

**Nomination of Allison Jones Rushing to the U.S. Court of Appeals for the Fourth  
Circuit Questions for the Record  
October 24, 2018**

**QUESTIONS FROM SENATOR FEINSTEIN**

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

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

It is never appropriate for a lower court to depart from binding Supreme Court precedent.

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

While a circuit court judge must always apply and follow Supreme Court precedent, the judge may, in rare circumstances, flag an issue for the Supreme Court, such as concerns that a precedent's foundations have been eroded by other Supreme Court decisions or difficulties that lower courts experience in applying Supreme Court precedent. The Supreme Court has observed that such a practice may "facilitate[]" its review. *Eberhart v. United States*, 546 U.S. 12, 19–20 (2005). The circuit court judge nevertheless remains bound to follow the existing precedent in those instances as in any other.

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

In the Fourth Circuit, a panel's holding is binding on subsequent panels unless and until it is overruled, modified, or undermined by the Supreme Court or the Fourth Circuit sitting en banc. See *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc) ("A number of cases from this court have stated the basic principle that one panel cannot overrule a decision issued by another panel.").

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

The decision to overturn Supreme Court precedent rests with the Supreme Court alone, and it has identified factors that it considers in making that determination. As a nominee to an inferior court, it would be inappropriate for me to offer my own view on when and if it is appropriate for the Supreme Court to overturn its own precedent.

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

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

*Roe v. Wade* has survived legal challenges and is binding on all lower courts. For a lower court judge, it does not matter how a binding Supreme Court precedent is labeled, because each one must be followed faithfully.

**b. Is it settled law?**

Yes, from the perspective of a lower court, all Supreme Court precedent is settled law.

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

Yes, from the perspective of a lower court, all Supreme Court precedent is settled law.

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

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

The dissent’s position was rejected by the Supreme Court in *Heller*. Lower court judges are bound to faithfully apply the Court’s decision in *Heller*, as with any Supreme Court precedent.

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

In *Heller*, the Supreme Court noted that “the right secured by the Second Amendment is not unlimited.” 554 U.S. 570, 626 (2008); *see id.* at 626–627 (recognizing categories of permissible limitations on the right).

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

## Supreme Court precedent?

As a nominee to a lower court, I am bound by the Supreme Court's own reading of its precedents, and the Court in *Heller* stated that the question presented was "judicially unresolved" prior to its decision. *Id.* at 625.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

**a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

The Supreme Court "has recognized that First Amendment protection extends to corporations." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010). In *Citizens United* in particular, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 365. If I am confirmed, I will be bound by *Citizens United* and all of the Supreme Court's precedents, and I will follow them faithfully. The scope of corporations' First Amendment rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

**b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

In *Citizens United*, the Supreme Court rejected what it called "the antidistortion rationale." 558 U.S. at 348–356. If I am confirmed, I will be bound by *Citizens United* and all of the Supreme Court's precedents, and I will follow them faithfully. The scope of corporations' First Amendment rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

**c. Do you believe corporations also have a right to freedom of religion under the First Amendment?**

The question is broad. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993 and also noted the limits of its holding, *see, e.g., id.* at 2759–2760. If I am confirmed, I will be bound by *Hobby Lobby* and all of the Supreme Court's precedents, and I will follow them faithfully. The existence and scope of corporations' religious freedom rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

6. You were admitted to practice in the Fourth Circuit Court of Appeals in 2017.

**a. Why did you seek admission to the Fourth Circuit in 2017?**

I sought admission to the Fourth Circuit in connection with a case I was litigating.

**b. If you sought admission because of a case you were handling, please identify the name of the case and the party you represented in that case.**

I represented the plaintiffs-appellants in *JTH Tax, Inc. v. Aime*, Nos. 17-1859 & 17-1905 (4th Cir.).

**c. Before seeking admission to the Fourth Circuit in 2017, did you discuss with anyone — including but not limited to officials in the White House Counsel’s Office and the Justice Department’s Office of Legal Policy — whether admission to the Fourth Circuit was important, necessary, or otherwise relevant to your nomination to serve as a judge on that court?**

No.

7. You have an extended relationship with the Alliance Defending Freedom (ADF), formerly known as the Alliance Defense Fund. Your affiliation began in the summer of 2005, when you interned for ADF. You have also served as a panelist and speaker at three ADF-sponsored events. Among other positions, ADF opposes women’s reproductive rights; believes that healthcare workers have a right to decline participation in the performance of practices they find morally objectionable; and opposes marriage equality, civil unions between same-sex couples, and adoption by same-sex couples.

**a. When did you become aware that the organization:**

**i. Opposes women’s reproductive rights?**

Regarding the Alliance Defending Freedom (ADF), I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. As regards the alleged positions attributed to ADF, I am not aware of all of ADF’s policy or litigating positions, and for those positions of which I am aware, I do not recall when I learned of them. I do not work for ADF or have any official role with them. If I am confirmed as a judge on the Fourth Circuit, I will be bound by the precedent of the Supreme Court and the Fourth Circuit, including *Roe v. Wade* and *Obergefell v. Hodges*, among others. I will faithfully follow those precedents.

**ii. Believes healthcare workers can decline participation in the performance of practices they find morally objectionable?**

Please see my response to question 7.a.i above.

**iii. Opposes marriage equality, civil unions between same-sex couples, and adoption by same-sex couples?**

Please see my response to question 7.a.i above.

**b. In 2017, you received \$1,750 in honoraria from ADF. Have you received honoraria, travel expenses, or any other payments from ADF at any time besides 2017? If so, please provide the year, the amount of the payment, and the reason for the payment.**

To the best of my recollection, I received honoraria for each speaking engagement with ADF that is listed in my Questionnaire for Judicial Nominees filed with the Committee. I do not have records of those exact amounts. I believe I received travel expenses for the speaking engagement in Arizona on August 4, 2015 that is listed in my Questionnaire for Judicial Nominees filed with the Committee. I do not have records of that exact amount. I also believe I received travel expenses for the summer internship in 2005 that is listed on my Questionnaire for Judicial Nominees filed with the Committee. I do not have records of that exact amount.

8. In 2005, you co-authored an article with an ADF attorney, Jordan Lorence, in which you advocated for more stringent standards for plaintiffs to establish standing in Establishment Clause lawsuits. Your article argued that “offended observers” of Establishment Clause violations do not have standing. You argued that “offended observers” are “delicate plaintiffs with eggshell sensitivities—who claim deep offense at the acknowledgement of any beliefs that conflict with their own.” (*Nothing to Stand On: ‘Offended Observers’ and the Ten Commandments*, 6 ENGAGE 138 (2005))

**a. At your hearing, you said that the thesis and tone of the article were Mr. Lorence’s. But you allowed your name to be listed as a coauthor. Did you read the article before it was published?**

Yes.

**b. Did you play any role in the development of writing of the article? If so, what was your role?**

I assisted with researching and drafting the Establishment Clause article as a law student during a summer internship. As you noted, the thesis and tone of the article were set by my co-author, an experienced First Amendment attorney. The article discussed a Supreme Court decision, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), in which the Court held that the standing requirements of Article III, including the

requirement of a particularized injury, apply equally to Establishment Clause cases. The article discussed how that holding might apply to passive religious monument cases (in contrast to cases where individuals feel pressured to make some religious observance).

**c. Why did you allow your name to be listed as a coauthor?**

Please see my response to question 8.b above.

**d. Is there any part of the article that you do not stand by today? If so, which part(s)?**

Please see my response to question 8.b above.

**e. Your article argued that in Establishment Clause cases, “no standing exists” for plaintiffs “who have changed their behavior to avoid the disagreeable message.” Where did this standard come from? Has the Supreme Court ever held that?**

The question of Article III standing in what are called “offended observer” Establishment Clause cases is an unresolved question that litigants continue to raise before the Supreme Court. The courts of appeals have reached different outcomes and applied different legal tests to address the question.

**f. The Supreme Court has held that “environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” (*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))) How do you reconcile your argument with the Supreme Court’s holding in *Friends of the Earth*?**

As I noted above, the question of Article III standing in “offended observer” Establishment Clause cases is an unresolved question that litigants continue to raise before the Supreme Court. The courts of appeals have reached different outcomes and applied different legal tests to address the question. Because cases raising this question are pending and impending in courts around the country, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

**g. The argument in your article relies on *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).**

**How does that case support an argument that no standing exists for individuals who, unlike the plaintiffs in *Valley Forge*, personally observe the unconstitutional conduct and change their behavior to avoid it?**

Please see my response to question 8.f above.

**h. If the Supreme Court were to adopt the standard for standing proposed in your article, how would Establishment Clause violations be challenged?**

First, as I indicated at the Committee hearing, the article only addressed “offended-observer” standing; there are Establishment Clauses cases that do not rely on “offended-observer” standing. Second, as regards particular cases, because cases raising this question are pending and impending in courts around the country, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

**i. Given your arguments in favor of limiting Establishment Clause cases, what assurances can you offer litigants that you will treat claims fairly and without bias or prejudice?**

If I am confirmed, I will take an oath to follow the law, to administer justice without respect to persons, and to perform my duties faithfully and impartially. I will abide by that oath. I will keep an open mind, fairly consider the parties’ arguments, and decide each case according to the law.

9. In a 2013 panel discussion entitled “‘Enemies of Mankind’: Religion and Morality in the Supreme Court’s Same-Sex Marriage Jurisprudence,” you said that the Supreme Court’s majority in *United States v. Windsor*, which struck down the Defense of Marriage Act (DOMA), “chose to write the opinion in a unique way that calls it bigotry to believe homosexuality does not comport with Judeo-Christian morality.”

**a. Where does the majority opinion make the claim that it is “bigotry to believe homosexuality does not comport with Judeo-Christian morality”? Please provide the specific pin cite.**

For this talk, I was asked to explain the Supreme Court’s decision in *United States v. Windsor*, 570 U.S. 744 (2013), to an audience of non-lawyers as part of a presentation at a church. I described both the majority and dissenting opinions and did not express an opinion on the case.

The Court in *Windsor* quoted a House Report for the proposition that DOMA expressed “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” *Id.* at 771 (internal quotation marks omitted). The Court concluded that DOMA’s principal purpose was “to impose inequality.” *Id.* at 772. In the passage you quote in the question above, I was describing an argument made by the dissenting Justices. Specifically, the dissenters argued that, by virtue of this

reasoning, the majority opinion accused DOMA’s supporters of “act[ing] with malice—with the ‘purpose’ ‘to disparage and to injure’ same-sex couples,” as opposed to making a “legal error[ ],” which “may be made in good faith.” *Id.* at 797 (quoting majority op.).

**b. On what basis did you make this claim? What is your evidence that the Court’s opinion in *Windsor* “calls it bigotry to believe homosexuality does not comport with Judeo-Christian morality”?**

Please see my response to question 9.a above.

10. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 2012. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[ ] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

**a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

I did not write the Federalist Society’s website and have never been employed by the Federalist Society. I am not aware of the Federalist Society’s understanding of the quote referenced in the question. I have never had a discussion with any member or employee of the Federalist Society about this statement.

**b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

Please see my response to question 10.a above. I do not know how the Federalist Society seeks to reorder priorities in the legal system, if at all. I have never had a discussion with any member or employee of the Federalist Society about this statement.

**c. What “traditional values” does the Federalist society seek to place a premium on?**

Please see my response to question 10.a above. I am not aware of what the Federalist Society means by the phrase “traditional values.” I have never had a discussion with any member or employee of the Federalist Society about this statement.

11. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

**a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

During my June 2018 interview with officials from the White House and the Department of Justice, we discussed a variety of legal topics. I do not recall the specific questions or answers, or whether we discussed administrative law.

**b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

To the best of my recollection, no employee of those groups has asked me about my views on administrative law. In my law practice, I may work with attorneys who are Federalist Society members on cases that implicate administrative law principles; any such discussion about administrative law in the context of litigation on behalf of my clients would be privileged.

**c. What are your “views on administrative law”?**

Based on my time clerking on the Court of Appeals for the District of Columbia Circuit and litigating regulatory matters, I am familiar with a number of relevant Supreme Court decisions that touch on the vast topic of administrative law. As in all other areas of law, I would faithfully follow all binding precedents.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756

(2017).

13. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

Upon receiving these questions, I reviewed the questions, conducted any necessary research, and drafted answers. I sent my answers to attorneys with the Department of Justice and solicited feedback. I made edits, finalized my answers, and then authorized the submission of these responses on my behalf. My answers are my own.

**Written Questions for Allison Jones Rushing**  
**Nominee for the U.S. Court of Appeals for the Fourth Circuit**  
**Submitted by Senator Patrick Leahy**  
**October 17, 2018**

1. You served as a legal intern for the Alliance Defending Freedom (ADF). You also served as a panelist and speaker at three ADF events between 2015 and 2017. On the ADF website, the organization states that “[t]he cultural battle over marriage isn’t about two individuals looking to legally establish their love. It’s much bigger than that, and much more is at stake.”<sup>1</sup> Justice Kennedy, in *Obergefell v. Hodges*, wrote that “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. . . . [Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right.” **Do you believe that marriage equality represents a threat to the “foundation of society,” and risks “needless emotional and material hardships” for “women, children, and the underprivileged”?**<sup>2</sup>

Regarding the Alliance Defending Freedom, I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. I am not familiar with all of the material on the group’s website; I do not work for them or have any official role with them. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that the Constitution protects a fundamental right to same-sex marriage. If I am confirmed, I will faithfully follow that binding precedent.

2. In 2013, you spoke at the Henry Forum on “Enemies of Mankind: Religion and Morality in the Supreme Court’s Same-Sex Marriage Jurisprudence.” According to the text of your speech provided to this Committee, you criticized the Supreme Court’s holding in *U.S. v. Windsor*, arguing that the holding would allow litigants to seek to overturn bans on same-sex marriage. You stated that, under this scenario, “morality is no longer relevant.” **Do you believe that the Constitution protects the right to marry the person of one’s choice as a fundamental right of consenting, competent adults?**

Respectfully, I disagree with the characterization of my 2013 talk. I was asked to explain the Supreme Court’s decision in *United States v. Windsor*, 570 U.S. 744 (2013), to an audience of non-lawyers as part of a presentation at a church. I described both the majority and dissenting opinions and did not express an opinion on the case. I did not express agreement or disagreement with the Court’s holding. In the passage to which you refer, I was describing the state of affairs in litigation around the country after *Windsor*; the “no longer relevant” statement referred to an argument in a brief in one of those cases. The Supreme Court has recognized that the Constitution protects a fundamental right to marry, including a right to same-sex marriage. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). If I am confirmed, I will faithfully follow those binding precedents.

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<sup>1</sup> <https://adflegal.org/issues/marriage/redefining-marriage/overview>.

<sup>2</sup> <https://adflegal.org/issues/marriage/overview>.

3. **For any state in which you are licensed to practice law, please list the month/year in which you received your license.**

Virginia: October 2007

District of Columbia: December 2009

4. **Please list the months/years in which you served as a judicial law clerk for Justice Thomas, now-Justice Gorsuch, and Judge Sentelle.**

To the best of my recollection, I clerked for now-Justice Gorsuch from August 2007 to August 2008, for Judge Sentelle from August 2008 to August 2009, and for Justice Thomas from July 2010 to July 2011.

5. **Are you currently pursuing a license to practice law in North Carolina?**

I may pursue a license in North Carolina at a later date, but I am not currently pursuing a license. If I am confirmed, I will be ethically prohibited from practicing law.

6. **Please detail your experience practicing law in the state of North Carolina, including reference to specific cases and court appearances, specifying federal, state, or any other court.**

To the best of my recollection, I have not appeared in the North Carolina courts, although I have appeared in the Fourth Circuit.

7. During Donald Trump's presidential campaign he called for a "total and complete shutdown of Muslims entering the United States." After taking office, President Trump, according to Rudy Giuliani and other top officials, frequently called his executive order the "Muslim ban." He also said in an interview that Christian refugees from Muslim-majority countries would be given preference.

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

The Free Exercise Clause and the Establishment Clause of the First Amendment work together to protect freedom of religion. Together they provide that individuals are free to practice their religion (or no religion) and cannot be coerced into observing another religion (or no religion). There is no national religion. As regards the President's particular immigration policies or orders, Canon 3 of the Code of Conduct for United States Judges prohibits me from commenting because cases about those policies or orders are pending or impending in court.

- (b) How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?**

This is a broad question. No one is above the law, and courts may be called upon to enforce the limits of the President's power even in cases concerning national security. The Supreme Court has addressed this general issue in a variety of different contexts, and lower court judges must follow and apply those precedents in the factual scenarios before them.

**(c) When people arrive at our borders, they give up certain rights. For example, under current case law, the government may have the right to conduct a warrantless search of their luggage. But do visitors give up all their rights, like the right to equal protection of the laws?**

No, visitors do not relinquish all of their rights.

**(d) Can the government ban a certain class of people from coming to the United States?**

Please see my response to question 7(a) above.

8. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home." **Do you believe the Constitution protects that personal autonomy as a fundamental right?**

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that a Texas statute making it a crime for two adults of the same sex to engage in intimate sexual conduct violates the Due Process Clause. If I am confirmed, I will follow that precedent faithfully. More broadly, the Court has long held that the Constitution protects a right of privacy, which the Court has applied in subsequent cases. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). If I am confirmed, I will faithfully follow those precedents.

9. **Do you agree with Justice Lewis F. Powell Jr. – whose seat Justice Kennedy took – who wrote in *Moore v. East Cleveland*, "Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment? Do you consider it a "fundamental" liberty such that the government may interfere only for extraordinary reasons?**

The Supreme Court has held that the Constitution protects personal decisions such as marriage, procreation, contraception, family relationships, and child rearing. If I am confirmed, I will follow those precedents faithfully.

10. Many are concerned that the White House's denouncement in 2017 of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

Generally speaking, one essential ingredient of a government with a separation of power among three co-equal branches is respect among the branches for the roles of the other branches. For example, courts must respect the law as written, and the legislature must respect the rulings of the courts. In any given case, if a party refuses to comply with a court order, the opposing party may seek injunctions or similar remedies from the court. As for the specific question, it would be inappropriate for me to comment under the Code of Conduct for United States Judges.

**(b) What examples would you cite of proper limits on the assertion of executive power by the president?**

None of the three branches of government has unlimited power. One example of limits the Supreme Court has identified on executive power is Justice Jackson's three-part typology in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–638 (1952) (Jackson, J., concurring), which the Court continues to apply.

11. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women. **Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has held that gender discrimination is subject to intermediate scrutiny under the Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190 (1976). If confirmed, I will faithfully follow that precedent.

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

I am not familiar with that statement or its context. The right to vote is fundamental, and Congress may enact laws to protect that right, subject to the limits of the Constitution.

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

Article I, Section 9, Clause 8 of the Constitution states as follows: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."

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

Congress has broad authority to enact laws to counteract racial discrimination. The remedial powers of the Thirteenth, Fourteenth, and Fifteenth Amendments also give Congress authority to abrogate the States' Eleventh Amendment immunity. *See* U.S. Const. amend. XIII sec. 2, amend. XIV sec. 5, amend. XV sec. 2.

15. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety. **How do you interpret the recusal standard for federal judges, and in what types of cases – if any – do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.**

If confirmed, I will carefully review and address any real or potential conflicts of interest by reference to 28 U.S.C. § 455, all applicable canons of the Code of Conduct for United States Judges, and any and all other laws, rules, practices, and procedures governing such circumstances. For example, I will recuse myself from any case where I have ever played any role. I also anticipate recusing myself, for a time, in all cases in which my current law firm, Williams & Connolly LLP, represents a party. I will evaluate any other real or potential conflict of interest, or relationship that could give rise to the appearance of a conflict of interest, on a case-by-case basis and determine appropriate action, including recusal, with the input of the parties and consultation of the applicable canons of judicial ethics.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals, especially the less powerful and marginalized. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” **Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

Courts have a responsibility to uphold the constitutional rights of all people. Footnote four of *Carolene Products* is famous because it previewed the idea, which the Supreme Court would later flesh out in various lines of cases, of tiered levels of judicial scrutiny to assess constitutionality. If confirmed, I will faithfully follow all of those binding precedents of the Supreme Court. As regards the quotation from *Carolene Products*, respectfully, the question misstates that the Court “held” the quoted language in that case; instead, the Court noted that “[i]t is unnecessary to consider now whether” the quoted language was correct. 304 U.S. 144, 152 n.4 (1938).

**Senator Dick Durbin**  
**Written Questions for Allison Jones Rushing**  
**October 24, 2018**

For questions with subparts, please answer each subpart separately.

- 1. You have been nominated for a North Carolina seat on the 4<sup>th</sup> Circuit. Why have you not yet become a member of the North Carolina bar?**

I am a member of the Virginia bar and the District of Columbia bar, and I practice law pro hac vice in other jurisdictions as necessary. Federal appellate courts, where I conduct the majority of my work, do not require attorneys to be members of the particular local state bar in order to practice in the federal appellate court. I am a member of the Fourth Circuit bar, among other federal court of appeals bars, and the Supreme Court bar. If I am confirmed, I will be prohibited from practicing law in any jurisdiction.

- 2. You note in your questionnaire that “[t]here is no selection commission in my jurisdiction.” In describing your judicial selection process, you discuss only interviews you had with officials from the White House and the Department of Justice. Did you interview with anyone from the North Carolina legal community in the course of your judicial selection process?**

I met with Senator Burr, Senator Tillis, and their staff during this process.

- 3. According to your questionnaire, you were only admitted to practice before the Fourth Circuit in 2017, ten years after you were first admitted to a state bar (Virginia). Why did you wait until 2017 to seek admission to practice before the Fourth Circuit?**

In 2017 I was lead counsel on a case in the Fourth Circuit and realized I had not yet formally been admitted to practice before that court. I therefore sought admission.

- 4. Have you ever litigated any matters before any of North Carolina’s current sitting federal judges? If so, please describe the matters.**

Yes. For example, I recently litigated *JTH Tax, Inc. v. Aime*, Nos. 17-1859 & 17-1905 (4th Cir.), before a panel of judges that included Judge Diaz of the Fourth Circuit from North Carolina. I represented the plaintiffs-appellants in that appeal, which included filing briefs and presenting oral argument. Judge Diaz authored the opinion for the court ruling in favor of my clients.

I also have litigated a case before the en banc Fourth Circuit, which included all three of the North Carolina judges: Judge Duncan, Judge Wynn, and Judge Diaz. I worked on the en banc briefs in that case, *Al-Quraishi v. L-3 Services, Inc.*, Nos. 10-1891 & 10-1921 (4th Cir.).

- 5. On May 2, White House Press Secretary Sarah Sanders issued the following statement about former Williams & Connolly partner Emmet Flood: “Emmet Flood will be joining the White**

House staff to represent the president and the administration against the Russia witch hunt.” Flood joined the White House in May and is now Acting White House Counsel. According to your questionnaire, you were first contacted by the White House Counsel’s Office about this nomination in mid-June 2018.

- a. **Did you work on any matters with Emmet Flood while you were at Williams & Connolly? If so, please list and describe each such matter.**

To the best of my recollection, I worked with Emmet Flood on a government investigation in which we represented an entity that was receiving requests for documents and information from a congressional committee. The substance of that matter is confidential.

- b. **Did you communicate at any point with Emmet Flood about your nomination? If so, please provide the date and contents of those communications.**

No, I did not.

- c. **Did you communicate at any point with Emmet Flood about Special Counsel Mueller’s investigation? If so, please provide the date and contents of those communications.**

No, I did not.

6. **Please list all organizations from which you have accepted honoraria since you graduated from law school.**

I have accepted invitations to speak to a variety of groups since graduation from law school, as reflected in the list of speaking engagements in my Questionnaire for Judicial Nominees filed with the Committee. To the best of my recollection, and without financial records extending back that far, I received honoraria from the Alliance Defending Freedom for the talks that are reflected in my Questionnaire for Judicial Nominees, which were talks to students about clerking and careers.

7.

- a. **Do you believe that judges should be “originalist” and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

When applying constitutional provisions today, lower court judges should adhere to the meaning that the Supreme Court has assigned to those provisions. It is exceedingly rare for a lower court to consider a constitutional case for which there is no applicable Supreme Court precedent.

- b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause**

**today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

Please see my response to question 7.a above.

8. You say in your questionnaire that you have been a member of the Federalist Society since 2012.

a. **Why did you join the Federalist Society?**

I am a member of the Federalist Society, the American Bar Association, and, until my maternity leave, the Edward Coke Appellate Inn of Court. I joined the Federalist Society because attorneys I knew were involved with the Society and I appreciated the diversity of viewpoints presented at their continuing legal education events.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

As a judicial nominee, Canon 5 of the Code of Conduct for United States Judges prohibits me from commenting on political matters.

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

To the best of my recollection, I attended part of the Federalist Society's annual convention in 2015, 2012, and 2011.

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

I did not attend this speech.

9.

a. **Is waterboarding torture?**

I have not researched the issue, but it is my general understanding that something would be considered torture if it is “committed by a person acting under the color of law specifically intend[ing] to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1).

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

Again, I have not researched the issue, but it is my general understanding that the Detainee Treatment Act, as amended, provides that no person in the custody or control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual, 42 U.S.C. § 2000dd-2(a)(2), and that waterboarding is not authorized in the Army Field Manual.

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

Please see my responses to questions 9.a and 9.b above.

10. **Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

I do not have any basis for evaluating the accuracy of this statement, and even if I did I would not be able to comment because Canon 5 of the Code of Conduct for United States Judges prohibits judicial nominees from commenting on political matters.

11. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees should answer questions to the best of their ability within the confines imposed by the Code of Conduct for United States Judges and any other restrictions that govern their conduct, such as the attorney-client privilege.

12.

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

I have no knowledge of any such donations, and I am not aware of the Judicial Crisis Network supporting my nomination. Because the question whether any such donations

are problematic is a question of ongoing political debate, Canon 5 of the Code of Conduct for United States Judges prohibits me from offering an opinion on the question.

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

If I am confirmed, I will carefully apply the recusal requirements in 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other relevant sources. Beyond that, the question of disclosure or nondisclosure of any donations is a matter of ongoing political debate, therefore Canon 5 of the Code of Conduct for United States Judges prohibits me from commenting.

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

Please see my responses to questions 12.a and 12.b above.

13.

- a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not litigated or researched this question.

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

I have not litigated or researched this question.

**Nomination of Allison Rushing, to be  
United States Circuit Judge for the Fourth Circuit  
Questions for the Record Submitted October 24, 2018  
Senator Sheldon Whitehouse**

1. Are you aware that the Alliance Defending Freedom (ADF), where you worked as a summer intern during law school, has been labeled a hate group by the Southern Poverty Law Center (SPLC) for its anti-LGBTQ views?

Yes, I have recently become aware of this label.

- a. Are ADF's anti-LGBTQ views in line with your own?

Hate is wrong, and it should have no place in our society. In my experience with the Alliance Defending Freedom (ADF), I have not witnessed anyone expressing or advocating hate. A number of leading Supreme Court practitioners at well-regarded national law firms work with ADF. Members of Congress, including members of this Committee, have filed amicus briefs in the Supreme Court supporting ADF's positions. I do not think members of this Committee or large reputable law firms would work with a hate group. I certainly would not.

As regards the alleged positions attributed to ADF, I am not aware of ADF holding those positions, nor am I aware of all of ADF's policy or litigating positions. I do not work for ADF or have any official role with them. I do not know what is meant by "homosexual legal agenda" or a link between homosexuality and pedophilia. Criminalization of homosexuality would be unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). All people possess inherent worth and dignity and should be treated equally before the law.

- b. ADF's website and its members have made frequent [references](#) to the "homosexual legal agenda" being one of the greatest threats to religious freedom in America. Do you believe there is a "homosexual legal agenda"? If so, could you briefly explain the substance of that agenda?

Please see my response to question 1.a above.

- c. Do you believe individuals who identify as LGBTQ are a threat to religious freedom in the United States?

Please see my response to question 1.a above.

- d. Are you aware that a former president of ADF and several of its members have linked homosexuality to pedophilia? Is that a view you share?

Please see my response to question 1.a above.

- e. Are you aware that ADF has supported [criminalizing](#) homosexuality domestically

and [abroad](#)? Is that a policy position you share?

Please see my response to question 1.a above.

- f. While an intern at ADF, you co-wrote a [law review article](#) arguing that the courts should prohibit legal challenges to government-sponsored religious displays, such as displays of the Ten Commandments, based on standing. Is it your view that taxpayers lack standing to sue the government for sponsoring religious displays under the Establishment Clause of the First Amendment?

The question whether individuals who observe a passive religious display have a sufficiently particularized injury for purposes of Article III standing is an open question in the Supreme Court. The courts of appeals have reached different outcomes and applied different legal tests to address the question. Because cases raising this question are pending and impending in courts around the country, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

- g. In a 2013 panel discussion, you [indicated](#) that you opposed the holding in *U.S. v. Windsor* striking down the Defense of Marriage Act (DOMA). You stated that the majority in *Windsor* “write the opinion in a unique way that calls it bigotry to believe that homosexuality does not comport with Judeo-Christian morality.”
- i. In your view, are Judeo-Christian morality and homosexuality incompatible? If so, why?

Respectfully, the question misconstrues my remarks. For this talk, I was asked to explain the Supreme Court’s decision in *United States v. Windsor*, 570 U.S. 744 (2013), to an audience of non-lawyers as part of a presentation at a church. I described both the majority and dissenting opinions and did not express an opinion on the case. I did not express agreement or disagreement with the Court’s holding.

The Court in *Windsor* quoted a House Report for the proposition that DOMA expressed “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” *Id.* at 771 (internal quotation marks omitted). The Court concluded that DOMA’s principal purpose was “to impose inequality.” *Id.* at 772. In the passage you quote, I was describing the dissenting Justices’ argument that, by virtue of this reasoning, the majority opinion accused DOMA’s supporters of “act[ing] with malice—with the ‘purpose’ ‘to disparage and to injure’ same-sex couples,” as opposed to making a “legal error[.],” which “may be made in good faith.” *Id.* at 797 (quoting majority op.).

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

*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is precedent of the Supreme Court that is binding on inferior courts. If I am confirmed, *Obergefell* will be binding on me and I will follow it faithfully.

2. You have been out of law school for 11 years. As you are aware, the American Bar Association takes the position that a nominee to the federal bench should have at least 12 years' experience in the practice of law. You have practiced eight years and spent an additional three years as a judicial law clerk. Why do you believe you have the professional and life experience necessary to be a fair and effective circuit court judge?

A majority of the American Bar Association's Standing Committee on the Federal Judiciary is of the opinion that I am "qualified," and a minority of the committee determined that I am "well qualified," to serve as a federal appellate judge.

I have extensive experience relevant to the work of a federal appellate judge. I clerked for judges on two different federal courts of appeals (the Tenth Circuit and the D.C. Circuit), in addition to clerking at the Supreme Court. In private practice, I have filed over 45 briefs in the Supreme Court and have worked on well over 50 appeals, including arguing in multiple different federal circuit courts, state appellate courts, and a state court of last resort. I have litigated a wide variety of cases that reflects the variety of subjects that come before the courts of appeals. For example, I have handled criminal cases and prisoner litigation, cases under the bankruptcy and tax laws, intellectual property, products liability, commercial litigation, qui tam actions, proceedings under various federal statutes, and constitutional issues. In addition to my appellate work, I have litigated many cases in the federal district courts, including filing briefs and presenting oral argument. Among other things, I have litigated four cases all the way to verdict in the district courts.

I am proud of the letters of support for my nomination submitted to the Committee by literally hundreds of attorneys who know me and believe I am qualified to serve as a federal appellate judge. Virtually all of my partners at Williams & Connolly LLP, who are a politically and demographically diverse group, have submitted a letter supporting my nomination. Attorneys who clerked with me at the Supreme Court, from every active Justice's chambers, have submitted a letter of support. The Committee also has received letters from a diverse group of female attorneys, from a district attorney, from a former public defender, from co-clerks, and from North Carolinians of differing political persuasions, all of whom believe I possess the experience, integrity, and temperament to serve as a federal court of appeals judge.

3. You filed an amicus brief in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, a 2015 case in which the Supreme Court held that disparate impact claims were cognizable under the Fair Housing Act, arguing that “the statutory text unambiguously prohibits only disparate treatment, not conduct resulting in a disparate impact in the absence of discriminatory intent.” Did the brief you filed reflect your personal views? To what extent should a policy’s disparate impact be taken into account when assessing the legality of that policy?

I filed an amicus brief in that case on behalf of my clients, three trade associations of homeowners’ insurers. As an advocate, my job representing any client is not to present my personal views but rather to advocate for the client’s position. As you note, the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act (FHA). Lower courts should assess disparate-impact claims under the FHA using the guidelines identified by the Court in *Inclusive Communities*.

4. You filed an amicus brief in *Ernst & Young LLP v. Morris*, defending the ability of corporations to force workers to sign arbitration clauses making it more difficult for them to challenge workplace misconduct such as sexual harassment. Sexual assault and sexual harassment are significantly underreported by victims. Do you agree that forced arbitration clauses are likely to further discourage workers from coming forward about sexual harassment and other workplace misconduct?

In *Ernst & Young LLP v. Morris* (also known as *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)), I represented my clients, the petitioners (not amici), in the Supreme Court. In that case, the employer and employees had a pre-existing agreement to arbitrate all claims on an individual, rather than collective, basis. The underlying complaint in the case concerned an alleged misclassification for purposes of overtime pay. The case did not concern sexual harassment or assault, nor did the Supreme Court mention sexual harassment or assault in its opinion in the case. I am unaware of any implications of the *Epic Systems* decision for employee allegations of sexual harassment or sexual assault, which is a crime.

5. As a judge, would your personal views prevent you from objectively evaluating scientific evidence that demonstrates that there is overwhelming consensus that human activity is a contributing factor to climate change?

No.

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

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

I agree that the job of a judge is to apply legal principles fairly to the facts before her in a particular case, without regard to result.

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

The question is somewhat difficult to address in the abstract. A judge should always allow process and reason to drive results, rather than working backwards from a preferred result. But the Supreme Court has identified situations in

which the applicable legal doctrine requires taking into account the practical consequences of a decision. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (noting that courts consider whether the disposition required by a statute's text is absurd).

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

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

Empathy is an important part of anyone's character, including a judge. Although a judge should treat all litigants with kindness and respect, empathy for one party or another may not govern judicial decision-making. *See* 28 U.S.C. § 453. As Justice Kagan said during her 2010 testimony before this Committee, "I think it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is, and this is true of constitutional law and it's true of statutory law, the question is what the law requires." The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 111th Cong., S. Hrg. 111-1044, at 103 (2010).

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

Please see my response to question 7.c above.

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

No.

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

If I am confirmed, I will take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. I will respect and live up to that oath. In private practice, I have represented large companies and private individuals, plaintiffs and defendants. I have represented banks and bankrupt debtors trying to protect their assets from creditors. I have represented criminal defendants, a prisoner seeking access to court, and a veteran seeking government benefits. I have provided pro bono representation to many clients who cannot afford to pay. In each instance, I gave each client my best work, regardless of resources.

Senate Judiciary Committee  
“Nominations”  
Questions for the Record  
October 17, 2018  
Senator Amy Klobuchar

Questions for Ms. Rushing, nominee to be U.S. Circuit Judge for the Fourth Circuit

- I understand that at a 2013 event, you discussed *U.S. v. Windsor*, which held that the Defense of Marriage Act was unconstitutional because its definition of marriage excluded same-sex couples. How do you view the precedent created by *Windsor* and *Obergefell*, and will you commit to upholding it if you are confirmed to the Fourth Circuit?

The Supreme Court’s decisions in *Windsor* and *Obergefell*, as interpretations of the U.S. Constitution, are the law of the land. Those decisions will be binding on me if I am confirmed as a judge on the Fourth Circuit Court of Appeals, and I commit to follow those precedents faithfully if I am confirmed.

- How would you view the importance of adhering to precedent – even precedent where you felt that the case was wrongly decided – if you are confirmed to the Fourth Circuit?

Precedent is essential to our judicial system. Among other things, it provides predictability and stability for litigants and prevents judges from simply applying their own preferences in any case. If I am confirmed, as a judge on an inferior court I would be bound by the precedent of the U.S. Supreme Court and the precedent of the Fourth Circuit (absent en banc review). I will follow that precedent faithfully in every case.

**Nomination of Allison Jones Rushing, to be United States Circuit Judge  
for the Fourth Circuit  
Questions for the Record  
Submitted October 24, 2018**

**QUESTIONS FROM SENATOR COONS**

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

I would apply the framework set forth in the numerous Supreme Court decisions assessing these questions, including but not limited to *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

Yes, as directed by the Supreme Court.

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

Yes, as directed by the Supreme Court. The inquiry would include sources such as the historical practice under the common law, the practice in the American colonies, the history of state statutes and judicial decisions, and long-established traditions. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes. I would be bound by Supreme Court and Fourth Circuit precedent. Absent a decision from those courts on the issue, I could look to decisions from other courts of appeals as persuasive authority.

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

Yes.

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

Both *Casey* and *Lawrence* are binding precedents, and I would apply them faithfully along with other binding precedents.

- f. What other factors would you consider?

I would consider any other factors that are relevant under Supreme Court or Fourth Circuit precedent.

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

The Equal Protection Clause applies to both race-based classifications and gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

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

Any academic argument about the intent of the individuals who passed the Fourteenth Amendment does not affect the binding precedent cited above, which I would apply faithfully.

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

I am unaware why *United States v. Virginia* was filed or resolved at the time it was filed or resolved.

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

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

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

Equality under the law is paramount in our legal system. However, it is my understanding that this question is the subject of litigation, therefore Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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

to use contraceptives?

Yes, under the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, under the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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

Yes, under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

Please see my responses to question 3 above.

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

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

If confirmed as a lower court judge, I would follow all binding Supreme Court precedent and Fourth Circuit precedent. Where applicable precedent from those courts makes it appropriate to consider such evidence, I would do so in accordance with that precedent.

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

The role of sociology, scientific evidence, and data depends on the nature of the judicial analysis at issue. I would consider binding Supreme Court and Fourth Circuit precedent to determine what role these sources should play in a given case.

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”
  - a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

*Obergefell* is binding Supreme Court precedent, and I will follow it faithfully along with other binding precedents. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”).

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

Please see my response to question 5.a above.

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

I believe this topic has been the subject of significant scholarly debate over the last several decades. From the perspective of a nominee to a lower court, the question is an academic one in light of the binding precedent of *Brown*, which I would apply faithfully.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited October 24, 2018).

I have not studied this white paper. The quoted language seems to reflect the fact that determining the original public meaning of a constitutional provision can be difficult.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision

today?

For a lower court judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If the Supreme Court has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision is dispositive. I would faithfully apply all binding Supreme Court precedents regardless of their methodology.

- d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to question 6.c above.

- e. What sources would you employ to discern the contours of a constitutional provision?

I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent that identifies the appropriate sources to use in discerning the contours of a constitutional provision.

7. You graduated from law school in 2007 and clerked for three years.

- a. What motions have you argued under the Federal Rules of Civil Procedure?

I regularly consult and make arguments under the Federal Rules of Civil Procedure, both in my appellate practice and my practice in the federal district courts. I do not have a complete list of all of the arguments arising under those rules that I have submitted to a court.

- b. What motions have you argued under the Federal Rules of Criminal Procedure?

I occasionally consult and make arguments under the Federal Rules of Criminal Procedure in my practice. I do not have a complete list of all of the arguments arising under those rules that I have submitted to a court.

- c. Have you presented argument in a federal court on an evidentiary issue governed by the Federal Rules of Evidence?

Yes, I have presented many arguments in federal courts on evidentiary issues governed by the Federal Rules of Evidence.

- d. Have you taken a deposition in a federal court proceeding?

Like many nominees to the federal appellate bench, my practice has focused largely on appeals, so I have not taken or defended a deposition in a federal court proceeding. However, I have practiced in the federal district courts, including litigating four cases all the way to verdict or final judgment.

- e. Have you defended a deposition in a federal court proceeding?

Please see my response to question 7.d above.

f. Have you argued a discovery motion in federal court?

Yes, I have argued discovery motions in federal court.

g. Have you argued a motion in limine in federal court?

Yes, I have argued motions in limine in federal court.

h. Have you participated in a federal court mediation?

Yes, I have participated in federal court mediation on behalf of clients.

i. Have you participated in a pre-trial conference in federal court?

Yes, I have participated in a pre-trial conference in federal court.

j. Have you participated in voir dire in federal court?

Yes, I have participated in voir dire in federal court.

k. Have you examined a fact witness in federal court?

No. Please see my response to question 7.d above.

l. Have you examined an expert witness in federal court?

No. Please see my response to question 7.d above.

8. In your Senate Judiciary Committee Questionnaire, the ten most significant litigated matters you listed were before the Southern District of New York, the Second Circuit, the Federal Circuit, and the Supreme Court of the United States. Please provide a list of the matters you have litigated in federal court in Maryland, Virginia, West Virginia, North Carolina, South Carolina, or the United States Court of Appeals for the Fourth Circuit.

To the best of my recollection, I have litigated the following matters in federal courts within the Fourth Circuit, although I may be overlooking assistance I have provided with other federal litigation within the circuit. I also have litigated in state courts within the Fourth Circuit on multiple occasions.

*Al-Quraishi v. L-3 Services, Inc.*, Nos. 10-1891 & 10-1921 (4th Cir.)

*JTH Tax, Inc. v. Aime*, Nos. 17-1859 & 17-1905 (4th Cir.)

*Independent Community Bankers of America v. National Credit Union Administration*,

No. 1:16-cv-1141 (JCC/TCB) (E.D. Va.)

*JTH Tax, Inc. v. Aime*, No. 2:16-cv-279 (HCM/DEM) (E.D. Va.)

9. The Federal Judicial Center publishes an ethics guide for clerks, *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks*, Federal Judicial Center, <https://www.fjc.gov/sites/default/files/materials/09/Maintaining-Public-Trust-4D-FJC-Public-2013-July-2018-Update.pdf> (last visited Oct. 23, 2018). The guide reminds clerks, “The parties and the public accept judges’ rulings because they trust the system to be fair and impartial. Maintaining this trust is crucial to the continued success of our courts.” Clerks should not engage in an activity if “the activity present[s] an appearance of impropriety or reflect[s] adversely on the court.” The *New York Times* published an article describing a Heritage Foundation training academy for clerks that would require clerks to sign an agreement to “keep the program’s teaching materials secret and pledge not to use what they learned ‘for any purpose contrary to the mission or interest of the Heritage Foundation.’” Is it appropriate for a judge to hire a law clerk who attended a clerk training program sponsored by an outside group that requires the clerk to keep material secret from others?

Impartiality is a cornerstone of our judicial system. It is important for judges and their staff, including law clerks, to avoid activities that would call into question their impartiality.

10. Your Senate Judiciary Committee Questionnaire indicates that you interned for the Alliance Defending Freedom (ADF) and have spoken at ADF on several occasions.
- a. Were you a Blackstone legal intern or a fellow?

I participated in a summer internship with the Alliance Defending Freedom (ADF) as a law student. I do not recall the nomenclature the group used for the internship program.

- b. In a speech, you indicated you completed Phase III of this internship. Please describe each phase of the internship program and the work that you performed during each phase.

To the best of my recollection, Phase I and Phase III of the summer program for law students consisted of educational programs taught by professors, judges, and practitioners. Phase II of the program was the internship work component. To the best of my recollection, my internship work included contributing to an article about Article III standing in Establishment Clause cases and compiling information for employees about their religious rights in the workplace.

- c. Why have you chosen to remain affiliated with ADF?

I have spoken to law students at ADF events about clerking and careers, as I have done for students through other organizations. It is my practice, when possible, to agree to

speaking with students about these topics when asked, whether in a group setting or individually.

- d. In 2016, the Southern Poverty Law Center designated ADF as a hate group. Were you aware of that designation when you spoke at ADF events in 2017?

Hate is wrong, and it should have no place in our society. As I mentioned above, I participated in a summer internship with ADF as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. In my experience with ADF, I have not witnessed anyone expressing or advocating hate. A number of leading Supreme Court practitioners at well-regarded national law firms work with ADF. Members of Congress, including members of this Committee, have filed amicus briefs in the Supreme Court supporting ADF's positions. I do not think members of this Committee or large reputable law firms would work with a hate group. I certainly would not. I do not recall when I learned of the designation.

- e. Do you disagree with the Southern Poverty Law Center's designation of ADF as a hate group? If so, please explain why.

Please see my response to question 10.d above.

- f. Given your associations with ADF, if confirmed, do you commit to recusing yourself from cases with which ADF is affiliated?

In any case, I would carefully address any real or potential conflicts of interest by reference to 28 USC § 455, all applicable canons of the Code of Conduct for United States Judges, and any and all other laws, rules, practices, and procedures governing such circumstances. I would determine the appropriate action with the input of the parties, consultation of these rules and ethical canons, and consultation with my colleagues.

11. The Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), impacts the ability of millions of workers' access to courts.

- a. You filed a brief on behalf of Ernst & Young LLP asserting that the National Labor Relations Act should "yield" to the Federal Arbitration Act. Why was it necessary for the National Labor Relations Act to yield to the Federal Arbitration Act?

In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), I represented the interests of my clients in the Supreme Court. In that case, the employer and employees had a pre-existing agreement to arbitrate all claims on an individual, rather than collective, basis. Among other things, the agreement provided that the employer would cover many of the fees and costs associated with arbitration, and the agreement expressly preserved employees' right to file charges with the Equal Employment Opportunity Commission or any other administrative agency. The parties' agreement was enforceable under the Federal Arbitration Act (FAA). The question presented in the case was whether the National Labor Relations Act

(NLRA) conflicted with the FAA so as to prohibit enforcement. On behalf of my clients, I argued that Supreme Court precedent indicated that the FAA and the NLRA could be harmonized. The Supreme Court held that the NLRA did not contain a congressional command overriding the FAA's command to enforce arbitration agreements according to their terms.

- b. In her dissent, Justice Ginsburg wrote, "The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers." Do you agree or disagree with this statement? Please explain your response.

The Court disagreed with Justice Ginsburg's dissenting opinion. As a nominee to an inferior court, I must view all precedent of the Supreme Court, including *Epic Systems*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully.

- c. If an employee signed an arbitration agreement requiring them to arbitrate all claims, must that employee arbitrate claims of sexual harassment or racial discrimination under civil rights laws?

Please see my response to question 11.a above. Regarding this question as a general matter, the Code of Conduct for United States Judges prohibits me from answering because a case raising this question may come before me if I am confirmed.

- d. In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring), Justice O'Connor warned, "The Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." Do you agree or disagree with this statement? Please explain your response.

As a nominee to an inferior court, I must view all binding precedent of the Supreme Court, including *Allied-Bruce Terminix* and the Court's other Federal Arbitration Act precedents, as correctly decided in the sense that they will be binding on me if I am confirmed, and I will follow them faithfully.

- e. Is there ever a public interest in resolution of claims in federal court rather than arbitration?

This question may come before me in a case if I am confirmed, therefore the Code of Conduct for United States Judges prohibits me from commenting.

12. In *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016), *cert. denied sub nom. City of Bloomfield v. Felix*, 138 S. Ct. 357 (2017), a case involving the Ten Commandments placed outside a municipal building, your amicus brief stated that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not a sufficient injury to confer Article III standing. This approach to standing would make it harder for plaintiffs to bring a challenge based on the Establishment Clause. In

*Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184 (2d Cir. 2014), your amicus brief asserted that courts must apply strict scrutiny to instances when states have restricted the ability of religious entities to access grant money or public space. What is the proper relationship between the Establishment Clause and the Free Exercise Clause of the First Amendment?

Respectfully, the question misconstrues both briefs. In *Felix*, I represented a client in filing an amicus brief in the Supreme Court. The language you quote from the amicus brief is actually quoting the Supreme Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). As the brief states, the Supreme Court held that such a consequence is not a sufficient injury to confer Article III standing. That has been the law since 1982. In *Bronx Household*, I represented the Black, Latino, and Asian Caucus of the New York City Council in presenting its views to the Second Circuit regarding a regulation that prohibited churches from meeting in school buildings on weekends. That brief did not make any argument about, or even reference to, strict scrutiny.

Regarding the proper relationship between the Establishment Clause and the Free Exercise Clause of the First Amendment, the Supreme Court has issued many decisions addressing that topic in a variety of contexts, and I will follow those precedents faithfully if I am confirmed.

13. In a speech about *United States v. Windsor*, 570 U.S. 744 (2013), you stated, "The majority chose [to] write the opinion in a unique way that calls it bigotry to believe that homosexuality does not comport with Judeo-Christian morality." You also stated, "Justice Scalia pointed out that citizens who disagree with same-sex marriage on religious or moral grounds have now been marked by the Court's opinion as motivated by hatred of their fellow man."

- a. What role does morality play in determining whether a challenged law or regulation is unconstitutional or otherwise illegal?

This is a broad question. A judge's own moral beliefs are never an appropriate basis for a judge's decision in a case. But in some cases, the Supreme Court has instructed judges to evaluate whether a law is impermissibly enforcing the lawmaker's moral views. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that criminal laws cannot be used to enforce moral views about homosexuality).

- b. Did the majority opinion in *Windsor* express animus toward Judeo-Christian morality or those observant of it? If so, how?

For this talk, I was asked to explain the Supreme Court's decision in *Windsor* to an audience of non-lawyers as part of a presentation at a church. I described both the majority and dissenting opinions and did not express an opinion on the case.

The Court in *Windsor* quoted a House Report for the proposition that the Defense of Marriage Act (DOMA) expressed “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” *Windsor*, 570 U.S. at 771 (internal quotation marks omitted). The Court concluded that DOMA’s principal purpose was “to impose inequality.” *Id.* at 772. In the passage you quote, I was describing an argument made by the dissenting Justices. Specifically, the dissenters argued that, by virtue of this reasoning, the majority opinion accused DOMA’s supporters of “act[ing] with malice—with the ‘purpose’ ‘to disparage and to injure’ same-sex couples,” as opposed to making a “legal error[.]” which “may be made in good faith.” *Id.* at 797 (quoting majority op.).

- c. Do you believe that LGBT people experience discrimination today?

Yes.

**Nomination of Allison Jones Rushing to be  
United States Circuit Judge for the Fourth Circuit  
Questions for the Record  
October 24, 2018**

**QUESTIONS FROM SENATOR BLUMENTHAL**

You have maintained a connection with the Alliance Defending Freedom (ADF) for thirteen of the fourteen years of your post-college professional career. You first worked for ADF in the summer of 2005, and you subsequently spoke at ADF sponsored events at least three different times. You also published an article with Jordan Lorence, a senior counsel for ADF. As recently as last year, you received a \$1,750 honoraria from ADF. As you know, the Southern Poverty Law Center has designated ADF as an anti-LGBT hate group.<sup>1</sup> According to the Center, ADF “has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society.”<sup>2</sup>

**1. Do you support the recriminalization of homosexuality in the U.S. and its criminalization abroad?**

Hate is wrong, and it should have no place in our society. As for the Alliance Defending Freedom (ADF), I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. In my experience with ADF, I have not witnessed anyone expressing or advocating hate. A number of leading Supreme Court practitioners at well-regarded national law firms work with ADF. Members of Congress, including members of this Committee, have filed amicus briefs in the Supreme Court supporting ADF’s positions. I do not think members of this Committee or large reputable law firms would work with a hate group. I certainly would not.

As regards the alleged positions attributed to ADF, I am not aware of ADF holding those positions, nor am I aware of all of ADF’s policy or litigating positions. I do not work for ADF or have any official role with them. I do not know what that the organization means by “homosexual agenda” or a link between homosexuality and pedophilia. Criminalization of homosexuality would be unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Government-compelled sterilization would implicate the constitutional right to refuse unwanted medical procedures. See *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). All people possess inherent worth and dignity and should be treated equally before the law.

**2. Do you support state-sanctioned sterilization of trans people abroad?**

Please see my response to question 1 above.

**3. Do you believe that homosexuality is linked to pedophilia?**

Please see my response to question 1 above.

**4. Do you believe that there exists a ‘homosexual agenda’ that will destroy Christianity and society?**

Please see my response to question 1 above.

**5. Would you perform a same-sex wedding if asked to do so?**

I do not intend to perform any weddings if I am confirmed. Performing weddings is not a duty or requirement for federal judges.

In your testimony before the Judiciary Committee you stated: “My experience in the federal courts of appeals and the Supreme Court are why I am qualified.” A significant portion of your experience before the Supreme Court is related to *Ernst & Young LLP v. Morris*, a case concerning the rights of employees to bring class action lawsuits to protect their rights.<sup>3</sup> In a victory for the corporate interests you represented in that case, the Supreme Court held 5-4 that arbitration agreements could be used to block employees’ collective action.<sup>4</sup> Writing in dissent, Justice Ginsburg called the decision “egregiously wrong.”<sup>5</sup>

**1. Do you believe that *Ernst & Young LLP* was correctly decided? Why or why not?**

*Ernst & Young LLP v. Morris* (also known as *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)), is one of seven cases I have litigated on behalf of a party at the merits stage in the Supreme Court. Representing the interests of my clients in that case, I argued that, under Supreme Court precedent, the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA) could be harmonized. The Supreme Court held that the NLRA did not contain a congressional command overriding the FAA’s command to enforce arbitration agreements according to their terms. As a nominee to an inferior court, I must view all precedent of the Supreme Court, including *Epic Systems*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully.

I am concerned about public faith in the judiciary’s impartiality and integrity. Please address the following question in light of our nation’s constitution, laws, and code of conduct for the judiciary.

**1. Do you believe that a sitting judge or justice who is shown to have committed perjury or substantially misled the Senate Judiciary Committee about the truth of a matter should continue to serve on the bench?**

No one is above the law. It is imperative that judges show respect for the law and uphold the integrity of the judiciary. That said, the selection, confirmation, and removal of judges are functions for the political branches, and I think it would be inappropriate

for me to comment on the exercise of those political functions as a judicial nominee.  
*See* Code of Conduct for United States Judges, Canon 5.

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<sup>1</sup> Southern Poverty Law Center, *Alliance Defending Freedom*, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

<sup>2</sup> *Id.*

<sup>3</sup> 138 S. Ct. 1612 (2018).

<sup>4</sup> *See Id.* at 1619 (“This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board.”).

<sup>5</sup> *See Id.* at 1633 (Ginsburg, J., dissenting).

There have been recent reports that the Heritage Foundation was planning to run a secret clerkship training program.<sup>6</sup> I am generally concerned about growing attempts by outside groups to buy influence in the judiciary.

- 1. Other than your law school, please list all people and organizations that provided you with any training relating to your service as a federal law clerk. Please include a description of the content of the training that was provided.**

None, other than the courts with which I clerked.

- 2. Do you believe it is appropriate for sitting judges to participate in trainings designed to help law clerks with a particular ideological perspective advance their beliefs within the judiciary?**

Impartiality is a cornerstone of our judicial system. It is important for judges and their staff, including law clerks, to avoid activities that would call into question their impartiality.

- 3. Please list all meetings, conferences or events affiliated with the Federalist Society in which you have participated.**

To the best of my recollection, I attended part of the National Lawyers' Convention in 2015, in 2012, and in 2011; part of the Second Annual Executive Branch Review Conference in 2014; and a Supreme Court term preview event in September 2011.

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<sup>6</sup> Adam Liptak, *A Conservative Group's Closed-Door 'Training' of Judicial Clerks Draws Concern* N.Y. Times (Oct. 18 2018) <https://www.nytimes.com/2018/10/18/us/politics/heritage-foundation-clerks-judges-training.html>.

Questions for the Record for Allison J. Rushing  
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

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

No.

2. At the hearing, Senator Kennedy highlighted your lack of life experience and explained that “to be a really good federal judge you got to have some life experience.” This is particularly concerning given the significant and far-reaching decisions that are made by federal appeals court judges. Although a majority of the ABA’s Standing Committee on the Federal Judiciary rated you as “Qualified,” its guidelines state that the Committee “believes that a prospective nominee to the federal bench ordinarily should have at least twelve years’ experience in the practice of law.” You graduated from law school 11 years ago. You have only practiced law for 8 of those years. And, in response to Senator Kennedy’s questions, you failed to identify any life experience that makes you qualified to be a circuit court judge and simply pointed to your experience handling appeals.

a. What experiences, other than having handled appeals, over your 8 years as a practicing lawyer do you have that qualify you to serve in a lifetime position as a federal circuit court judge?

I have extensive experience relevant to the work of a federal appellate judge. I clerked for judges on two different federal courts of appeals (the Tenth Circuit and the D.C. Circuit), in addition to clerking at the Supreme Court. In private practice, I have filed over 45 briefs in the Supreme Court and have worked on well over 50 appeals, including arguing in multiple different federal circuit courts, state appellate courts, and a state court of last resort. I have litigated a wide variety of cases that reflects the variety of subjects that come before the courts of appeals. For example, I have handled criminal cases and prisoner litigation, cases under the bankruptcy and tax laws, intellectual property, products liability, commercial litigation, qui tam actions, proceedings under various federal statutes, and constitutional issues. In addition to my appellate work, I have litigated many cases in the federal district courts, including filing briefs and presenting oral argument. Among other things, I have litigated four cases all the way to verdict in the district courts.

I have represented plaintiffs and defendants. I have represented large companies and private individuals. I have represented banks and bankrupt debtors trying to protect their assets from creditors. I have represented criminal defendants, a prisoner seeking access to court, and a veteran seeking benefits. I have provided pro bono

representation to many clients who cannot afford to pay. These experiences have been valuable preparation for the federal appellate bench, if I am so fortunate as to be confirmed.

- b. Do you believe life experience, in addition to legal experience, is relevant to being qualified to be a federal appeals court judge?

In addition to professional competence, integrity and judicial temperament are important qualifications for a federal judge, and those qualities may be developed over time. I am proud of the letters of support filed with the Committee by literally hundreds of attorneys – a demographically and politically diverse group – who know me and believe that I possess all the qualities necessary to serve as a federal appellate judge.

3. You have a long history with the organization Alliance Defending Freedom.

- You interned with the organization in 2005 when it was known as the Alliance Defense Fund.
- You co-authored an article with the organization's senior counsel in 2005.
- You authored amicus briefs for clients in support of the Alliance Defending Freedom's positions in at least three cases.
- You spoke at Alliance Defending Freedom events in 2012, 2013, 2014, 2015, 2016, and 2017.
- You received honoraria from the organization in 2017.

The Alliance Defending Freedom has been listed as an anti-LGBT hate group by the Southern Poverty Law Center, which describes the organization as follows:

“Founded by some 30 leaders of the Christian Right, the Alliance Defending Freedom is a legal advocacy and training group that has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society. ADF also works to develop ‘religious liberty’ legislation and case law that will allow the denial of goods and services to LGBT people on the basis of religion. Since the election of President Donald Trump, the ADF has become one of the most influential groups informing the administration’s attack on LGBT rights working with an ally in Attorney General Jeff Sessions.”

- a. How do you justify your continued involvement with an organization that advocates such extreme views?

Hate is wrong, and it should have no place in our society. As for the Alliance Defending Freedom (ADF), I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. In my experience with ADF, I have not witnessed anyone expressing or advocating hate. A number of leading Supreme Court practitioners at well-regarded national law firms work with ADF. Members of Congress, including members of this Committee, have filed amicus briefs in the Supreme Court supporting ADF’s positions. I do not think members of this Committee or large reputable law firms would work with a hate group. I certainly would not.

- b. In view of your close association with the Alliance Defending Freedom, how can LGBTQ individuals or women seeking to assert their constitutional rights to abortion or contraception have confidence that you will treat them fairly if you are confirmed as a judge?

Equality before the law is of paramount importance. If I am confirmed, I will take an oath to follow the law, to administer justice without respect to persons, and to perform my duties faithfully and impartially. Part of that promise is following all of the binding precedent of the Supreme Court and the Fourth Circuit. I will uphold that oath and faithfully apply precedent in every case.

- c. If confirmed, will you recuse yourself from all cases in which the Alliance Defending Freedom has taken a position, including LGBTQ rights, abortion, and access to contraception?

In any case, I would carefully address any real or potential conflicts of interest by reference to 28 USC § 455, all applicable canons of the Code of Conduct for United States Judges, and any and all other laws, rules, practices, and procedures governing such circumstances. I would determine the appropriate action with the input of the parties, consultation of these rules and ethical canons, and consultation with my colleagues.

4. You represented Ernst & Young LLP before the Supreme Court in *Epic Systems Corp. v. Lewis*, which addressed employment agreements requiring parties to arbitrate on an individual basis instead of bringing a class action lawsuit. In that case, the Court—by a 5-4

majority—adopted your position that such employment agreements are enforceable under the Federal Arbitration Act and supersede provisions of the National Labor Relations Act (NLRA) that provide a nonwaivable right to collective litigation. Justice Ginsburg called the decision (and by extension your argument) “egregiously wrong.” She explained that the majority “forgets the labor market imbalance that gave rise to the [Norris-LaGuardia Act] and the NLRA, and ignores the destructive consequences of diminishing the right of employees ‘to band together in confronting an employer.’”

Individual employees—like those that sued your client, Ernst & Young—often have claims too small to pursue on an individual basis. Denying such employees collective action in essence allows employers to leverage their dominant positions and resources to violate laws intended to protect workers with impunity.

Under your view of the Federal Arbitration Act, what practical recourse do individual employees—like those that sued Ernst & Young—have when their rights are violated by their employers and requiring them to arbitrate their claims on an individual basis would effectively prevent them from obtaining relief?

In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), I represented the interests of my clients in the Supreme Court. In that case, the employer and employees had a pre-existing agreement to arbitrate all claims on an individual, rather than collective, basis. Among other things, the agreement provided that the employer would cover many of the fees and costs associated with arbitration, and the agreement expressly preserved employees’ right to file charges with the Equal Employment Opportunity Commission or any other administrative agency. The parties’ agreement was enforceable under the Federal Arbitration Act (FAA). The question presented in the case was whether the National Labor Relations Act (NLRA) conflicted with the FAA so as to prohibit enforcement. On behalf of my clients, I argued that Supreme Court precedent indicated that the FAA and the NLRA could be harmonized. The Supreme Court held that the NLRA did not contain a congressional command overriding the FAA’s command to enforce arbitration agreements according to their terms.

5. In a 2005 article you co-authored, you argued that courts should limit the types of people with standing to challenge government endorsements of religion under the Establishment Clause. You argued that so-called “offended observers”—individuals you described as those whose “‘injury’ consisted solely of having occasion to pass by the ‘offensive’ display”—lack standing to challenge government endorsement of religion under the Establishment Clause. You went further and argued that even “‘enhanced’ offended observers, who have changed their behavior to avoid the disagreeable message” would lack standing. For these individuals, you argued that their only recourse is the political process.

During your confirmation hearing, you claimed that the “thesis and tone” of the article were set by your co-author. Yet, you advanced similar arguments before the Supreme Court in an amicus brief in *City of Bloomfield v. Felix*.

Many minority groups in this country—including religious minorities—have historically faced barriers to accessing the political process. Under your view of standing, how can members of a minority religious group enforce their rights under the Establishment Clause to be free of government sponsorship of religion if their only recourse is the political process?

I assisted with the Establishment Clause article as a law student. As you noted, the thesis and tone of the article were set by my co-author, an experienced First Amendment attorney. The article discussed a Supreme Court decision, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), in which the Court held that the standing requirements of Article III, including the requirement of a particularized injury, apply equally to Establishment Clause cases. The article discussed how that holding might apply to passive religious monument cases (in contrast to cases where individuals feel pressured to make some religious observance).

The question of Article III standing in what are called “offended observer” Establishment Clause cases is an unresolved question that litigants continue to raise before the Supreme Court. Most recently, the City of Bloomfield, New Mexico sought certiorari on this issue in a religious monument case. On behalf of a client, I filed an amicus brief in the Supreme Court urging the Court to grant certiorari and clarify this issue. Members of Congress, including members of this Committee, also filed a separate amicus brief urging the Court to grant certiorari and arguing that “offended observer” standing conflicts with *Valley Forge*.

6. You were a co-speaker at the Capitol Hill Baptist Church’s Henry Forum, “‘Enemies of Mankind’: Religion and Morality in the Supreme Court’s Same-Sex Marriage Jurisprudence.” In your presentation, you noted that President Obama instructed the Justice Department not to defend the Defense of Marriage Act. You described President Obama’s action as “unusual.”

Earlier this year, in the case *Texas v. United States*, the Justice Department not only refused to defend a properly-enacted statute—the Affordable Care Act—it also actively argued against the constitutionality of certain provisions of the statute.

Do you consider it appropriate for the Justice Department to actively argue against the constitutionality of a properly-enacted statute, such as the Affordable Care Act?

In *United States v. Windsor*, 570 U.S. 744 (2013), the Supreme Court discussed at some length the Executive's decision not to defend the Defense of Marriage Act. In explaining the Court's discussion to an audience of non-lawyers, I noted two reasons the Executive's decision was noteworthy, as explained by the Supreme Court: first, the law had not been held unconstitutional by a court or been alleged to infringe presidential powers; and second, although the Executive believed the law was unconstitutional, the Executive still enforced the law against Windsor by refusing to refund her estate taxes.

Canon 5 of the Code of Conduct for United States Judges prohibits judicial nominees from making political statements, so it is important for me not to answer political or policy questions. Pursuant to that ethical rule, I do not believe I can say more about whether particular arguments by the Justice Department are appropriate.

7. Have you ever appeared before any court in North Carolina? If so, in what capacity? As attorney of record or in another capacity? Please specify the court and the case.

To the best of my recollection, I have not appeared in the North Carolina courts.

8. I have questions about your experience in federal appellate courts.
- a. Please detail the briefs you have filed in federal appellate courts, specifying in which court and in which case each brief was filed.

I have filed approximately 47 briefs in the United States Supreme Court, which I have listed to the best of my recollection in the Questionnaire for Judicial Nominees filed with the Committee. I do not have a complete list of the briefs I have filed in the federal circuit courts of appeals. Below I have attempted to list those briefs to the best of my recollection, but the list will inevitably be incomplete.

*Advertise.com, Inc. v. AOL LLC*, Nos. 10-55069 & 10-55071, Brief of Appellees (9th Cir.)

*Al-Quraishi v. L-3 Services, Inc.*, Nos. 10-1891 & 10-1921, Brief for Appellants on Rehearing En Banc (4th Cir.)

*Al-Quraishi v. L-3 Services, Inc.*, Nos. 10-1891 & 10-1921, Reply Brief for Appellants on Rehearing En Banc (4th Cir.)

*Al-Quraishi v. L-3 Services, Inc.*, Nos. 10-1891 & 10-1921, Supplemental Brief of Appellants on Rehearing En Banc (4th Cir.)

*American Insurance Association v. Department of Housing and Urban Development*, No. 14-5321, Brief in Support of Motion By Appellees to Vacate and Remand (D.C. Cir.)

*American Insurance Association v. Department of Housing and Urban Development*,

No. 14-5321, Reply Brief in Support of Motion By Appellees to Vacate and Remand (D.C. Cir.)

*Apple Inc. v. Samsung Electronics Co., Ltd.*, Nos. 14-1335 & 15-1029, Brief of Amici Curiae Dell Inc., et al. In Support of Defendants-Appellants' Petition for Rehearing En Banc (Fed. Cir.)

*Bronx Household of Faith v. Board of Education of the City of New York*, No. 12-2730, Brief of Amicus Curiae The New York City Council Black, Latino, and Asian Caucus (2d Cir.)

*Certain Funds, Accounts, and/or Investment Vehicles Managed by Affiliates of Fortress Investment Group LLC v. KPMG LLP*, No. 14-2838, Brief of Defendant-Appellee KPMG LLP (2d Cir.)

*Daiichi Sankyo Co., Ltd. v. Accord Healthcare Inc.*, Nos. 17-1052 & 17-1053, Brief of Appellants (Fed. Cir.)

*Daiichi Sankyo Co., Ltd. v. Accord Healthcare Inc.*, Nos. 17-1052 & 17-1053, Reply Brief of Appellants (Fed. Cir.)

*Eli Lilly and Company v. Teva Parenteral Medicines, Inc.*, No. 15-2067, Brief of Plaintiff-Appellee (Fed. Cir.)

*Fahey v. Massachusetts Department of Revenue (In re Fahey)*, Nos. 14-1328, 14-1350, 14-9002, 14-9003, Petition for Panel Rehearing and Rehearing En Banc (1st Cir.)

*Friedman v. Federal Aviation Administration*, No. 17-1043, Brief for Amicus Curiae The American Diabetes Association (D.C. Cir.)

*G.D. Searle LLC v. Lupin Pharmaceuticals, Inc.*, No. 14-1476, Brief of Plaintiffs-Appellants (Fed. Cir.)

*G.D. Searle LLC v. Lupin Pharmaceuticals, Inc.*, No. 14-1476, Reply Brief of Plaintiffs-Appellants (Fed. Cir.)

*Guilbeau v. Pfizer Inc. (In re Testosterone Replacement Therapy Products Liability Litigation)*, No. 17-2056, Brief of Defendants-Appellees (7th Cir.)

*Ho v. ReconTrust Company, N.A.*, No. 10-56884, Opposition of Appellees to Petition for Panel Rehearing and Rehearing En Banc (9th Cir.)

*JTH Tax, Inc. v. Aime*, Nos. 17-1859 & 17-1905, Brief of Plaintiffs-Appellants (4th Cir.)

*JTH Tax, Inc. v. Aime*, Nos. 17-1859 & 17-1905, Reply Brief of Plaintiffs-Appellants (4th Cir.)

*Madden v. Midland Funding, LLC*, No. 14-2131, Petition for Panel Rehearing and Rehearing En Banc by Defendants-Appellees (2d Cir.)

*Martin v. Shinseki*, No. 13-7097, Brief of Court-Appointed Amicus Curiae in Support of Claimant-Appellant (Fed. Cir.)

*Martin v. Shinseki*, No. 13-7097, Reply Brief of Court-Appointed Amicus Curiae in Support of Claimant-Appellant (Fed. Cir.)

*Monarch Beverage Company, Inc. v. Cook*, No. 15-3440, Brief of Appellant (7th Cir.)

*Monarch Beverage Company, Inc. v. Cook*, No. 15-3440, Reply Brief of Appellant (7th Cir.)

*Opportunity Finance, LLC v. Kelley*, Nos. 15-2060, 15-2061, & 15-2062, Brief of Appellants (8th Cir.)

*Opportunity Finance, LLC v. Kelley*, Nos. 15-2060, 15-2061, & 15-2062, Reply Brief of Appellants (8th Cir.)

*Phelps v. Wyeth, Inc.*, No. 15-35058, Brief of Defendants-Appellees Wyeth, Inc.; Schwarz Pharma, Inc.; and Alaven Pharmaceutical, LLC (9th Cir.)

*Quantum Capital, LLC v. Banco de los Trabajadores*, No. 17-10266, Brief of Defendant-Appellant (11th Cir.)

*Quantum Capital, LLC v. Banco de los Trabajadores*, No. 17-10266, Reply Brief of Defendant-Appellant (11th Cir.)

*Ritchie Capital Management, LLC v. Coventry First LLC*, No. 15-3207, Brief Supporting Appellees' Motion to Dismiss Appeal (2d Cir.)

*Ritchie Capital Management, LLC v. Coventry First LLC*, No. 15-3207, Reply Brief Supporting Appellees' Motion to Dismiss Appeal and Opposition to Appellants' Motion to Consolidate (2d Cir.)

*Ritchie Capital Management, LLC v. Coventry First LLC*, No. 15-3207, Opposition of Appellees to Petition for Panel Rehearing or Reconsideration of Order Dismissing Appeal (2d Cir.)

*Ritchie Risk-Linked Strategies Trading (Ireland), Limited v. Coventry First LLC*, No. 15-3214, Brief of Defendants-Appellees (2d Cir.)

*Scenic America, Inc. v. Department of Transportation*, No. 14-5195, Brief of Intervenor-Appellee Outdoor Advertising Association of America, Inc. (D.C. Cir.)

*Slater v. AG Edwards & Sons, Inc.*, No. 11-2170, Brief of Appellee FBR Capital Markets

& Co. (10th Cir.)

*Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, No. 12-2502, Brief of Amicus Curiae Missouri Wine and Spirits Association (8th Cir.)

*Stoebner v. Opportunity Finance, LLC*, No. 17-1097, Brief of Appellees Opportunity Finance, LLC; Opportunity Finance Securitization, LLC; Opportunity Finance Securitization II, LLC; Sabes Minnesota Limited Partnership; Robert W. Sabes; Janet F. Sabes; Jon R. Sabes; and Steven Sabes (8th Cir.)

*United States v. Bank of America, N.A.*, Nos. 15-496 & 15-499, Brief of Defendants-Appellants Bank of America, N.A.; Countrywide Bank, FSB; and Countrywide Home Loans, Inc. (2d Cir.)

*United States v. Bank of America, N.A.*, Nos. 15-496 & 15-499, Reply Brief of Defendants-Appellants Bank of America, N.A.; Countrywide Bank, FSB; and Countrywide Home Loans, Inc. (2d Cir.)

*United States v. Litvak*, No. 14-2902, Brief Supporting Motion for Release Pending Appeal (2d Cir.)

*United States v. Litvak*, No. 14-2902, Reply Brief Supporting Motion for Release Pending Appeal (2d Cir.)

*United States v. Litvak*, No. 14-2902, Brief of Defendant-Appellant (2d Cir.)

*United States v. Litvak*, No. 14-2902, Reply Brief of Defendant-Appellant (2d Cir.)

*United States v. Litvak*, No. 17-1464, Brief Supporting Motion for Release Pending Appeal (2d Cir.)

*United States v. Litvak*, No. 17-1464, Reply Brief Supporting Motion for Release Pending Appeal (2d Cir.)

*United States v. Litvak*, No. 17-1464, Brief of Defendant-Appellant (2d Cir.)

*United States v. Litvak*, No. 17-1464, Reply Brief of Defendant-Appellant (2d Cir.)

*United States Soccer Federation, Inc. v. United States National Soccer Team Players Association*, No. 15-3402, Brief of Defendant-Appellee (7th Cir.)

*United States Soccer Federation, Inc. v. United States National Soccer Team Players Association*, No. 15-3402, Petition for Panel Rehearing and Rehearing En Banc (7th Cir.)

*WesternGeco LLC v. Petroleum Geo-Services, Inc.*, Nos. 16-2099, 16-2100, 16-2332, 16-2333, 16-2334, Brief of Appellee Petroleum Geo-Services, Inc. (Fed. Cir.)

- b. Please detail times you have presented oral argument in federal appellate courts, specifying which court and which case for each, and whether each was a panel or en banc argument.

I have presented oral argument in federal circuit courts of appeals in the following cases, in addition to presenting oral argument in state appellate courts and federal district courts.

*Certain Funds, Accounts, and/or Investment Vehicles Managed by Affiliates of Fortress Investment Group LLC v. KPMG LLP*, No. 14-2838 (2d Cir.) (panel)

*JTH Tax, Inc. v. Aime*, Nos. 17-1859, 17-1905 (4th Cir.) (panel)

*Martin v. Shinseki*, No. 13-7097 (Fed. Cir.) (panel)

*Ritchie Risk-Linked Strategies v. Coventry First LLC*, 15-3214 (2d Cir.) (panel)

*Stoebner v. Opportunity Finance, LLC*, No. 17-1097 (8th Cir.) (panel)

*United States Soccer Federation, Inc. v. United States National Soccer Team Players Association*, No. 15-3402 (7th Cir.) (panel)

9. Do you believe there is a right to privacy protected by the Constitution?

Since *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court has held that there is a right of privacy in the Constitution.

10. In 1965, the Supreme Court, in *Griswold v. Connecticut*, struck down as unconstitutional a state law criminalizing the use of contraceptives based on the right to privacy. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe v. Wade* that the right to an abortion is constitutionally protected. The Court held that these decisions are protected because they are among “the most intimate and personal choices a person may make in a lifetime.”

a. Do you believe the Constitution protects the right to make “intimate and personal” decisions?

Yes, the Supreme Court has held that the Constitution protects personal decisions such as marriage, procreation, contraception, family relationships, and child rearing.

b. In your view, what is the central holding of *Griswold v. Connecticut*?

In *Griswold*, the Supreme Court held that the Constitution protects a right of privacy and that Connecticut’s statute forbidding use of contraceptives violated that right.

c. Is it your view that *Griswold* is settled law?

*Griswold* is precedent of the Supreme Court that is binding on inferior courts. If I am confirmed, *Griswold* will be binding on me and I will follow it faithfully.

d. Do you believe that *Griswold* was correctly decided?

As a nominee to an inferior court, I must view all binding precedent of the Supreme Court, including *Griswold*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully.

e. Will you commit to upholding the precedent created by *Griswold* if you are confirmed to the Fourth Circuit?

Yes.

**Nomination of Allison Jones Rushing  
United States Court of Appeals for the Fourth  
Circuit Questions for the Record  
Submitted October 24, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. As you no doubt noticed, one side of the dais at your October 17 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.

- a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, *and* without the minority's consent—which the Committee has never done before?

The selection and confirmation of judges is a function for the political branches, and the internal procedures of the Senate are a political matter. As a judicial nominee bound by Canon 5 of the Code of Conduct for United States Judges, it would be inappropriate for me to comment on those political matters.

- b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

Please see my response to question 1.a above.

- c. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the timing of your confirmation hearing?

Please see my response to question 1.a above.

2. It appears that, if confirmed, you would be the youngest federal court of appeals judge in the nation. It also appears that you would be the first federal court of appeals judge born in the 1980s. If you are confirmed to the Fourth Circuit, what concrete and affirmative steps do you plan to take to try to overcome the relative experience gap with your colleagues?

If I am confirmed, like many nominees, I will be new to judging. I am fortunate, however, to have extensive litigation experience – at trial, on appeal, and before the Supreme Court – that I expect will benefit me on the bench. If confirmed, I intend to listen to and learn from my colleagues as we work together in panels of three to resolve cases according to the law.

3. What is the most difficult experience you have had making an oral argument before a federal court of appeals, and why?

Each case has its own difficulties, and I work hard to give every client my best work regardless of the difficulty of the particular case. On a personal level, the two oral

arguments I delivered before federal courts of appeals while on maternity leave were difficult: one before the Fourth Circuit in Richmond and one before the Eighth Circuit in St. Paul. Traveling apart from one's baby as a nursing mother is always difficult, and it adds an extra layer of complexity to an attorney's important work of putting the client's interests first as a zealous advocate.

4. What is the most difficult experience you have had writing a brief for a federal court of appeals, and why?

Again, each case has its own difficulties, and I work hard to give every client my best work regardless of the difficulty of the particular case. On a personal level, at one point during my pregnancy I was briefing multiple important criminal appeals before the Supreme Court and before a federal court of appeals, and the combination of those events was difficult.

5. Please describe your most significant experiences litigating before the Fourth Circuit.

Most recently, I represented clients in the Fourth Circuit who were appealing from an adverse verdict in a bench trial. The standard of review on appeal in such a case is deferential. The Fourth Circuit ruled in favor of my clients and held that the purported extension of the parties' contract lacked consideration and so could not be enforced. *See JTH Tax, Inc. v. Aime*, Nos. 17-1859 & 17-1905. The case is still pending on remand before the district court.

6. Please describe your most significant experiences litigating in North Carolina, or in any other state contained in the Fourth Circuit, in state or federal court.

Through my law firm, I have a longstanding relationship with the appellate division of the Maryland Public Defender's Office. In the capacity as an assigned public defender, I have represented three criminal defendants in appealing their murder convictions to the Maryland intermediate appellate court and, in one case, all the way to Maryland's court of last resort. Steve Mercer, an attorney formerly with the Maryland Public Defender's Office, has submitted a letter of support for my nomination describing my work on those cases.

7. You delivered remarks in 2013 about the Supreme Court's decision in *United States v. Windsor*<sup>1</sup> at a forum entitled "'Enemies of Mankind': Religion and Morality in the Supreme Court's Same-Sex Marriage Jurisprudence." As you know, *Windsor* was the landmark case in which the Court struck down as unconstitutional the provision of the Defense of Marriage Act (DOMA) that defined marriage as a union between a man and a woman only. The Court concluded that DOMA "violates basic due process and equal protection principles applicable to the Federal Government. . . . The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."<sup>2</sup>

You said, among other things, that it was "surprising" and "important" that the Supreme Court in *Windsor* did not rely on "traditional equal protection principles," but rather "began

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<sup>1</sup> 570 U.S. 744 (2013).

<sup>2</sup> *Id.* at 770-71.

and ended its analysis with the assertion that Section 3 of DOMA was ‘*designed to injure*’ homosexual couples.”<sup>3</sup> You added that “the majority of the Court in *Windsor* believed that the only basis for a law like DOMA that distinguishes between heterosexual and homosexual marriage is bigotry, or a hateful desire to injure homosexuals. . . . The majority would go on to decide that only this new insight was valid; the old morality was no longer a valid basis for law.”<sup>4</sup>

- a. Why did you find this part of the Court’s decision in *Windsor* “surprising”?

For this talk, I was asked to explain the Supreme Court’s decision in *United States v. Windsor*, 570 U.S. 744 (2013), to an audience of non-lawyers as part of a presentation at a church. I described both the majority and dissenting opinions and did not express an opinion on the case. As I explained in my remarks, the Court’s holding “was not necessarily surprising,” pg. 7, but the Court’s reasoning was. Court watchers expected the Court to announce which level of scrutiny applies to laws that distinguish on the basis of sexual orientation, as I explained in my remarks. The level of scrutiny that applies under traditional equal protection analysis – whether rational basis review, intermediate scrutiny, or strict scrutiny – was a key disagreement in the lower courts as the case evolved. The Supreme Court, however, did not directly address the scrutiny question but instead based its ruling on the motivation for law. That surprised many commentators and court watchers.

- b. In what way was it surprising that the Court found that the “avowed purpose and practical effect” of a law that denied recognition of same-sex marriages was “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages”?

Please see my response to question 7.a above.

- c. You also discussed Justice Scalia’s dissent in *Windsor*, highlighting his argument that “[i]n the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement.”<sup>5</sup> Quoting this passage, you stated that “Justice Scalia pointed out that citizens who disagree with same-sex marriage on religious or moral grounds have now been marked by the Court’s opinion as motivated by hatred of their fellow man.”<sup>6</sup> Based on your wording, is it correct to understand that you agree with Justice Scalia’s argument here?

As I have previously stated, I was asked to explain the Supreme Court’s decision in *Windsor* to an audience of non-lawyers. I described both the majority and dissenting opinions and did not express an opinion on the case. To the extent that I quoted Justice Scalia’s dissenting opinion, it was in an effort to elucidate the disagreement between the majority and the dissent.

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<sup>3</sup> SJQ Attachments to Question 12(a) at 77.

<sup>4</sup> *Id.* at 78-79.

<sup>5</sup> 570 U.S. at 797-98.

<sup>6</sup> SJQ Attachments to Question 12(a) at 80.

- d. You said that this argument was the “most interesting[.]” part of Justice Scalia’s dissent in that it “observed that . . . the majority chose the write the opinion in a unique way that calls it bigotry to believe that homosexuality does not comport with Judeo-Christian morality.”<sup>7</sup> What specifically did you find so significant in this dissent?

Please see my response to question 7.c above.

- e. Do you believe that *Windsor* was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As a nominee to an inferior court, I must view all binding precedent of the Supreme Court, including *Windsor*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *United States v. Hernandez*, 276 Fed. App. 291, 296 (4th Cir. 2008) (per curiam) (“It goes without saying that the decisions of the Supreme Court bind the circuit courts of appeals.”).

- f. In these remarks, you also said: “Indeed, in light of the Court’s reasoning that there can be no valid purpose for a law limiting marriage to opposite-sex couples, it is difficult to see how the Court’s opinion would not also apply to state laws distinguishing between heterosexual and homosexual relationships. Already litigants are using the *Windsor* decision to argue that state laws banning same-sex marriage are unconstitutional.”<sup>8</sup> Do you believe that *Obergefell v. Hodges*,<sup>9</sup> issued two years after *Windsor*, was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I predicted in my remarks, the *Obergefell* decision was the logical result of the Supreme Court’s decision in *Windsor*. As a nominee to an inferior court, I must view all binding precedent of the Supreme Court, including *Obergefell*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *United States v. Hernandez*, 276 Fed. App. 291, 296 (4th Cir. 2008) (per curiam) (“It goes without saying that the decisions of the Supreme Court bind the circuit courts of appeals.”).

8. The Alliance Defending Freedom has been designated by the Southern Poverty Law Center as a “hate group” on account of its anti-LGBTQ views and advocacy. The Center’s report describes ADF as follows:

Founded by some 30 leaders of the Christian Right, the Alliance Defending Freedom is a legal advocacy and training group that has supported the recriminalization of homosexuality in the U.S. and criminalization abroad;

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<sup>7</sup> *Id.* at 79.

<sup>8</sup> *Id.* at 81.

<sup>9</sup> 135 S. Ct. 2584 (2015).

has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a “homosexual agenda” will destroy Christianity and society. ADF also works to develop “religious liberty” legislation and case law that will allow the denial of goods and services to LGBT people on the basis of religion. Since the election of President Donald Trump, the ADF has become one of the most influential groups informing the administration’s attack on LGBT rights working with an ally in Attorney General Jeff Sessions.<sup>10</sup>

In the summer of 2005, while you were in law school, you interned at ADF. You co-wrote an article with a senior counsel at ADF. During the last few years, you have served as a panelist at several events sponsored by ADF, and you accepted \$1,750 in honoraria from ADF in 2017.

- a. When did you first become aware that the Southern Poverty Law Center had designated ADF as a hate group?

I do not recall.

- b. Attorney General Jeff Sessions recently said that he does not believe ADF should be designated as a hate group.<sup>11</sup> Do you disagree with the Southern Poverty Law Center’s designation of ADF as a hate group?

Hate is wrong, and it should have no place in our society. As for the Alliance Defending Freedom (ADF), I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. In my experience with ADF, I have not witnessed anyone expressing or advocating hate. A number of leading Supreme Court practitioners at well-regarded national law firms work with ADF. Members of Congress, including members of this Committee, have filed amicus briefs in the Supreme Court supporting ADF’s positions. I do not think members of this Committee or large reputable law firms would work with a hate group. I certainly would not.

- c. When you spoke at ADF-sponsored events in recent years, were you concerned in any way about this hate-group designation?

Please see my response to question 8.b above.

- d. Please explain whether or not you disagree with any of the extreme positions taken by ADF on LGBTQ rights, such as the ones identified by the Southern Poverty Law Center’s report.

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<sup>10</sup> *Alliance Defending Freedom*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last visited Oct. 15, 2018).

<sup>11</sup> Jeff Sessions, Att’y Gen., Remarks at the Alliance Defending Freedom’s Summit on Religious Liberty (Aug. 8, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-alliance-defending-freedoms-summit>.

As regards the alleged positions attributed to ADF, I am not aware of ADF holding those positions, nor am I aware of all of ADF's policy or litigating positions. I do not work for ADF or have any official role with them. I do not know what that the organization means by "homosexual agenda" or a link between homosexuality and pedophilia. Criminalization of homosexuality would be unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Government-compelled sterilization would implicate the constitutional right to refuse unwanted medical procedures. See *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). All people possess inherent worth and dignity and should be treated equally before the law.

- e. You have filed pro bono amicus briefs on behalf of organizations in a number of Establishment Clause cases before the Supreme Court and the federal courts of appeals, including *Trinity Lutheran Church of Columbia, Inc. v. Comer*,<sup>12</sup> *Felix v. City of Bloomfield*,<sup>13</sup> and *Bronx Household of Faith v. Board of Education of the City of New York*.<sup>14</sup> ADF represented the petitioners in each of these cases. Please describe the extent of your interactions and coordination with ADF in the course of your amicus representation in these cases.

In every case, the choice of counsel is for the client to make, and once counsel is chosen, the client directs the attorney's conduct of the litigation. It is often the case that clients choose to hire me based in part on recommendations from other attorneys. Once a client hires me, the attorney-client privilege and work product doctrine apply to my work for that client. In each case, I represent the interests of my clients, not any other group or party. For example, in *Bronx Household of Faith*, I represented the Black, Latino, and Asian Caucus of the New York City Council in presenting its views about the school board regulation at issue to the Second Circuit. The Caucus believed that the regulation, which prohibited churches from meeting in school buildings on the weekend, would harm their constituents, who benefitted from the tangible assistance the churches provided to the underserved communities represented by members of the Caucus.

9. In 2005, you published an article entitled *Nothing To Stand On: "Offended Observers" and the Ten Commandments*,<sup>15</sup> with Jordan Lorence, a senior counsel at ADF. The article advocated tightening the requirements for standing in Establishment Clause cases, which would effectively make it harder to bring church-state separation challenges in court. The opening sentence of this article was: "The Supreme Court could *end* many Establishment

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<sup>12</sup> 137 S. Ct. 2012 (2017).

<sup>13</sup> 841 F.3d 848 (10th Cir. 2016).

<sup>14</sup> 750 F.3d 184 (2d Cir. 2014).

<sup>15</sup> Jordan Lorence & Allison Jones, *Nothing To Stand On: "Offended Observers" and the Ten Commandments*, 6 ENGAGE 138 (2005), <https://www.wc.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRVPMQiLsSwKZCmG3!/document>.

Clause disputes by enforcing Article III standing requirements on those bringing the lawsuits, who many times have no more stake in the issues than being ‘offended observers.’”<sup>16</sup> The article described these so-called offended observers as “delicate plaintiffs with eggshell sensitivities” and argued that “oversights” regarding their standing “provide a loophole for every village secularist to charge into court with the ACLU and challenge governmental acknowledgements of religion, no matter how passive or benign”—allowing these suits to “clutter the federal courts.”<sup>17</sup>

- a. Why is it desirable for the Supreme Court and other federal courts to “end” more Establishment Clause disputes through standing doctrine?

I assisted with this article as a law student during a summer internship. As I testified before the Committee, the thesis and tone of the article were set by my co-author, an experienced First Amendment attorney. The article discussed a Supreme Court decision, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), in which the Court held that the standing requirements of Article III, including the requirement of a particularized injury, apply equally to Establishment Clause cases. Courts have an obligation to assure themselves of their jurisdiction, including standing under Article III, before deciding the merits of any case. The article discussed how that holding might apply to passive religious monument cases (in contrast to cases where individuals feel pressured to make some religious observance).

- b. Has federal standing doctrine changed in any significant ways since 2005 that would affect the ability of the plaintiffs described in your article to bring suit?

The question of Article III standing in what are called “offended observer” Establishment Clause cases is an unresolved question that litigants continue to raise before the Supreme Court. Most recently, the City of Bloomfield, New Mexico sought certiorari on this issue in a religious monument case. Members of Congress, including members of this Committee, filed an amicus brief urging the Court to grant certiorari and arguing that “offended observer” standing conflicts with *Valley Forge*.

- c. In your October 17 testimony, you told Senator Kennedy that this is “definitely an open question under the law.” Do you think federal courts, including the Fourth Circuit, should modify standing doctrine to align with the views expressed in this article?

Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting because cases raising this question are pending or impending in court.

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<sup>16</sup> *Id.* at 138 (emphasis added).

<sup>17</sup> *Id.*

10. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>18</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>19</sup> These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>20</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>21</sup>

a. Do you believe there is implicit racial bias in our criminal justice system?

Sadly, racism continues to exist in our country, both in explicit and implicit forms. Our institutions, including the criminal justice system, are not immune.

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I am generally familiar with the topic, but I have not studied the issue.

11. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.<sup>22</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>23</sup>

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is

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<sup>18</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

<sup>19</sup> *Id.*

<sup>20</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

<sup>21</sup> *Id.*

<sup>22</sup> Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

<sup>23</sup> *Id.*

a direct link, please explain your views.

Please see my response to question 11.a above.

12. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

13. Do you believe that *Brown v. Board of Education*<sup>24</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As a nominee to an inferior court, I must view all binding precedent of the Supreme Court, including *Brown*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *United States v. Hernandez*, 276 Fed. App. 291, 296 (4th Cir. 2008) (per curiam) (“It goes without saying that the decisions of the Supreme Court bind the circuit courts of appeals.”).

14. Do you believe that *Plessy v. Ferguson*<sup>25</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. In *Brown v. Board of Education* and decisions following it, the Supreme Court has rejected *Plessy*. If I am confirmed, *Brown* and all Supreme Court precedents will be binding on me, and I will follow them faithfully. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *United States v. Hernandez*, 276 Fed. App. 291, 296 (4th Cir. 2008) (per curiam) (“It goes without saying that the decisions of the Supreme Court bind the circuit courts of appeals.”).

15. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

My responses are my own. I believe that Canons 1 and 3 of the Code of Conduct for United States Judges, which require integrity, independence, and impartiality, counsel in favor of a lower-court nominee such as myself not expressing an opinion on the correctness of binding Supreme Court precedent.

16. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”<sup>26</sup> Do you believe that immigrants, regardless of

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<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> 163 U.S. 537 (1896).

<sup>26</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

status, are entitled to due process and fair adjudication of their claims?

Canon 5 of the Code of Conduct for United States Judges prohibits judicial nominees from making political statements. It would be inappropriate for me to comment on the President's statement. Further, cases concerning federal immigration policy are pending and impending in courts around the country, therefore Canon 3(a)(6) also prohibits me from commenting.

**Questions for the Record from Senator Kamala D. Harris  
Submitted October 24, 2018  
For the Nomination of**

**Allison Jones Rushing, to the U.S. Court of Appeals for the Fourth Circuit**

1. For over a decade, you have maintained a relationship with the Alliance Defending Freedom (ADF). In 2005, you worked there as a legal intern. You published an article with an ADF attorney. While in private practice, you have written several briefs supporting ADF's positions in litigation. ADF forcefully opposes abortion, calling women who choose to terminate their pregnancies "misguided and misinformed." ADF is fighting to overturn *Roe v. Wade* and for courts to recognize that fetuses are persons entitled to constitutional protection. It also advocates for the defunding of Planned Parenthood.

a. **Were you aware of ADF's opposition to abortion at any point before or during your relationship with ADF?**

Regarding the Alliance Defending Freedom (ADF), I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. As regards the alleged positions attributed to ADF, I am not aware of all of ADF's policy or litigating positions, and for those positions of which I am aware, I do not recall when I learned of them. I do not work for ADF or have any official role with them. If I am confirmed as a judge on the Fourth Circuit, I will be bound by the precedent of the Supreme Court and the Fourth Circuit, including *Roe v. Wade* and its progeny, among others. I will faithfully follow those precedents.

b. **Have you ever, in any way, assisted with or contributed to ADF's advocacy against abortion or contraception rights? If the answer is "yes," please explain the nature and scope of your assistance.**

No.

2. In *Whole Woman's Health* in 2016, the U.S. Supreme Court invalidated two provisions of Texas law that imposed new restrictions on health care facilities that provide abortions. After the law was passed, the number of those facilities in Texas dropped in half, severely limiting access to health care for the women of Texas. ADF submitted amicus briefs to both the Fifth Circuit and the Supreme Court arguing that the Texas law did not violate women's rights to full reproductive healthcare.

a. **Was *Whole Woman's Health* correctly decided?**

As a nominee to an inferior court, I must view all binding precedent of the Supreme Court, including *Whole Woman's Health*, as correctly decided in the

sense that it will be binding on me if I am confirmed, and I will follow it faithfully.

- b. **Did *Whole Woman's Health* change or clarify the “undue burden” test used to evaluate laws restricting access to abortion? If so, how?**

*Whole Woman's Health* reaffirmed the undue burden standard set forth in *Casey*. *Whole Woman's Health*, like *Casey*, is a precedent of the Supreme Court that is binding on lower court judges.

- c. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

As a nominee to a lower court, I will be bound to follow the precedent of the Supreme Court in determining whether a law places an undue burden on a woman's right to choose. I will faithfully follow the precedent of the Supreme Court with respect to the facts and arguments that may be considered in that analysis.

3. ADF also opposes same-sex marriage, civil unions, and adoption by same-sex couples. ADF, for example, has filed amicus briefs urging the U.S. Supreme Court to uphold anti-LGBT laws defining marriage as the union of one man and one woman in both *Windsor* and *Obergefell*. In addition, ADF has drafted model legislation—the Student Physical Privacy Act—for many states' so-called “bathroom bills,” the latest example of the organization's long record of advocating against LGBT rights.

- a. **Were you aware of ADF's opposition to same-sex marriage at any point before or during your relationship with ADF?**

As I stated previously regarding ADF, I participated in a summer internship as a law student, and since then I have spoken to law students about clerking and careers, as I have done for other organizations. As regards the alleged positions attributed to ADF, I am not aware of all of ADF's policy or litigating positions, and for those positions of which I am aware, I do not recall when I learned of them. I do not work for ADF or have any official role with them. If I am confirmed as a judge on the Fourth Circuit, I will be bound by the precedent of the Supreme Court and the Fourth Circuit, including *Windsor* and *Obergefell*, among others. I will faithfully follow those precedents.

- b. **Have you ever, in any way, assisted with or contributed to ADF's advocacy against same-sex marriage? If the answer is “yes,” please explain the nature and scope of your assistance.**

No.

- c. **Have you ever, in any way, assisted with or contributed to ADF’s advocacy against other LGBT rights? If the answer is “yes,” please explain the nature and scope of your assistance.**

No.

4. In 2013, you gave a speech about religion and morality in the U.S. Supreme Court’s LGBT-related jurisprudence. Among other things, you stated that the *Windsor* majority, which held the Defense of Marriage Act unconstitutional, “chose to write the opinion in a unique way that calls it bigotry to believe homosexuality does not comport with Judeo-Christian morality.” Moreover, you said Justice Scalia’s dissent had pointed out that “citizens who disagree with same-sex marriage on religious or moral grounds have now been marked by the Court’s opinion as motivated by hatred of their fellow man.”

- a. **Were you saying, as ADF has, that *Windsor* was incorrectly decided?**

No. For this talk, I was asked to explain the Supreme Court’s decision in *United States v. Windsor*, 570 U.S. 744 (2013), to an audience of non-lawyers as part of a presentation at a church. I described both the majority and dissenting opinions and did not express an opinion on the case or the Court’s holding. Both of the partial quotations in your question are part of the talk explaining the dissenting opinion.

- b. **Do you believe that LGBT rights cannot be reconciled with religion?**

Please see my response to question 4.a above.

5. Building on *Windsor*, the U.S. Supreme Court in *Obergefell* held that same-sex couples have a constitutional right to marry.

- a. **Does the right to marry include ensuring that those who have that right may exercise it equally?**

The Fourteenth Amendment requires that same-sex couples be afforded the right to marry “on the same terms as accorded to couples of the opposite sex.” *Obergefell*, 135 S. Ct. at 2607. To the extent that the question implicates pending or impending litigation, Canon 3(a)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

- b. **If a state or county makes it harder for same-sex couples to marry than for heterosexual couples to marry, are those additional hurdles constitutional?**

Please see my response to question 5.a above.

- c. **If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

Please see my response to question 5.a above.

6. In deciding how closely to look at discriminatory laws, the U.S. Supreme Court often considers two things: (1) is the group being discriminated against defined by immutable characteristics, and (2) has the group faced discrimination in the past. If a group has those characteristics, the Court has said it should be more suspicious of laws that harm them.

- a. **Is being gay or lesbian an immutable characteristic?**

The question of what level of scrutiny applies to classifications based on sexual orientation is pending and impending in courts around the country, therefore Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

- b. **Have gay and lesbian Americans been subject to discrimination in the past?**

Please see my response to question 6.a above.

- c. **Is being transgender an immutable characteristic?**

Please see my response to question 6.a above.

- d. **Have transgender Americans been subject to discrimination in the past?**

Please see my response to question 6.a above.

- e. **Given that LGBT Americans have faced discrimination in the past, do you believe they should be protected by federal anti-discrimination laws?**

Please see my response to question 6.a above. Further, whether particular federal anti-discrimination laws should exist is a political question for Congress.

7. Many employers require workers to give up the right to file lawsuits against the employer in court, as a condition of getting the job. These agreements are known as forced arbitration clauses. More than 60 million American workers are bound by these kinds of agreements. Unlike a court proceeding, arbitration is hidden from public scrutiny and usually cannot be reviewed by a court. This means arbitration keeps the public from learning about employers who violate the law by discriminating against workers, sexually harassing them, or cheating them out of wages. In 2018, you argued to the U.S. Supreme Court that forced arbitration clauses are enforceable. The Court accepted your argument. Justice Ginsburg dissented, calling the Court's decision "egregiously wrong" under the governing statutes, and predicting it would lead to "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

- a. **Do you believe there is merit to Justice Ginsburg’s point that forced arbitration may lead to “the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers”?**

In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), I represented the interests of my clients in the Supreme Court. In that case, the employer and employees had a pre-existing agreement to arbitrate all claims on an individual, rather than collective, basis. Among other things, the agreement provided that the employer would cover many of the fees and costs associated with arbitration, and the agreement expressly preserved employees’ right to file charges with the Equal Employment Opportunity Commission or any other administrative agency. The parties’ agreement was enforceable under the Federal Arbitration Act (FAA). The question presented in the case was whether the National Labor Relations Act (NLRA) conflicted with the FAA so as to prohibit enforcement. On behalf of my clients, I argued that Supreme Court precedent indicated that the FAA and the NLRA could be harmonized. The Supreme Court held that the NLRA did not contain a congressional command overriding the FAA’s command to enforce arbitration agreements according to their terms. The Court disagreed with Justice Ginsburg’s dissenting opinion. As a nominee to an inferior court, I must view all precedent of the Supreme Court, including *Epic Systems*, as correctly decided in the sense that it will be binding on me if I am confirmed, and I will follow it faithfully.

- b. **In making your arguments to the Supreme Court, did you have any concerns that the arbitration clauses you were advocating for may deny individuals access to the courts to enforce their rights under employment laws?**

Please see my response to question 7.a above.

8. According to the Brookings Institution, for the past 30 years, the average age of circuit court judges upon appointment has been 50 years old.<sup>1</sup>
- a. **Why do you think federal circuit judges are appointed at an average age of 50?**

I have not researched the accuracy of, or reasons for, this statistic.

9. You currently practice as a partner at the law firm Williams & Connolly. Today, there are 109 partners at Williams & Connolly, including renowned lawyers like Brendan Sullivan (76) and Robert Barnett (72).
- a. **As Senator Kennedy asked at your nominations hearing, why are you more qualified to serve as a federal circuit judge than other partners at Williams & Connolly who have more experience in the practice of law?**

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<sup>1</sup> <https://www.brookings.edu/research/judicial-nominations-in-the-bush-and-obama-administrations-first-nine-months/>

I am proud of the letters of support for my nomination submitted to the Committee by literally hundreds of attorneys who know me and believe I am qualified to serve as a federal appellate judge. Significantly, virtually all of my partners at Williams & Connolly LLP have signed a letter supporting my nomination. Attorneys who clerked with me at the Supreme Court, from every active Justice's chambers, have submitted a letter of support. The Committee also has received letters from a diverse group of female attorneys, from a district attorney, from a former public defender, from clerks, and from North Carolinians of differing political persuasions, all of whom believe I possess the experience, integrity, and temperament to serve as a federal court of appeals judge. I am also proud to have the support and confidence of both North Carolina senators, Senator Burr and Senator Tillis.

Preparation for the federal appellate bench is not merely a matter of years but of accruing the relevant experience. I have extensive experience relevant to the work of a federal appellate judge. I clerked for judges on two different federal courts of appeals (the Tenth Circuit and the D.C. Circuit), in addition to clerking at the Supreme Court. In private practice, I have filed over 45 briefs in the Supreme Court and have worked on well over 50 appeals, including arguing in multiple different federal circuit courts, state appellate courts, and a state court of last resort. I have litigated a wide variety of cases that reflects the variety of subjects that come before the courts of appeals. For example, I have handled criminal cases and prisoner litigation, cases under the bankruptcy and tax laws, intellectual property, products liability, commercial litigation, qui tam actions, proceedings under various federal statutes, and constitutional issues. In addition to my appellate work, I have litigated many cases in the federal district courts, including filing briefs and presenting oral arguments. Among other things, I have litigated four cases all the way to verdict in the district courts. Based on this record, and despite its usual years-in-practice rule, a majority of the American Bar Association's Standing Committee on the Federal Judiciary is of the opinion that I am "qualified," and a minority of the committee determined that I am "well qualified," to serve as a federal appellate judge.