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

1. In the notes for a speech you gave to school-age children entitled "Should You Be a Judge?" you stated that "diversity in judic[ial] compos[ition]" is "essential to public confidence" in the judiciary.

a. Can you explain what you meant by this statement?

Response: As is the case with other institutions of government, the public's perception of the judiciary is important to maintaining confidence in that institution. The perception of equal justice under the law is enhanced when the public can observe that judicial officers are drawn from many different backgrounds that reflect the richness and diversity of our great nation.

b. Does this statement accurately reflect your judicial philosophy?

Response: The above statement reflects my personal opinion. I would not characterize this opinion as a judicial philosophy.

c. Do you believe that an individual's race or gender affects the quality of his or her decisionmaking?

Response: No.

2. At your confirmation hearing, I asked you about Virginia College Building Authority v. Lynn, 260 Va. 608 (Va. 2000), in which the Virginia Supreme Court considered whether Regent University, a sectarian private school in Virginia, could participate in a state-run bond program. The majority found that the bond program did not violate the Establishment Clause, the State Constitution, or Virginia law. The dissent that you joined concluded that Regent's primary overall purpose was to provide religious training, and as a result, the Virginia statute governing the program prohibited Regent's participation in the bond program, even though the University taught secular subjects. At your hearing, you stated that there was not an Establishment Clause issue before the Court. In fact, there was an Establishment Clause issue in the case, but the dissent focused only on the Virginia statute at issue. You also stated that the dissent's reasoning focused solely on the fact that the bond funds would have been used for the Divinity School; however, both the majority and dissent recognized that the Divinity school issue required a different analysis.

a. Although your dissent did not reach the issue, please provide your analysis of the Establishment Clause issue in that case.

Response: An appellate court speaks only through its written opinions and orders, including its dissents. Therefore, while I am able to provide an explanation of the reasoning that I employed in any opinion that I joined or wrote, I am unable to provide an analysis of an issue that was not addressed substantively in the portion of the opinion that I joined or wrote. Accordingly, because the dissent that I joined in the VCBA case conducted a statutory analysis and review of the lower court record that I thought fully resolved the issue before the Court, it is not appropriate for me to provide an advisory opinion on an issue not reached by the dissent.

b. Your dissent did not address an argument raised by the VCBA that the statute, if interpreted to bar Regent from participating in the bond program, was "viewpoint discriminatory." The statute defined "institute of higher education" as "a nonprofit educational institution within the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education." Your dissent essentially defined "religious training" to include teaching standard graduate school courses from a religious perspective and then declined to address the viewpoint discrimination claim, stating that it was waived because the VCBA raised the issue for the first time on appeal.

i. Do you believe that the statute at issue is viewpoint discriminatory?

Response: As I indicated above, because an appellate court speaks only through its opinions and orders, I am unable to provide an analysis of any issue that was not addressed substantively in the portion of an opinion that I joined or wrote. Therefore, because the issue of "viewpoint discrimination" was not addressed substantively in the dissent that I joined, it is not appropriate for me to provide an advisory opinion regarding that issue.

ii. If not, at least under your interpretation of the statute, the statute appears to treat religious institutions less favorably than non-religious institutions. In other words, colleges that teach a standard college curriculum from any number of perspectives (for example economic or political) can participate in the bond program, but colleges that teach from a religious perspective cannot. Do you agree that that is the essence of viewpoint discrimination?

Response: As I indicated above, it is not appropriate for me to provide an advisory opinion on this issue that was not addressed substantively in the dissenting opinion that I joined.

iii. What is the rationale for treating religious institutions less favorably?

Response: I am unable to answer this general question because it does not address an issue that was part of an opinion that I joined or wrote.

c. Would your opinion have prevented a university such as Georgetown or Notre Dame, assuming they were present in Virginia, from participating in this bond program?

Response: I am unable to answer this question because it seeks an advisory opinion on a hypothetical case that was not before the Supreme Court of Virginia.

d. In Rosenberger v. Rector and Visitors of the University of Virginia, the U.S. Supreme Court held that the University of Virginia violated the First Amendment when it withheld funds provided to student publications from a magazine that had a religious perspective.

i. Do you agree that Rosenberger is still the law of the land?

Response: Unless overturned by a later United States Supreme Court decision or by an act of Congress, all United States Supreme Court decisions are the law of the land.

ii. If confirmed, will you commit to following Rosenberger and other applicable precedent on this issue?

Response: If confirmed, I will follow all applicable precedent, including the decision in Rosenberger.

e. To what extent does the Establishment Clause limit the government's ability to include churches, religious schools, or other religious organizations in neutral government aid programs?

Response: I am unable to answer this question because it seeks an advisory opinion and is unrelated to a particular case that was decided by the Supreme Court of Virginia.

3. What in your view is the role of a judge?

Response: The role of a judge is to consider fully all evidence presented and arguments posed by the parties to a case, to ascertain the applicable precedent governing those issues, and to render a clear and precise decision that follows the governing precedent.

a. Do you think it is ever proper for judges to indulge their own values in determining what the law means?

Response: No.

i. If so, under what circumstances?

ii. Please identify any cases in which you have done so.

Response: There are no cases in which I have done so.

iii. If not, please discuss an example of a case where you have had to set aside your own values and rule based solely on the law.

Response: I have never been required to set aside my own values in deciding a case, because personal values are not part of my thought process as a judge. My process of deciding a case is based soley on the law and the record before the court.

b. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: No.

i. If so, under what circumstances?

ii. Please identify any cases in which you have done so.

Response: There are no cases in which I have done so.

iii. If not, please discuss an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.

Response: In Chandler v. Graffo, 268 Va. 673, 604 S.E.2d 1 (2004), the majority opinion held that Virginia Code § 8.01-581.20, which sets forth qualifications for testifying as an expert witness in a medical malpractice case, did not permit either party the right to retain a former malpractice panel member as an expert in the case. Id. at 680, 604 S.E.2d at 4. I joined Justice Agee's dissent, which stated that while such a prohibition might be "preferred public policy," a prohobition did not appear within the written statute and, thus, the inclusion of such a prohibition in the statute was a matter for future legislative action, not for "judicial amendment" by the Court. Id. at 684, 604 S.E.2d at 6.

4. How do you define "judicial activism?"

Response: There is no generally recognized definition of this term. I view this term as describing a situation in which a judge wrongly sets aside legal precedent and renders a decision based on personal preference and a desire to reach a predetermined result.

5. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: I do not think that the Constitution is "constantly evolving" based on interpretations or views of "society." In each case when a court considers a constitutional issue, the court must examine the Constitution under existing precedent and render a decision based on that precedent.

6. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit.

a. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

b. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision of your own best judgment of the merits?

Response: The decisions of the Supreme Court of the United States, and of the United States Court of Appeals for the Fourth Circuit, are binding precedent on a judge of the United States Court of Appeals for the Fourth Circuit. If confirmed as a Court of Appeals judge, I would honor that precedent.

7. As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:

"We need somebody who's got the heart, the empathy, 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. And that's the criteria by which I'm going to be selecting my judges."

a. Do you believe that you fit President Obama's criteria for federal judges, as described in his quote?

Response: As a judge, I try always to remain aware that parties, whether rich or poor, come before a court because of difficult issues that they are unable to resolve, and it is the court's job to decide those issues impartially based on the law. I cannot opine regarding President Obama's criteria for selecting judges.

b. What role do you believe that empathy should play in a judge's consideration of a case?

Response: Empathy is not an analytical tool to be applied in a judge's consideration of a case. A judge must always, however, accord to all parties careful consideration of the issues presented and allow the parties to be heard fully on those issues.

c. Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?

Response: No.

i. If so, under what circumstances?

ii. Please identify any cases in which you've done so.

Response: There are no cases in which I have done so.

iii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.

Response: There are no such cases, because empathy is never a factor in the decisions that I reach as an appellate judge.

Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. In Senator Mark Warner's introduction of your nomination, he mentioned that "many" of your letters of support were "unsolicited." Did you or anyone else solicit any letters of support in connection with your nomination?

Response: Yes.

If so, please list the names of the individuals who were solicited and provide copies of the letters, if any.

Response:

Vincent J. Mastracco, Jr., Esq. (copy of letter attached)

John A. Heilig, Esq. (copy of letter attached)

Thomas G. Johnson, Jr., Esq. (copy of letter attached)

The Hon. Owen B. Pickett and The Hon. Linda (Toddy) Puller also were asked to write letters of support on my behalf. I do not have copies of any letters that may have been sent by these two individuals. Of all the above-listed individuals, the only one I contacted personally was Ms. Puller.

The above requests were made before Senator Webb and Senator Warner sent their recommendation to the White House.

2. In *Conner v. National Pest Control Ass'n*, 257 Va. 286 (Va. 1999), a wrongful termination case, you joined a concurrence criticizing the policy outcome of the opinion but holding that your court could not "act as a super-legislative body" and reject the law the state legislature passed. That is an encouraging statement. It suggests that you understand the role of a judge or justice. However, the very next year in *Mitchem v. Counts*, 259 Va. 179 (Va. 2000), you wrote the majority opinion for a divided court, holding that a former employee could sue her former employer based on the claim that the employee rejected her supervisor's sexual advances. *Mitchem* involved the same state law as the 1999 case I just mentioned. The dissent argued that your majority opinion went against your prior statement that the court could not act as a "super-legislative body."

a. How do you respond to this criticism?

Response: Although the decisions in Conner and Mitchem both addressed a 1995 amendment to the Virginia Human Rights Act (VHRA), the plaintiff in Mitchem asserted an additional claim not alleged in Conner. In Conner, the plaintiff alleged only that she was wrongfully

terminated from employment based on her gender in violation of public policy stated in the VHRA, the Constitution of Virginia, and various Virginia statutes. Conner, 257 Va. at 288, 513 S.E.2d at 399. The Court held that Connor's claim was barred by the 1995 amendment to the VHRA because the legislature, in enacting that amendment to former Virginia Code § 2.1-725, eliminated causes of action for wrongful termination of employment based on any public policy reflected in the VHRA, even when the same public policy was reflected elsewhere in Virginia law other than state civil rights statutes or local ordinances. Id., 257 Va. at 290, 513 S.E.2d at 400.

Although the pleadings filed by the plaintiff in Mitchem included a claim similar to the claim asserted in Conner, the plaintiff in Mitchem also raised an alternative common law claim alleging that she was wrongfully terminated from her employment in violation of Virginia's public policy against fornication and lewd and lascivious behavior, because the plaintiff refused to commit those crimes at her employer's request. Mitchem, 259 Va. at 183, 523 S.E.2d at 248. Therefore, Mitchem raised a question of first impression not presented in Conner, namely, whether the VHRA barred a common law action for wrongful termination of employment based on a violation of public policy not reflected in the VHRA, when the conduct at issue also violated a public policy contained in the VHRA. The Court held that former Virginia Code § 2.1-725 did not prohibit a common law claim for wrongful termination of employment based on the public policies prohibiting fornication and lewd and lascivious behavior, because those policies are not reflected in the VHRA. Mitchem, 259 Va. at 190-91, 523 S.E.2d at 252-53.

b. How did the law support your conclusion in the *Mitchem* case?

Response: As previously stated, Mitchem presented a case of first impression for the Court to consider. The Court's holding was supported by existing legal precedent.

First, because former Virginia Code § 2.1-725 was enacted by the legislature in derogation of the common law, Virginia law required that the Court strictly construe the plain language of that statute. Chesapeake & O. Ry. Co. v. Kinzer, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965). Former Virginia Code § 2.1-725(D) stated, in relevant part: "causes of action based upon the public policies reflected [in the VHRA] shall be exclusively limited to those actions, procedures and remedies . . . afforded by applicable federal or state civil rights statutes or local ordinances." The plain language of this statute restricted causes of action relating only to the public policies reflected in the VHRA.

Second, Court precedent recognized a common law cause of action for wrongful termination of employment for violation of public policies underlying existing laws designed to protect the property rights, personal

freedoms, and the health, safety, or welfare of the general public. See City of Virginia Beach v. Harris, 259 Va. 220, 232-33, 523 S.E.2d 239, 245 (2000); Miller v. SEVAMP, Inc., 234 Va. 462, 468, 362 S.E.2d 915, 918 (1987); Bowman v. State Bank of Keysville, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985). The Virginia statutes prohibiting fornication and lewd and lascivious behavior embodied public policies designed to protect the welfare of the general public.

c. Do you think that it is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: No.

i. If so, under what circumstances?

ii. Please identify any cases in which you've done so.

Response: There are no cases in which I have acted in such a manner.

If not, please discuss an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.

Response: In Chandler v. Graffo, 268 Va. 673, 604 S.E.2d 1 (2004), the majority opinion held that Virginia Code § 8.01-581.20, which sets forth qualifications for testifying as an expert witness in a medical malpractice case, did not permit either party to retain a former malpractice panel member as an expert in the case. Id. at 680, 604 S.E.2d at 4. I joined Justice Agee's dissent, which stated that while such a prohibition might be "preferred public policy," a prohibition of this kind did not appear within the written statute and, thus, the inclusion of such a provision in the statute was a matter for future legislative action, not for "judicial amendment" by the Court. Id. at 684, 604 S.E.2d at 6.

Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Follow-up Questions of Senator Tom Coburn, M.D.

1. You personally solicited a letter of support from The Hon. Linda (Toddy) Puller, a Virginia State Senator. Has Ms. Puller ever appeared before you in court either in her personal capacity or in her official capacity?

Response: No. Ms. Puller has never appeared before me in court in either a personal or an official capacity.

a. If yes, how did you handle recusal issues?

b. Have you ever ruled in a case involving legislation sponsored or cosponsored by Ms. Puller?

Response: As a matter of practice, I never conduct research or otherwise attempt to determine who was a sponsor or a cosponsor of legislation that is before me as a judge. I cannot recall any case before me as a judge in which I was aware that Ms. Puller was a sponsor or a cosponsor of legislation at issue in the case, nor have I since become aware of any such situation.

c. Is it possible that you could rule on a matter involving Ms. Puller or legislation that she has sponsored or cosponsored in the future?

Response: Yes, it is possible that a matter involving Ms. Puller or legislation that she has sponsored or cosponsored would come before me as an appellate judge in the future.

d. How will you handle recusal issues in the future if Ms. Puller has a case before you or your court is handling legislation that has sponsored or cosponsored?

Response: If the case is before the Supreme Court of Virginia and personally involves Ms. Puller, who is not an attorney, or involves legislation that I am aware she has sponsored or cosponsored, I would consult and follow the Virginia Canons of Judicial Conduct regarding my participation in such a case. If I am confirmed as a judge of the United States Court of Appeals for the Fourth Circuit, and if such a case comes before that Court, I would consult and follow the Code of Conduct for United States Judges and any other pertinent directives, including 28 U.S.C. § 455, regarding the ethical duties of United States judges.

2. You stated that letters of support were solicited from Vincent J. Mastracco, Jr., Esq., John A. Heilig, Esq., Thomas G. Johnson, Jr., Esq., and The Hon. Owen B. Pickett, but you did not solicit these letters. Who solicited these letters on your behalf?

Response: My husband, Alan E. Rosenblatt, asked John A. Heilig, Esq., and The Hon. Owen B. Pickett, both of whom he has known for over twenty-five years, to write letters on my behalf. Hunter W. Sims, Esq., whom I have known for over 30 years, asked his law partner, Vincent J. Mastracco, Jr., Esq., to write a letter on my behalf. My friend and colleague on the Supreme Court of Virginia, Justice S. Bernard Goodwyn, asked his former law partner, Thomas G. Johnson, Jr., Esq., to write a letter on my behalf.

These letters were written before my interview with Senators Webb and Warner, and before they recommended me to the White House. The letters were intended to inform the Senators about support within the legal community regarding my application and about my judicial service to the Commonwealth of Virginia. I understood that the Senators welcomed such information regarding judicial candidates.

a. Has the person who solicited the letters on your behalf ever appeared before you in court? Is it possible that they could appear before you in the future?

Response: Neither my husband nor Justice Goodwyn has ever appeared before me in court, and it is not possible that they will do so in the future. Hunter W. Sims, Esq., has appeared before me in court in the past. It is possible that he would appear before me in court in the future.

b. If they have had a case before you, how did you handle recusal issues?

Response: To the best of my recollection, Hunter W. Sims, Esq., has not appeared before me in court since he requested Vincent J. Mastracco, Jr., Esq., to write a letter on my behalf. In his prior appearances, there was no recusal issue for consideration.

c. How will you handle recusal issues in the future with regard to the person who solicited these letters?

Response: If Mr. Sims appears before the Supreme Court of Virginia in the future, I would consult and follow the Virginia Canons of Judicial Conduct regarding my participation in such a case. If I am confirmed as a judge of the United States Court of Appeals for the Fourth Circuit, and if a case involving Mr. Sims comes before that Court, I would consult and follow the Code of Conduct for United States Judges and any other

pertinent directives, including 28 U.S.C. § 455, regarding the ethical duties of United States judges.

d. Has Vincent J. Mastracco Jr., Esq., John A. Heilig, Esq., or Thomas G. Johnson, Jr., Esq., ever appeared before you in court either as an attorney representing a client or a litigant or is it possible that they would in the future?

Response: To the best of my recollection, Vincent J. Mastracco, Jr., Esq., John A. Heilig, Esq., and Thomas G. Johnson Jr., Esq., have never appeared before me in court either as an attorney representing a client or as a litigant. It is possible that any of these three attorneys would appear before me in court in the future.

e. If they do appear before you in the future, how will you handle recusal issues?

Response: If any of these three attorneys appears before me in the Supreme Court of Virginia in the future, I would consult and follow the Virginia Canons of Judicial Conduct regarding my participation in the case. If I am confirmed as a judge of the United States Court of Appeals for the Fourth Circuit, and if a case involving any of these three attorneys comes before that Court, I would consult and follow the Code of Conduct for United States Judges and any other pertinent directives, including 28 U.S.C. § 455, regarding the ethical duties of United States judges.

f. To whom was the letter from The Hon. Owen B. Pickett addressed?

Response: I never saw a copy of the letter that I was told former Congressman Pickett wrote. Assuming that such a letter was sent, it likely was sent to Senator Jim Webb.

3. Did anyone instruct or advise you to request these letters of support, including anyone at the U.S. Department of Justice or the White House?

Response: No, no one instructed or advised me to request the above letters of support, including anyone at the United States Department of Justice or the White House.

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

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

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

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

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

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

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

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

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

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

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

a. How would you define viewpoint discrimination?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Follow-up Questions of Senator Tom Coburn, M.D.

1. In response to questions 1d., 2c., and 2e., you stated that if any of the individuals who wrote or solicited letters of recommendation on our behalf appeared before you in court, you would consult and follow the applicable ruled of ethics regarding recusal, including either the Virginia Canons of Judicial Conduct or the Code of Conduct for United States Judges.

a. How do you think recusal should be approached generally?

Response: In every case that a judge is assigned to hear, the judge must consider whether an issue of recusal exists. These issues may arise from a judge's own consideration of the case, or from issues that the litigants present to the judge. A judge must consider any issue of recusal very thoroughly and carefully. This includes giving extended consideration to issues involving the appearance of impropriety, as well as to issues of actual impropriety. Litigants must be assured that the judge deciding their case will be free from bias, whether actual or perceived. In addition, full consideration of recusal issues is necessary to maintain public confidence in the integrity and impartiality of the judiciary.

b. When determining whether recusal is required do you believe the rules should be interpreted narrowly or broadly?

Response: The applicable standards for recusal should be interpreted broadly, so that a judge will recognize and consider all issues involving the appearance of impropriety and of actual impropriety, including those that are not immediately apparent, in making a recusal decision.

i. Please explain your reasoning.

Response: Often, issues involving recusal are complex in nature. A judge must be certain that he or she has considered all aspects of the issues presented, including issues of the appearance of impropriety as well as issues of actual impropriety. When a judge determines that recusal is an issue in a particular case, a judge should consider all perspectives of the parties to the case and always resolve any reasonable question in favor of recusal.

c. How will you evaluate whether you should recuse yourself in cases involving the individuals from whom you or your husband solicited letters of support for your potential nomination for a position on the U.S. court of appeals for the Fourth Circuit?

Response: In every case that I hear as a judge, I always evaluate whether an issue of recusal is presented. In cases involving individuals from whom I or my

husband solicited letters of support for my potential nomination, I would disclose this fact on the record of the case and ask the parties if they wish to be heard on the question whether I should remove myself from the case. I would also informally consult with my judicial colleagues regarding the issue and resolve any remaining reasonable question in favor of recusal.

2. Canon 3C(1) of the Code of Conduct for United States Judges states that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonable be questioned …" Do you believe that your impartiality might reasonably be questioned by a litigant if you participated in a case involving Mr. Sims, Mr. Mastracco, Mr. Heilig, Mr. Johnson, or Ms. Puller given you and your husband's solicitations for letters of support from them relating to your potential nomination?

Response: As a general matter, I do not think that my impartiality might reasonably be questioned by my participation in a case involving the above individuals. However, in the event that other persons participating in such a case have a different perspective, I would carefully consider their different perspectives, informally consult with my colleagues regarding the matter, and resolve any remaining reasonable question in favor of recusing myself from such a case.

i. If not, why?

Response: Such letters solely addressed my professional qualifications based on my public record of judicial service. However, in a future case of the above-referenced nature, I would disclose on the record the fact that these individuals were asked to send letters of support on my behalf. I also would informally consult with my judicial colleagues and consider their perspectives on the subject. Further, I would invite the parties to state whether they would prefer that I recuse myself from the case. I would consider fully their perspective and would be strongly inclined to grant any reasonable recusal request simply to avoid any appearance of impropriety. To date, in the rare instances in which I have been asked to recuse myself for any particular reason, I have never refused such a request.

ii. Do believe that your impartiality might reasonably be questioned by a litigant if you participated in a case involving legislation that Ms. Puller had sponsored or cosponsored given your solicitation of a letter of support from her?

Response: No, I do not believe that my impartiality might reasonably be questioned by a litigant if I participated in a case involving legislation that Ms. Puller had sponsored or cosponsored. Although I did not see any letter that she may have written on my behalf, I would expect that it stated my professional qualifications for the job on the basis of my public record

of judicial service. However, in a future case of the above-referenced nature, I would disclose on the record that I had asked Ms. Puller to write a letter on my behalf. I would invite the litigants to state any concerns on the record and would give those concerns my full consideration. I would informally consult with my judicial colleagues on the issue and consider all points of view that they express. I would invite the parties to state whether they prefer that I recuse myself from the case. I would consider fully their position and would be strongly inclined to grant any reasonable recusal request simply to avoid any appearance of impropriety. To date, in the rare instances in which I have been asked to recuse myself for any particular reason, I have never refused such a request.

iii. Please explain your reasoning.

Response: Although I do not believe that my impartiality might reasonably be questioned in such instances, I must always be aware that other persons may entertain a different point of view on the subject. When individuals entertaining a different point of view have a case before me, I must be very careful to consider their perspectives. In any question of recusal, a judge must always consider the issues from the differing perspectives presented. I think that the fact that I have never refused a recusal request demonstrates my commitment to the principles of impartiality and integrity in the judicial process, and my general willingness to recuse myself from a case when asked to do so based on a reasonable concern.

3. You stated in response to question 1b. that: "[a]s a matter of practice, [you] never conduct research or otherwise attempt to determine who was a sponsor or cosponsor of legislation that is before [you] as a judge." If you do not conduct such research, how do you determine whether there might be a conflict of interest or recusal issue in the case?

Response: The identity of a sponsor or cosponsor of legislation is never part of my analysis of a case, and I cannot recall ever having been aware of the sponsor or cosponsor of legislation that was litigated before me either as a trial judge or as an appellate judge. Therefore, the identity of such a legislator does not present an issue of conflict of interest or recusal sua sponte.

a. Will you begin conducting this type of research if confirmed as a circuit court judge, especially in light of the letter of support you solicited from a legislator to help obtain the position?

Response: I do not plan to undertake this type of research if confirmed as a circuit court judge, because such an inquiry has never been part of my procedure in analyzing a statute. Further, I am not aware of any federal judge who conducts such research, despite the fact that many of those judges have personal

relationships with legislators on both the federal and state level. However, I will fully and carefully consider any motion for recusal made by a party to a case. I have never refused a request for recusal that a party has placed on the record of a case. I believe that this fact demonstrates my awareness of the sensitivity and importance of recusal issues. I will consider each such future request from all perspectives presented.

b. If you do not conduct this type of research, do you take the position that legislative history is not relevant to determine the meaning of a statute?

Response: Legislative history, in certain cases, can be important in determining the meaning of the text of a statute. In Virginia, however, there is rarely any substantive legislative history to be considered. In the future, if confirmed as a circuit court judge, I will consider legislative history whenever appropriate in the context of the issues presented.

c. If you do think legislative history is relevant to statutory interpretation, how can you determine legislative history without knowing the sponsor or cosponsor of the legislation?

Response: I agree that when considering the legislative history of a statute, I likely will learn who was the sponsor or cosponsor of a particular statute.

d. Do you consider yourself a textualist?

Response: I am not certain what you mean by the term "textualist." However, if your inquiry seeks my approach to statutory analysis, I offer the following answer: A court is required to apply the plain meaning of a statute, whenever possible. In most instances, the language of a statute is plain on its face. However, there are unusual instances in which the language of a statute is ambiguous, in that the language can be interpreted to have more than one meaning. In such instances, a court should consider the intent of the legislative body in enacting a particular statute, in order to assist the court in interpreting that statute. In these types of cases, a court seeks to interpret the statute at issue to enable the enactment to remedy the particular situation at which it is directed.