINAL-LIST-v6-1-2.docx.pdf). Again, as Becket's General Counsel, I was closely involved in the litigation in a supervisory and strategic role.

Third, *Little Sisters of the Poor v. Sebelius*, 136 S. Ct. 446 (Mem.) (Nov. 6, 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (May 16, 2016), involved a religious order of nuns who serve the elderly poor and sought to vindicate their rights under the Religious Freedom Restoration Act against a federal mandate requiring their insurance to cover all FDA-approved contraceptive methods. As General Counsel of Becket, I directly assisted in obtaining and providing *pro bono* representation for the nuns and supervised their litigation while I remained at Becket. The nuns eventually won a reversal of the lower court decisions in the United States Supreme Court.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from

beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On or about February 6, 2017, I was contacted by staff for U.S. Senator Bill Cassidy of Louisiana regarding the Louisiana vacancy on the U.S. Court of Appeals for the Fifth Circuit. On February 13, 2017, I interviewed with Senator Cassidy and his staff. On or about February 16, 2017, I was also contacted by staff for U.S. Senator John Kennedy of Louisiana regarding the Louisiana vacancy on the U.S. Court of Appeals for the Fifth Circuit. On March 1, 2017, I interviewed with Senator Kennedy and his staff. On April 7, 2017, Senator Cassidy's office contacted me to request that I interview with his judicial advisory committee. I interviewed with that committee on May 9, 2017 in New Orleans, Louisiana and received a favorable recommendation. I met with Senator Kennedy for a second time on September 6, 2017.

Since February 27, 2017, I have also been in contact with officials from the White House Counsel's Office. On March 8, 2017, I interviewed with attorneys from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice in Washington, D.C. On October 2, 2017, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.