Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Judge Deborah Boardman
Nominee to the U.S. District Court for the District of Maryland
May 19, 2021

1. **You have served as a federal magistrate judge since 2019. In this role, you have issued hundreds of written decisions and letter orders.**

   Please give a general overview of your role as a federal magistrate judge. What types of cases do you routinely handle?

   Response: As a Magistrate Judge, I preside over civil cases by consent of the parties, resolve civil discovery disputes, conduct settlement conferences, and preside over preliminary criminal proceedings. Additionally, I administer the District of Maryland's Social Security appeals docket. In civil cases before me by consent of the parties, I rule on motions to dismiss, resolve discovery disputes, decide whether cases should proceed to trial, and preside over bench and jury trials. These cases have involved claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Rehabilitation Act; claims under 42 U.S.C. § 1983, the Fair Labor Standards Act, and the Fair Debt Collection Practices Act; qualified and sovereign immunity defenses; and state law claims stemming from contract disputes and personal injuries.

2. **During your confirmation hearing, Senator Kennedy asked you to discuss rational basis review. You correctly identified rational basis as the lowest standard of review that courts apply to constitutional questions.**

   a. **Please expand on your answer to Senator Kennedy.**

      Response: Generally speaking, rational basis review tests whether certain government actions are "rationally related to legitimate government interests." Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

   b. **In what types of cases do courts typically apply the rational basis test?**

      Response: In the equal protection context, the Supreme Court applies the rational basis test rather than a heightened form of scrutiny when the challenged classification "involves neither a 'fundamental right' nor a 'suspect' classification." Armour v. City of Indianapolis, Ind., 566 U.S. 673, 681 (2012); see also Wilkins v. Gaddy, 734 F.3d 344, 347–49 (4th Cir. 2013). In the substantive due process context, the Supreme Court applies the rational basis test if the challenged government action does not implicate "a fundamental liberty interest protected by the due process clause." Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

c. **To the best of your recollection, as a federal magistrate judge, have you ever applied the rational basis test?**

   Response: As a Magistrate Judge, I have not presided over a case that required the application of the rational basis test to determine the constitutionality of government action.

3. **You spent eleven years serving as an Assistant Federal Public Defender in the Office of the Public Defender for the District of Maryland. While there is no doubt that you have a great deal of experience working on criminal matters, you also have experience in private practice working on civil cases.**

   Can you discuss your experience working on civil matters during your time in private practice?

   Response: As a litigation associate at Hogan Lovells (formerly known as Hogan & Hartson) in Washington, D.C. from 2001 to 2008, I worked exclusively on civil matters. I represented a wide range of corporate and individual clients in state and federal courts. Specifically, I counseled insurance companies, universities, healthcare and pharmaceutical companies, among others, in business and contract disputes. As a fifth-year associate, the firm selected me to serve as the Senior Pro Bono Associate in its nationally recognized pro bono department. I managed the firm's largest pro bono cases full-time and appeared in federal and state courts as the lead attorney in several cases. I tried a wrongful eviction action before a D.C. jury. I was lead counsel in a three-day evidentiary hearing on a habeas corpus petition in the Circuit Court for the City of Norfolk. I argued numerous discovery motions before a U.S. Magistrate Judge in the District Court for the District of Columbia in an employment discrimination class action lawsuit. When I was not in court, I drafted and responded to written discovery; conducted privilege reviews; managed large document productions; vetted and prepared expert witnesses; took and defended dozens of depositions; and drafted pleadings, discovery motions, dispositive motions, and mediation statements.

Senator Chuck Grassley, Ranking Member
Questions for the Record
Judge Deborah Boardman
Nominee to be United States District Judge for the District of Maryland

1. **I was not able to ask all the questions I wanted during your hearing about two particular cases, so I will do so now. Can you, as specifically as possible, identify the particular facts the district court relied upon in order to reverse you in the cases *U.S. v. Gallagher* and *U.S. v. Spencer*?**

   Response: The District Judges issued opinions in United States v. Gallagher, No. SAG-19-479, 2020 WL 2614819 (D. Md. May 22, 2020), and United States v. Spencer, No. GLR-19-400, 2020 WL 2126880 (D. Md. May 5, 2020).

   Mr. Gallagher was charged with possession with intent to distribute marijuana and THC, possession of a firearm and ammunition in furtherance of a drug trafficking crime, and possession of a firearm and ammunition by a convicted felon. Gallagher, 2020 WL 2614819, at *1. In detaining the defendant, Judge Gallagher relied on the government's proffer that "distribution quantities of marijuana and THC, drug packaging paraphernalia, [and] more than $44,000" were recovered from Mr. Gallagher's residence and vehicles. Id. at *4. She also relied on the proffer that an unloaded handgun and ammunition were recovered "from a backpack in a white van, which had been associated with Gallagher." Id.

   Judge Gallagher found additional facts weighed in favor of detention. First, "[a]t just twenty-eight years of age, Gallagher ha[d] sustained seven adult criminal convictions, including three felony convictions for possession with intent to distribute narcotics." Id. at *5. Second, "he ha[d] violated the terms and conditions of every period of court supervision imposed upon him," and "he committed the instant offenses, according to the government, while under the supervision of . . . two [state] Courts." Id. Third, he had "cut off his ankle bracelet and fled the jurisdiction, while under supervision of the state court." Id. Fourth, "he ha[d] no underlying medical conditions." Id.

   Mr. Spencer was charged with possession with intent to distribute and conspiracy to distribute controlled substances. Spencer, 2020 WL 2126880, at *1. In detaining him, Judge Russell relied on the government's proffer that Mr. Spencer "was a leader of the narcotics conspiracy that distributed and sold significant and daily amounts of heroin, fentanyl, and cocaine base"; Mr. Spencer and others in the "criminal organization engaged in numerous sales of narcotics with law enforcement monitored confidential informants"; and "[m]embers of the organization employed juveniles and used firearms to further the business enterprise." Id. at *2. The government also proffered that "drugs, packaging material, and paraphernalia" were recovered from Mr. Spencer's residence. Id.

   Judge Russell also noted that the 24-year-old defendant had "two previous convictions for distribution and one conviction for robbery" and "was on probation for a narcotics distribution offense at the time of his arrest in the present case." Id. He had

"little confidence" that Mr. Spencer's proposed third-party custodian, his sister, "could influence the [d]efendant in a way that would protect the public" because she was "furloughed and ha[d] three children to provide for." Id.

2. **In *Gallagher*, the defendant was a drug dealer with a gun who had shown himself to be a flight risk. The district court found all relevant factors counseled continued detention. Why did you think letting this individual back into the public was a good idea?**

Response: In United States v. Gallagher, the government moved for the defendant's pretrial detention. During an April 2020 hearing on the motion, I considered the factual proffer and arguments of counsel and the factors in the Bail Reform Act to determine "whether there [were] conditions of release that [would] reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(g). At the hearing, the defendant proposed release to his girlfriend's custody at her apartment near the location of the alleged offenses. No detainee or staff member at the facility where Mr. Gallagher was detained had tested positive for COVID-19. Further, electronic home monitoring was not an available release condition. Applying the Bail Reform Act factors, I found that no condition or combination of conditions reasonably assured me of the safety of the community and the defendant's appearance at trial. I, therefore, ordered Mr. Gallagher's detention.

In May 2020, Mr. Gallagher moved to reopen the detention hearing because correctional officers and a detainee at the facility where he was detained had tested positive for COVID-19. I reopened the detention hearing pursuant to 18 U.S.C. § 3142(f)(2). At the second detention hearing, I again considered the factual proffers and arguments from counsel and applied the Bail Reform Act factors. I also considered the possibility that COVID-19, which was then inside the facility, would spread rapidly among the detainees and staff, as it had weeks earlier at another local pretrial detention facility. At the second detention hearing, the defendant offered a more suitable release plan than he had at his first detention hearing, and electronic home monitoring was now an available release condition. He proposed release to the third-party custody of his mother and grandmother, who lived together in a single-family home in rural Delaware, over 100 miles from where the alleged offenses occurred. I spoke at length with his grandmother and mother during the hearing. His grandmother was retired, and his mother worked from home. Neither had a criminal history, and Pretrial Services approved them as third-party custodians. Both women assured me that they would watch over Mr. Gallagher and transport him to court proceedings, meetings with counsel, and a Bureau of Prisons facility for surrender to serve any imposed sentence. They also assured me there was room in the home for him to quarantine safely upon his release from jail. There were no allegations that Mr. Gallagher acted violently or used a firearm. Mr. Gallagher previously was released by a state court judge on related state charges, subject to electronic home monitoring. After the state court charges were dismissed in favor of federal prosecution, Mr. Gallagher removed his ankle bracelet and

did not report to face the federal charges. He remained in communication with his attorney and the law enforcement officer on the case, and he eventually voluntarily appeared in Court for an initial appearance on the indictment.

Applying the Bail Reform Act factors in Mr. Gallagher's case, I found release conditions that "reasonably assure[d] the appearance of the [defendant] as required and the safety of any other person and the community." 18 U.S.C. § 3142(f). The Bail Reform Act requires the Court to find "the least restrictive" conditions that will reasonably assure the defendant's appearance as required and the community's safety. 18 U.S.C. § 3142(c)(1)(B). I released Mr. Gallagher on the strictest possible conditions. Specifically, I released him to the third-party custody of his mother and grandmother, subject to home detention and electronic monitoring. He would have been allowed to leave the home only with advance permission of his Pretrial Services Officer.

3. **In *Spencer*, the defendant led a drug ring that "distributed and sold significant and daily amounts of heroin, fentanyl, and cocaine base. Members of the organization employed juveniles and used firearms to further the business empire…To make matters worse, the Defendant was on probation for a narcotics distribution offense at the time of his arrest in the present case." Why did you think letting this individual back into the public was a good idea?**

Response: In United States v. Spencer, the government moved for the defendant's pretrial detention. During a hearing on the motion, I considered the factual proffers and arguments of counsel and the factors in the Bail Reform Act to determine "whether there [were] conditions of release that [would] reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(g). I also considered that the pretrial detention facility where Mr. Spencer was detained was in the midst of an uncontrolled outbreak of COVID-19. Two weeks earlier, a United States District Judge for the District of Columbia found a likelihood that the District of Columbia Department of Corrections, which oversaw the facility where Mr. Spencer was detained, was deliberately indifferent to the risks that COVID-19 poses to the health of detainees. See Banks v. Booth, 459 F. Supp. 3d 143, 158 (D.D.C. 2020). Judge Kollar-Kotelly reasoned that the plaintiffs in Banks, who, like Mr. Spencer, were pretrial detainees, "provided evidence that Defendants are aware of the risk that COVID-19 pose[d] to Plaintiffs' health and ha[d] disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus." Id. I also considered the fact that there were no allegations that Mr. Spencer acted violently or that he possessed or used a firearm.

Applying the Bail Reform Act factors, I found conditions of release that reasonably assured me of the safety of the community and the defendant's appearance at trial. I found that he could be released to the third-party custody of his older sister, who had no criminal history and was home all day during the pandemic with her three young children. She owned her home and lived several miles from the neighborhood where Mr. Spencer allegedly sold narcotics. Pretrial Services vetted her and deemed her a suitable

third-party custodian. As a condition of release, I required home confinement subject to location monitoring by Pretrial Services. Mr. Spencer would have been allowed to leave the home only with advance permission of his Pretrial Services Officer.

a. **Does the distribution of fentanyl pose a risk to communities?**

   Response: Yes.

b. **Does running an operation that uses juveniles with firearms pose a risk to communities?**

   Response: Yes.

4. **Do you believe the district court was correct in reversing you in both cases?**

   Response: I applied the Bail Reform Act factors in good faith in both cases, and I respect the decisions of the District Judges who reached different conclusions.

5. **There was also some confusion about a question I asked about which clients "deserve" civil representation. You may be aware of groups of law students targeting law firms over their representation of oil and gas companies. Here is an article you can review if you are unaware: https://www.law.com/2021/04/07/law-student-climate-change-activists-target-gibson-dunn/.**

   a. **As someone who has defended hundreds of individuals charged with horrific crimes, do you believe your clients deserved legal representation?**

      Response: Under the Sixth Amendment to the Constitution, every person charged with a crime has a right to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) ("[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the [widespread] belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

   b. **Do you think oil and gas companies deserve legal representation?**

      Response: Until receiving your question, I was unaware that groups of law students targeted firms that represented oil and gas companies. It would be

inappropriate for me, as a Magistrate Judge, to comment on whether any company deserves legal representation.

6. **Do you think it's good for the legal profession when activists pressure law firms about which civil clients (like oil and gas companies) "deserve" representation?**

   Response: It would be inappropriate for me, as a Magistrate Judge, to comment on whether the legal profession benefits from activists pressuring law firms about which civil clients they represent. My role as a judge is to interpret and apply the law to the specific facts of the case pending before me. My personal views and opinions are irrelevant to my judicial decisions.

7. **In the course of your representation of Harold Martin, an NSA contractor who pled guilty to willful detention of national defense information, you called him a "patriot." What is patriotic about illegally handling national defense information?**

   Response: I represented Mr. Martin while I served as an Assistant Federal Public Defender. Mr. Martin had a Sixth Amendment right to effective assistance of counsel, and as Mr. Martin's defense attorney, I was ethically obligated to represent him zealously. The comment about Mr. Martin's patriotism was in reference to his thirteen-year service in the United States Navy. Mr. Martin was never charged with disclosing national defense information. As his advocate, I emphasized his service to our country to underscore that Mr. Martin never intended to provide national defense information to enemies of the United States or foreign governments.

8. **You handled many defendants charged with unlawfully possessing firearms. Approximately how many cases did you handle that dealt with defendants charged with unlawful possession of a firearm, illegal firearm trafficking, or violence committed with a firearm?**

   Response: As an Assistant Federal Public Defender, I represented approximately 100 people charged with unlawful possession of a firearm, illegal firearm trafficking, or violence committed with a firearm. At the Federal Defender's Office, I generally did not select my cases. I typically was assigned the cases that came in on my duty day. Cases involving firearms are among the most common types of criminal cases in the District of Maryland.

9. **During your years as a federal defender did you ever raise a Second Amendment defense on behalf of your clients?**

   Response: I do not recall ever raising a defense to a criminal charge based on the Second Amendment.

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

Response: "[W]ords that create an immediate panic," such as the single word "fire" when shouted in a crowded theater, "are not entitled to constitutional protection" under the First Amendment. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (citing Schenck v. United States, 249 U.S. 47 (1919) (Holmes, J.)). The rule that First Amendment "'protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic'" is the "most classic" example of "the principle that certain forms of conduct mixed with speech may be regulated or prohibited." Cox v. Louisiana, 379 U.S. 559, 563 (1965) (quoting Schenck, 249 U.S. at 52). With regard to words advocating use of force or violence, "mere *advocacy* . . . does not remove speech from the protection of the First Amendment," as the advocacy is protected unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." N.A.A.C.P., 458 U.S. at 927–28 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)) (emphasis in original). If I am confirmed as a District Judge, I will adhere to this precedent.

11. **In *U.S. v. McIntosh*, you represented a Maryland jail worker accused of failing to provide medical attention to an inmate found hanging from a sheet. The inmate was a suspected cop killer and there were questions about vigilante justice, especially after the state's medical examiner ruled the death a homicide. You secured a plea deal, and made sure to note the deal did not implicate your client in the inmate's death. You were also asked why your client made false statements, and you responded, "That will be addressed at a later date." Can you now address that? If not, when will you address it, if ever?**

    Response: I made the quoted statement after Mr. McIntosh pled guilty. At his subsequent sentencing hearing, I addressed the reasons why he made the false statements.

12. **In *U.S. v. Neal*, you granted release to an inmate based on your determination that his detention facility was facing a COVID-19 outbreak. In that case, Pretrial Services opposed the defendant's release but you disagreed. Why didn't you defer to Pretrial Services?**

    Response: When I rule on a motion for pretrial detention as a Magistrate Judge, I have an obligation to make an independent determination based on the specific facts of the case and an application of the factors in the Bail Reform Act, 18 U.S.C. § 3142. In Mr. Neal's case, I decided that he should be temporarily released pending trial under § 3142(i). In making my decision, I followed the Fourth Circuit's decision in United States v. Creek, No. 20-4251 (4th Cir. Apr. 15, 2020), ECF 402 in United States v. Creek, No. CCB-19-36 (D. Md.), which governs temporary release under § 3142(i) during the pandemic. I also considered the Pretrial Services Report and factual proffers and arguments from counsel, as I do in every case. When I released Mr. Neal, I scheduled a status hearing for seven weeks after his release to decide whether he should remain on pretrial release. At

the status hearing, the government and Pretrial Services agreed that Mr. Neal should remain on pretrial release subject to the same conditions I previously found appropriate.

13. **When you were a federal defender, what was your view on whether defendants should cooperate with law enforcement?**

    Response: While I was an Assistant Federal Public Defender, I advised my clients about the option of cooperating with law enforcement. As their counsel, I ensured they understood the obligations, risks, and benefits of cooperation. Whether to cooperate with law enforcement is a fact-specific, individualized decision that varies from case to case and person to person. The decision to cooperate with law enforcement always belonged to my client.

14. **It is my understanding that, to ensure the safety of cooperating witnesses, the District of Maryland makes it difficult for non-parties to verify whether a defendant is cooperating with law enforcement.**

    a. **Do you agree with this approach in the District of Maryland?**

       Response: Yes.

    b. **What was your view on this approach, if any, when you were a federal defender?**

       Response: While I was an Assistant Federal Public Defender, I agreed with the District of Maryland's approach to ensuring the safety of cooperating witnesses.

15. **Do you agree that it's in the best interests of society for defendants to cooperate voluntarily with law enforcement?**

    Response: Voluntary cooperation with law enforcement can benefit society. Whether to cooperate with law enforcement is a fact-specific, individualized decision that varies from case to case and person to person. The decision to cooperate with law enforcement always belongs to the defendant.

16. **While I think it's in the best interests of society for defendants to cooperate with law enforcement, and it is likely in their personal best interests to cooperate because it can lead to leniency at sentencing, the cooperation of one criminal with law enforcement is probably not in the best interests of his confederates or their counsel. What methods, if any, would you or any of your federal-defender colleagues employ to identify whether a defendant was cooperating against your clients?**

Response: As an Assistant Federal Public Defender, I represented cooperators, and I appreciated the dangers a cooperating witness may have faced if his or her cooperation became public. In each case, I reviewed the discovery produced by the government, conducted an independent investigation, researched the relevant law, and advised my client about the available options.

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

    Response: In Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), the Supreme Court held that under the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees, the First Amendment's Religious Clauses barred two teachers' employment discrimination claims against Roman Catholic schools. If I am confirmed, I will adhere to Supreme Court and Fourth Circuit precedent.

18. **What level of scrutiny applies to a Second Amendment challenge in the District of Maryland?**

    Response: The level of scrutiny applicable to a challenge under the Second Amendment depends upon the facts and circumstances of each case. In United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010), the Fourth Circuit indicated that "a two-part approach seems appropriate under Heller" with respect to Second Amendment challenges:

    > The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means and scrutiny. Heller left open the issue of the standard of review, rejecting only rational basis review. Accordingly, unless the conduct at issue is not protected by the Second Amendment at all, the government bears the burden of justifying the constitutional validity of the law. . . . [The court's] tasks, therefore, is to select between strict scrutiny and intermediate scrutiny.

    Id. at 680, 682 (internal citations omitted). In Chester, for example, the Fourth Circuit applied intermediate scrutiny, finding the plaintiff's "claim [was] not within the core right identified in Heller." Id. at 683 (emphasis omitted).

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

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

      Response: When courts interpret statutes or regulations, they "begin with the text." Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1169 (2021). "[A]nalysis of the statutory text, aided by established principles of interpretation, controls." POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 112 (2014). Those principles of interpretation may include textual and contextual analysis and any relevant canons of construction appropriately employed prior to a finding of ambiguity.

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

      Response: Federal statutory language is ambiguous when "it lends itself to more than one reasonable interpretation." Wheeler v. Newport News Shipbuilding & Dry Dock Co., 637 F.3d 280, 284 (4th Cir. 2011) (quoting Newport News Shipbuilding & Dry Dock Co. v. Brown, 376 F.3d 245, 248 (4th Cir. 2004)). Similarly, the Supreme Court has recently observed that interpreting ambiguous regulations "involves a choice between (or among) more than one reasonable reading." Kisor v. Wilkie, 139 S. Ct. 2400, 2411 (2019). If I am confirmed, I will follow Supreme Court and Fourth Circuit precedent in determining whether text is ambiguous.

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

      Response: If I am asked to interpret text, I will examine the text in its structural context and employ any relevant and appropriate canons of construction to determine whether it is ambiguous. If I find text ambiguous, I will look to Supreme Court and Fourth Circuit precedent for guidance on the appropriate tools of interpretation that would apply to the particular facts of the case. If permitted by Supreme Court and Fourth Circuit precedent, I may, when appropriate, examine legislative history.

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

      Response: The canons of statutory interpretation are tools courts use to discern legislative intent. Depending on the language of the text and the particular circumstances of the case, different canons of interpretation may lead to conflicting results. To resolve that conflict, I would closely examine the plain

language of the provision at issue and the language and structure of the statute as a whole to interpret the statute consistent with legislative intent. If necessary and if permitted by Supreme Court and Fourth Circuit precedent, I may consult the legislative history to determine legislative intent.

20. **You were quoted in an article from your time in college about Villanovans for Life. In it you describe Villanovans for Life as seeking "to maintain the provisions of the University's resolution." The resolution read: "Resolved: That the Villanova University senate advocates the upholding of the sanctity and dignity of human life, especially as regards to the unborn, the elderly, the handicapped and the institutionalized." What was your involvement in Villanovans for Life?**

    Response: I do not recall making the statement in an article in my college newspaper. I do not recall belonging to the organization "Villanovans for Life" or participating in any activities the organization sponsored.

21. **Does smoking cause cancer?**

    Response: I am generally aware that, according to the Centers for Disease Control and Prevention and the U.S. Surgeon General, smoking may cause cancer. If a case came before me that involved related issues, I would, as I do in all cases, carefully review the record and apply the law, including Supreme Court and Fourth Circuit precedent, to the particular facts of the case.

22. **Do people have implicit racial bias?**

    Response: I am generally aware of studies indicating that everyone has subconscious bias, which are assumptions and stereotypes we make about others without being conscious of them. As a Magistrate Judge, I strive to ensure that I rule based solely on the applicable law and specific facts of the case before me. If confirmed, I will do so as a District Judge.

23. **Does human life begin at conception?**

    Response: The question of when human life begins is often the subject of debate and litigation. The Supreme Court concluded that it "need not resolve the difficult question of when life begins" in Roe v. Wade, 410 U.S. 113, 159 (1973), and it has not answered the question since Roe. If confirmed, I will adhere to Supreme Court and Fourth Circuit precedent. To the extent this question asks for my personal views, it would be inappropriate for me, as a Magistrate Judge and District Judge nominee, to offer them.

24. **Please explain, with detail, the process by which you became a district-court nominee.**

    Response: In response to an advertisement on Senator Cardin's website, I submitted my application to the District of Maryland's judicial selection committee on December 10,

2020. The members of the committee interviewed me via video conference on December 18, 2020. On January 11, 2021, Senators Cardin and Van Hollen interviewed me via video conference. The following week, I was advised that my name had been submitted to the White House for consideration as a District Judge nominee. On January 28, 2021, I received an e-mail from an official from the White House Counsel's Office requesting a video conference. Later that evening, I met via video conference with officials from the White House Counsel's Office. Since January 28, 2021, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On March 30, 2021, the President announced his intent to nominate me.

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

    Response: No.

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

    Response: No.

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

    Response: On May 19, 2021, the Office of Legal Policy at the Department of Justice forwarded these questions to me. I reviewed all the questions, conducted legal research as needed, and drafted answers. I shared my responses with the Office of Legal Policy, which provided feedback that I considered before submitting my final answers to the Committee.

28. **Do these answers reflect your true and personal views?**

    Response: Yes.

Nominations
Hearing before the Senate Committee on the Judiciary
Questions for the Record
May 19, 2021

QUESTIONS FROM SENATOR BLUMENTHAL

<u>Questions for Judge Deborah Boardman</u>

1. **You disclosed a 1994 issue of your college newspaper, *The Villanovan*, in which you are quoted as describing the activities of the organization Villanovans for Life. The article does not appear to identify you as a member of the group or explain why you were quoted.**

Please provide additional context for your remarks and your involvement with the group.

Response: I discovered the article in my college newspaper, *The Villanovan*, as part of my efforts to ensure that I provided comprehensive and thorough responses to the Senate Judiciary Questionnaire. I do not recall making the statements quoted in the article. I do not recall belonging to the organization "Villanovans for Life" or participating in any activities the organization sponsored.

Nomination of Deborah L. Boardman
to be United States District Judge for the District of Maryland
Questions for the Record
Submitted May 19, 2021

QUESTIONS FROM SENATOR COTTON

1. **Since becoming a legal adult, have you ever been arrested for or accused of committing ahate crime against any person?**

   Response: No.

2. **Since becoming a legal adult, have you ever been arrested for or accused of committing aviolent crime against any person?**

   Response: No.

3. **Please describe with particularity the process by which you answered these questions andthe written questions of the other members of the Committee.**

   Response: On May 19, 2021, the Office of Legal Policy at the Department of Justice forwarded these questions to me. I reviewed all the questions, conducted legal research as needed, and drafted answers. I shared my responses with the Office of Legal Policy, which provided feedback that I considered before submitting my final answers to the Committee.

4. **Did any individual outside of the United States federal government write or draft your answers to these questions or the written questions of the other members of the Committee? If so, please list each such individual who wrote or drafted your answers. Ifgovernment officials assisted with writing or drafting your answers, please also identifythe department or agency with which those officials are employed.**

   Response: No.

Senator Josh Hawley
Questions for the Record

Deborah Boardman

United States District Judge for the District of Maryland

1. **In 2020, you presided over multiple detention hearings tied to COVID-19 where you granted supervised release to a number of defendants, only to have your decisions subsequently reversed. Do you stand by your decisions in granting supervised release in these cases? If yes, what did the District Court judges who overruled you get wrong?**

   Response: In 2020, I presided over dozens of detention hearings, and I considered several motions for reconsideration of my detention orders based on COVID-19. District Judges reversed two of the dozens of pretrial detention decisions I made last year. In those two cases, I applied the factors in the Bail Reform Act, 18 U.S.C. § 3142(g), and found release conditions that "reasonably assure[d] the appearance of the [defendant] as required and the safety of any other person and the community." 18 U.S.C. § 3142(f). On review of my orders, the District Judges applied the Bail Reform Act factors and came to different conclusions. I made my decisions based on a good faith application of the factors in the Bail Reform Act, and I respect the decisions of the District Judges who disagreed with me.

2. **Can you explain your rationale in granting supervised release when the defendant had no underlying medical conditions, had not tested positive for COVID-19, and had not been in contact with anyone who had contracted it—as was the case in *United States v. Gallagher*?**

   Response: In United States v. Gallagher, the government moved for the defendant's pretrial detention. During an April 2020 hearing on the motion, I considered the factual proffer and arguments of counsel and the factors in the Bail Reform Act to determine "whether there [were] conditions of release that [would] reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(g). At the hearing, the defendant proposed release to his girlfriend's custody at her apartment near the location of the alleged offenses. No detainee or staff member at the facility where Mr. Gallagher was detained had tested positive for COVID-19. Electronic home monitoring was not an available release condition. Applying the Bail Reform Act factors, I found that no condition or

combination of conditions reasonably assured me of the safety of the community and the defendant's appearance at trial. I, therefore, ordered Mr. Gallagher's detention.

In May 2020, Mr. Gallagher moved to reopen the detention hearing because correctional officers and a detainee at the facility where he was detained had tested positive for COVID-19. I reopened the detention hearing pursuant to 18 U.S.C. § 3142(f)(2). At the second detention hearing, I again considered the factual proffers and arguments from counsel and applied the Bail Reform Act factors. I also considered the possibility that COVID-19, which was then inside the facility, would spread rapidly among the detainees and staff, as it had weeks earlier at another local pretrial detention facility. At the second detention hearing, the defendant offered a more suitable release plan than he had at his first detention hearing, and electronic home monitoring was now an available release condition. He proposed release to the third-party custody of his mother and grandmother, who lived together in a single-family home in rural Delaware, over 100 miles from where the alleged offenses occurred. I spoke at length with his grandmother and mother during the hearing. His grandmother was retired, and his mother worked from home. Neither had a criminal history, and Pretrial Services approved them as third-party custodians. Both women assured me that they would watch over Mr. Gallagher and transport him to court proceedings, meetings with counsel, and a Bureau of Prisons facility for surrender to serve any imposed sentence. They also assured me there was room in the home for him to quarantine safely upon his release from jail. There were no allegations that Mr. Gallagher acted violently or used a firearm.

Applying the Bail Reform Act factors in Mr. Gallagher's case, I found release conditions that "reasonably assure[d] the appearance of the [defendant] as required and the safety of any other person and the community." 18 U.S.C. § 3142(f). The Bail Reform Act requires the Court to find "the least restrictive" conditions that will reasonably assure the defendant's appearance as require and the community's safety. 18 U.S.C. § 3142(c)(1)(B). I released Mr. Gallagher on the strictest possible conditions. Specifically, I released him to the third-party custody of his mother and grandmother, subject to home detention and electronic monitoring. He would have been allowed to leave the home only with advance permission of his Pretrial Services Officer.

I would note that if Mr. Gallagher had COVID-19 or had been exposed to someone with COVID-19 when I released him, he could have exposed his elderly grandparents and his mother to the virus. During the pandemic, I denied pretrial release requests to defendants who had COVID-19 or had been exposed to someone with COVID-19, lest they infect others outside the facility.

3. **During your time as a student at Villanova did you belong to or participate in a group called "Villanovans for Life?"**

   Response: I do not recall belonging to the organization "Villanovans for Life" or participating in any activities the organization sponsored. I am aware that an article in my college newspaper, *The Villanovan*, identified me as the source of a quote about the organization, but I do not recall making the statements quoted in the article.

4. **Do you believe in upholding the sanctity and dignity of human life, especially as regards to the unborn, the elderly, the handicapped and all others?**

   Response: It would be inappropriate for me, as a Magistrate Judge and District Judge nominee, to discuss my personal views on "upholding the sanctity and dignity of human life, especially as regards to the unborn, the elderly, the handicapped and all others." My personal views are irrelevant to my judicial decisions. As a Magistrate Judge, I uphold the laws and Constitution of the United States, and I impartially apply the law—including Supreme Court and Fourth Circuit precedent—to the specific facts of the case before me. If I am confirmed as a District Judge, I will do the same.

Questions for the Record from
Senator Thom Tillis
For Judge Deborah Lynn Boardman

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

   Response: Yes.

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

   Response: Judicial activism is judicial decision-making based, at least in part, on the judge's personal views and opinions. Judges should not engage in judicial activism. As a Magistrate Judge, I rule based on the applicable law and the specific facts of the case pending before me. If I am confirmed as a District Judge, I will do the same.

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

   Response: Impartiality is a requirement for a judge. Judges should make all decisions impartially.

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

   Response: No.

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

   Response: As a Magistrate Judge, I interpret the law and apply it to the specific facts of the pending case without regard to the outcome. When a judge faithfully interprets the law without consideration of her personal views, the parties and the public can have confidence in the outcome of the case and the judicial system.

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

   Response: No.

Second Amendment

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

   Response: If I am confirmed as a District Judge, I will uphold the Constitution and adhere to Supreme Court precedent, including the Supreme Court's decisions in District

of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 561 U.S. 742 (2010). In Heller, the Supreme Court held that the possession of lawful firearms, including handguns, in the home is protected by the Second Amendment. In McDonald, the Supreme Court held that the Second Amendment right to possess and carry weapons is a fundamental right applicable to the states through the Fourteenth Amendment.

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

   Response: I would begin by reviewing the applicable Fourth Circuit and Supreme Court law. I then would apply the law to the specific facts of the case before me. If I am presented with an opportunity to rule on this matter as a District Judge, I will follow all binding precedent.

Law Enforcement

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

   Response: When considering whether the defense of qualified immunity applies, I look to applicable Supreme Court and Fourth Circuit law. Under Supreme Court precedent, I consider: (1) "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." Pearson v. Callahan, 555 U.S. 223, 232 (2009); see also Hicks v. Ferreyra, 965 F.3d 302, 307 (4th Cir. 2020). The court must grant qualified immunity "when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503 (2019); see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

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

    Response: The legislative and executive branches of our government, not the judiciary, determine whether qualified immunity provides sufficient protection for law enforcement officers. As a Magistrate Judge, I adhere to Fourth Circuit and Supreme Court precedent regarding qualified immunity for law enforcement officers. If I am confirmed as a District Judge, I will do the same.

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

Response: The legislative and executive branches of our government, not the judiciary, determine the proper scope of qualified immunity protections for law enforcement. As a Magistrate Judge, I adhere to Fourth Circuit and Supreme Court precedent regarding qualified immunity for law enforcement officers. If I am confirmed as a District Judge, I will do the same.

Patent Eligibility

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: The Supreme Court stated a two-step test for determining patent eligibility in Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014). A court first "determine[s] whether the claims at issue are directed to . . . patent-ineligible concept[s]," such as "laws of nature, natural phenomena, and abstract ideas." Id. Then, if the claims are "directed to a patent-ineligible concept," the court "search[es] for an 'inventive concept'" by "ask[ing], '[w]hat else is there in the claims before us?'" Id. The Federal Circuit, which has "exclusive jurisdiction" over appeals from district court decisions in patent cases, 28 U.S.C. § 1295, applies this two-step test. E.g., Free Stream Media Corp. v. Alphonso Inc., No. 2019-1506, --- F.3d ----, 2021 WL 1880931, at *4 (Fed. Cir. May 11, 2021). If I am presented with an opportunity as a District Judge to rule on matters relating to patent eligibility, I will follow Supreme Court and binding Federal Circuit precedent.

13. Do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: The Supreme Court "set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts" in Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014), as discussed in Question 12. If confirmed as a District Judge, I will consider the facts of each case carefully and follow Supreme Court and Federal Circuit precedent regarding patent eligibility.