

Senator Chuck Grassley
Questions for the Record

Stuart Delery

Nominee, Assistant Attorney General, Civil Division, U.S. Department of Justice

- 1. While at WilmerHale, you co-authored an amicus brief in *Boy Scouts of America v. Dale*. In the brief you argued that “anti-gay discrimination by organizations like Boy Scouts of America grants to each rising generation the tacit permission to hate, sowing the seeds of violence researchers describe as ‘epidemic’ in schools.”**

- a. Do you think the Boy Scouts of America is an organization that sows seeds of hatred and violence? Please explain your response, particularly addressing the statement from your brief.**

Response: In 2000, several other lawyers and I filed an *amicus* brief on behalf of a group of youth-focused organizations, including the National 4-H Council. The brief presented the position of the client organizations, which was based on the framework for evaluating the First Amendment right of expressive association established by the Supreme Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The brief argued that the application of the New Jersey public accommodations law at issue was supported by compelling state interests. Among other things, the brief surveyed studies of violence against, and suicide and other self-destructive behavior by, gay and lesbian youth, and explained why the client organizations believed that exclusionary policies by governments and prominent non-governmental organizations contribute to these harms.

The sentence from the brief quoted in the question referred to the position of the client organizations on the collateral, even unintended, effects that can result from exclusionary policies of respected organizations like the Boy Scouts. Indeed, the opening lines of the brief made clear the clients’ view that the Boy Scouts is a vital and beneficial institution:

Boy Scouts of America (‘BSA’) is one of the great organizations devoted to the growth and development of America’s youth. For nearly a century, BSA has provided incalculable benefit to generations of boys, teaching millions how to put up tents and survive in the wilderness, and how to be productive citizens in our civil society. BSA has sought and forged a close relationship with government at all levels, from Congress to towns and schools across the country, and it holds a special place in the life of many communities.

I myself was a Cub Scout growing up and learned first-hand the many benefits that Scouting has for youth.

If I am fortunate enough to be confirmed, I will make decisions as Assistant Attorney General based not on positions and arguments I previously advanced on behalf of my clients while in private practice, but on the long-term institutional interests of the United States and established legal principles.

- b. Do you agree or disagree with the Supreme Court’s decision that completely rejected your argument and instead defined and respected the implicit First Amendment right of association? Please explain your response.**

Response: In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court applied the framework it had established in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and held that New Jersey could not constitutionally apply its public accommodations law to require the Boy Scouts to accept an openly gay man as a scoutmaster because the Boy Scouts were an expressive association, the forced inclusion of the leader would impermissibly burden the organization’s expression, and the burden could not be justified by the proffered state interests. If confirmed, I would follow this precedent, as well as the Supreme Court’s other decisions on the First Amendment right of expressive association and principles of *stare decisis*, in carrying out the obligations of the office.

- c. Can you explain your views on how the first amendment right to association works within a private, not-for-profit group like the Boy Scouts of America? If confirmed, what will you do to protect such rights?**

Response: The Department of Justice has an obligation to safeguard the First Amendment rights of individuals and organizations, and I take that obligation very seriously. If I am fortunate enough to be confirmed, I will represent the interests of the United States in court vigorously and responsibly, and I will adhere to established legal principles in doing so. In particular, I will consider the litigating positions of the Civil Division carefully to make sure they appropriately reflect freedoms of association, speech, religion, and other rights protected by the First Amendment.

In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), the Supreme Court recognized that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” This freedom of expressive association “plainly presupposes a freedom not to associate,” such that a group may only be required to accept members who would impair the ability of the group to express its views in narrow circumstances based on

“compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* at 623. *See also Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000); *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). If confirmed as Assistant Attorney General, I would follow this precedent in carrying out the obligations of my office and would take it into account as appropriate in conducting litigation on behalf of the United States.

- d. Pleases explain your views on whether or not it is appropriate for the courts to force private entities like the Boy Scouts to adopt and embrace policies that convey viewpoints to which they are clearly and fundamentally opposed.**

Response: Under established Supreme Court precedent, a private group may only be required to accept members who would impair the ability of the group to express its views in narrow circumstances based on “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000); *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). In *Dale*, the Supreme Court applied the framework it had established in *Roberts* and held that New Jersey could not constitutionally apply its public accommodations law to require the Boy Scouts to accept an openly gay man as a scoutmaster because the Boy Scouts were an expressive association, the forced inclusion of the leader would impermissibly burden the organization’s expression, and the burden could not be justified by the proffered state interests. If confirmed as Assistant Attorney General, I would follow this precedent in carrying out the obligations of my office and would take it into account as appropriate in conducting litigation on behalf of the United States.

2. You have been deeply involved in the cases regarding the Defense of Marriage Act.

- a. Please describe your participation in any internal policy or strategy discussions regarding the Administration’s decision to abandon its defense of DOMA?**

Response: I did not participate in the internal discussions and decision-making leading to the decision by the Attorney General and the President, reflected in the Attorney General’s letter to congressional leaders dated February 23, 2011, that Section 3 of the Defense of Marriage Act violates equal protection as applied to same-sex couples married under state law, and that the Department of Justice would

cease defense of Section 3. I participated in the DOMA litigation after I joined the Civil Division in March 2012.

b. Please describe your views on the Administration's position that no reasonable argument could be made in defense of DOMA's constitutionality.

Response: *United States v. Windsor*, No. 12-307, remains pending in the Supreme Court, and I am not in a position to address these issues outside of my ongoing role representing the United States in that case. As explained in response to the previous question, I did not participate in the internal discussions and decision-making leading to the decision by the Attorney General and the President, reflected in the Attorney General's letter to congressional leaders dated February 23, 2011, that Section 3 of the Defense of Marriage Act violates equal protection as applied to same-sex couples married under state law, and that the Department of Justice would cease defense of Section 3.

I do not understand the Administration to have taken the position that no reasonable arguments can be made in defense of DOMA's constitutionality. As reflected in the Attorney General's February 2011 letter to congressional leaders in accordance with 28 U.S.C. § 530D, the President and the Attorney General determined that classifications based on sexual orientation warrant heightened scrutiny under the equal protection component of the Fifth Amendment, and that Section 3 of DOMA is unconstitutional under that standard. The President and the Attorney General therefore determined that this was one of the rare occasions in which declining to defend a federal statute was the proper course. The Attorney General's letter further stated, however, that "[i]f asked . . . for the position of the United States in the event [the] courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard." In the Brief for the United States filed in the Supreme Court in *Windsor*, the Department said: "The government has concluded that heightened scrutiny governs classifications based on sexual orientation and that DOMA Section 3 cannot be sustained under that standard. If the Court disagrees and applies rational-basis review, the government has previously defended Section 3 under rational-basis review, and does not challenge the constitutionality of Section 3 under that highly deferential standard."

3. **Prior to the abandonment decision, the Obama administration and Department of Justice defended the Act on multiple occasions. In fact, the Attorney General’s letter to Speaker Boehner admitted as much. Attorney General Holder wrote:**

“Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.”

Given that the Department of Justice previously (and recently) defended the statute and that circuit courts accepted and adopted the its defense, do you sincerely believe that no reasonable argument can be made to defend the statute? Please explain.

Response: As reflected in the Attorney General’s February 2011 letter to congressional leaders under 28 U.S.C. § 530D, the President and the Attorney General determined that classifications based on sexual orientation warrant heightened scrutiny under the equal protection component of the Fifth Amendment, and that Section 3 of DOMA is unconstitutional under that standard. The President and the Attorney General therefore determined that this was one of the rare occasions in which declining to defend a federal statute was the proper course. The Attorney General’s letter further stated, however, that “[i]f asked . . . for the position of the United States in the event [the] courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard.” In the Brief for the United States filed in the Supreme Court in *Windsor*, the Department said: “The government has concluded that heightened scrutiny governs classifications based on sexual orientation and that DOMA Section 3 cannot be sustained under that standard. If the Court disagrees and applies rational-basis review, the government has previously defended Section 3 under rational-basis review, and does not challenge the constitutionality of Section 3 under that highly deferential standard.”

4. **If the Attorney General concludes that another statute should not be defended, but you disagree, what will you do in your position as Assistant Attorney General, if you are confirmed?**

Response: The Department of Justice has a longstanding practice across Administrations of vigorously defending federal statutes, even if the Department disagrees with a particular statute on policy grounds, so long as reasonable arguments can be made in support of their constitutionality. (A statute that raises separation of powers issues and situations in which the President determines that a statute is unconstitutional present special circumstances.)

This foundational principle is consistent with the rule of law, affords appropriate respect to Congress as a co-equal branch of government, and recognizes the strong presumption of constitutionality that attaches to statutes that have been enacted by Congress and signed into law by the President. If I am fortunate enough to be confirmed, I will continue to discharge my responsibility to defend federal statutes in a manner that is consistent with the Department's established, bipartisan practice – a responsibility that I view as one of the most important of the office – as I have during my tenure over the past 15 months as Acting Assistant Attorney General.

Ultimately, the Attorney General has the statutory responsibility to direct the litigation of the United States; as a general matter, other officials in the Department exercise the Attorney General's delegated authority. *See, e.g.*, 28 U.S.C. §§ 516, 519. This question presupposes an extremely rare situation: one in which consideration is being given to declining to defend a statute. Should such a situation arise, I expect that I would have an opportunity to give the position of the Civil Division. In developing those views, I would consult with the many exceptional career lawyers who work in the Division and have vast expertise on issues related to the government's civil litigation. If confirmed, I will give my candid advice on all questions, even when (and indeed especially when) it appears that the Attorney General or other senior officials may have a different view. The Department's leadership would expect nothing less. The Committee should have confidence that I will examine all sides of an issue with fairness and respect, will exercise my best independent judgment to identify and defend the long-term institutional interests of the United States in accordance with established legal principles, and will act accordingly under the circumstances.

5. You argued in both the Proposition 8 and DOMA briefs that “sexual orientation” is a suspect classification that warrants heightened scrutiny. How would you legally define “sexual orientation”?

Response: This issue is currently pending before the Supreme Court in *United States v. Windsor*, No. 12-307, and *Hollingsworth v. Perry*, No. 12-144, in which I am representing the United States as counsel, and I am therefore not in a position to address the issue outside the context of my ongoing role representing my client in these pending matters. The position in the Department's briefs in these cases reflects the determination by the President and the Attorney General that classifications based on sexual orientation warrant heightened equal protection scrutiny. Under established Supreme Court precedent, one of the factors relied on by the Court to determine whether to apply heightened scrutiny to a classification that singles out a particular group is whether the disadvantaged class exhibits “obvious, immutable, or distinguishing characteristics that define them as a discrete group.” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (citation omitted). The Supreme Court provided in *Lawrence v. Texas*, 539 U.S. 558, 562, 576-77 (2003), that sexual orientation is a core aspect of a person's

identity, and that its expression is an “integral part of human freedom.” The briefs for the United States in *Windsor* and *Perry* argue that sexual orientation is a sufficiently discernible characteristic to define a suspect classification. If confirmed as Assistant Attorney General, I will follow whatever legal definition of sexual orientation or other guidance the Supreme Court may provide in its decisions of those cases and will take that precedent into account as appropriate in conducting litigation on behalf of the United States.

6. **I’d like to discuss a recent case before the Federal Circuit that your division has been handling: *National Organization of Veterans Advocates v. Secretary of Veteran Affairs*. Earlier this year, the Federal Circuit threatened sanctions against the government for repeatedly making representations to the court when in fact the represented agency, in this case the Department of Veterans Affairs, continued to act contrary to those representations.**

a. How involved were you in this case?

Response: I had no personal involvement in this case prior to the Federal Circuit’s Order to Show Cause dated March 21, 2013, to the best of my knowledge. I was briefed on the court’s Order and the efforts of the Civil Division lawyers to respond and to remedy the issue in the following weeks.

b. When did you first become aware of the VA’s failure to comply with the representations made to the court on its behalf?

Response: I first became aware of this issue after the Federal Circuit issued its Order to Show Cause.

c. Please explain why there was such a disparity between the promises made by your division’s attorneys and the conduct of the VA.

Response: In this appeal, the National Organization of Veterans’ Advocates (NOVA) challenged the Secretary of Veterans Affairs’ promulgation of a regulation. My understanding is that the Department of Justice, after reviewing the case, informed the VA that it would not defend the regulation because it had not been properly promulgated. In addition to agreeing to withdraw the regulation, the VA agreed in the interim not to apply the regulation to future cases in the administrative appeals process. As counsel for the VA, DOJ represented to the court that the VA had informed the Department that the regulation would not be applied prospectively. Those representations were based on the assurances by the VA that it would discontinue application of the rule, and the Department of Justice relied on those assurances when it sought extensions of time from the court so that the VA could

repeal the rule without requiring the court to decide the issue. As I understand it, senior VA leadership instructed administrative judges to stop applying the challenged regulation. Some administrative judges, however, did not stop applying the rule by the date represented to the court. That fact led the court to consider sanctions against the VA and its officials for continuing to apply the rule. The court did not suggest that the DOJ lawyers handling the court case had acted inappropriately in any way. In its response to the Show Cause Order, the VA made clear that it “understands and appreciates the significance of [its] commitments and deeply regrets its failure to abide by them.” *See* Response (May 20, 2013), at 3. This response included a plan, submitted with the support of NOVA, for identifying and rectifying the harms caused by this issue. The court “express[ed] satisfaction with the Government’s Response and its timeliness” and found that “the Proposed Plan appears to address in a creative and comprehensive way most of the problems for veterans” created by the VA’s failure to stop application of the challenged rule. *See* Order (June 10, 2013), at 2.

- d. Is this sort of issue of agency behavior at odds with the Department of Justice’s representation common? Is this an isolated or unique occurrence? Please explain.**

Response: I take very seriously the Department of Justice’s – and all attorneys’ – duty of candor and honesty to courts. Our advocacy on behalf of the United States in particular is most effective when it builds upon the reservoir of trust and respect that the Department has established over many years. That is why our lawyers work closely with their agency counterparts to make sure that factual representations are complete and accurate. Fortunately the kind of situation that occurred during the VA case has been rare, including during my tenure in the Civil Division.

- e. The reason the court in this case was so alarmed by the government’s conduct was that the VA continued to act contrary to its repeated assurances to the court. Although the court recently gave its preliminary approval of the government’s proposed remedy, subject to a few clarifications, what changes have occurred in this specific case that will ensure to the court and to this committee that the VA will comply with the representations you, as a DOJ attorney, have made to the court through your most recent filing?**

Response: My understanding is that when the plaintiff contacted the Civil Division lawyers on the case about the VA’s apparent failure to comply with its representations, our lawyers immediately brought the issue to the VA’s attention and insisted that the agency stop applying the challenged rule. Following the court’s Order to Show Cause, Civil Division lawyers worked with VA to develop a plan for identifying and rectifying the harms caused by this issue, and coordinated on behalf

of VA with NOVA to reach an acceptable proposal to resolve all harm caused by the failure by some administrative judges to cease application of the rule.

The VA's plan was submitted to the court, with NOVA's support, on May 20, 2013. The court filing said: "VA never intended to mislead the Court or NOVA, nor did it intend to prejudice any veteran's claims. VA undertook its commitment to cease applying the 2011 Rule with sincerity and deeply regrets that it fell short of that commitment. VA also never intended to evade responsibility for remedying any harm resulting from application of the 2011 Rule. VA has collaborated with NOVA in carefully drafting this Proposed Plan in an effort to ensure that any potentially affected appellant receives an opportunity for a new decision and a new hearing, including an opportunity to submit additional evidence." *See* Response (May 20, 2013), at 4-5. After reviewing this plan, the court "express[ed] satisfaction with the Government's Response and its timeliness" and found that "the Proposed Plan appears to address in a creative and comprehensive way most of the problems for veterans" created by the VA's failure to stop application of the challenged rule. *See* Order (June 10, 2013), at 2.

f. What efforts have you taken to ensure that this sort of issue doesn't occur again with respect to the VA?

Response: As noted above, my understanding is that when the plaintiff contacted the Civil Division lawyers on the case about the VA's apparent failure to comply with its representations, our lawyers immediately brought the issue to the VA's attention and insisted that the agency stop applying the rule. Following the court's Order to Show Cause, Civil Division lawyers worked with VA to develop a plan for identifying and rectifying the harms caused by this issue, and coordinated on behalf of the VA with NOVA to reach an acceptable proposal to resolve all harm caused by the failure by some administrative judges to cease application of the invalid rule. The lawyers also worked with the VA to file a statement with the court acknowledging the agency's obligation to follow through on the commitments it makes to the court and expressing regret for its failure to do so. I take very seriously the Department's obligation of candor and honesty to the courts. If confirmed, I will do everything in my power to safeguard the Department's hard-earned reservoir of trust, including through moving quickly and decisively to address any concerns that arise.

g. What steps have you taken to ensure that this issue doesn't arise between other executive agencies and the Department of Justice during future court action?

Response: As noted above, the Department of Justice's duty of candor and honesty to courts is a solemn obligation, and constant vigilance to meeting that obligation makes our advocacy on behalf of the United States most effective. That is among the

reasons why our lawyers work closely with their agency counterparts to make sure that factual representations are complete and accurate. If I am confirmed, I will continue to work with agency general counsel and other officials to maintain the high standards of candor that my predecessors and generations of career lawyers in the Department have set.

7. You have been involved in the Justice Department’s challenge of state immigration laws, specifically the cases involving Arizona and Alabama’s State laws, arguing that immigration legislation and enforcement lies in the sole purview of the federal government.

Do you believe States have any interest or power to protect themselves from the effects of illegal immigration or from the lack of enforcement of immigration statutes by the Federal Government?

Response: In *United States v. Arizona*, 132 S. Ct. 2492, 2510 (2012), the Supreme Court confirmed that “[t]he National Government has significant power to regulate immigration” and found unconstitutional state laws that conflicted with federal law and interfered with federal policies and priorities as reflected in statutes that Congress has passed. That said, state and local governments undoubtedly have legitimate interests in certain matters concerning aliens and retain some authority to act on certain matters that may affect aliens and immigration. In its briefs in these cases, the Department has made clear that states serve as critical partners in assuring the effective enforcement of the federal immigration laws (although, as the Supreme Court confirmed, federal law also makes clear that such state efforts must proceed in cooperation with the federal government). *See Arizona*, 132 S. Ct. at 2508 (“Consultation between federal and state officials is an important feature of the immigration system.”). The issue in the preemption cases is that federal law precludes state efforts to directly regulate immigration or to interfere with federal immigration law and policy. As the Supreme Court said, a state “may have understandable frustrations with the problems caused by illegal immigration . . . but the State may not pursue policies that undermine federal law.” *Arizona*, 132 S. Ct. at 2510. If I am fortunate enough to be confirmed, I will guide litigation and make decisions as Assistant Attorney General based on the long-term institutional interests of the United States and established legal principles.

8. You argued on behalf of the admissions policies in *Gratz v. Bollinger* and *Grutter v. Bollinger* that both explicitly consider a person's race as a factor in determining whether to admit them to public universities.

- a. Setting aside the Supreme Court's decisions, do you personally believe the Constitution requires the government to be color blind? Please explain.

Response: This question, like the others that follow in this section, asks about my personal views on legal issues, and relates to legal positions I took on behalf of clients while I was in private practice. If I am fortunate enough to be confirmed, whatever personal views I might have respecting any legal issue, like positions and arguments I previously advanced on behalf of clients before coming to the Department of Justice, will play no role in the discharge of my obligations. Instead, I will base my decisions on the law as Congress has enacted it and the courts have determined it, and will consult within the Department and with other agencies to determine what position is in the long-term institutional interests of the United States. I understand that I will have a special obligation to represent vigorously the broad interests of the United States to the best of my ability even if doing so conflicts with my own views on a particular matter, and I am firmly committed to doing so – as I have done during my service as Acting Assistant Attorney General.

The Fourteenth Amendment to the Constitution prohibits the denial of “equal protection of the laws,” which applies to government actions taken on the basis of race. As is now well-established, the Constitution requires that, regardless of the motivation, government may treat people differently because of their race only for the most compelling reasons, and only through means that are specifically and narrowly framed to accomplish those purposes. All government action based on race is inherently suspect and therefore subject to the most exacting judicial scrutiny.

- b. Do you personally believe that the Constitution permits the use of race by the government in determining how to treat an individual? Please explain.

Response: The protections of the Fourteenth Amendment restrict government actions that treat people differently because of their race. As the Supreme Court made clear in *Grutter*, “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” 539 U.S. at 327 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995)). Therefore, “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal

treatment under the strictest judicial scrutiny.” *Adarand*, 515 U.S. at 224. The Supreme Court has established that, in certain limited circumstances, such treatment may nonetheless be lawful, but only where the relevant government action is undertaken to promote a compelling governmental interest, and only where the government action is narrowly tailored to achieve that interest. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007); *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227. If confirmed as Assistant Attorney General, I would follow this established precedent in discharging my obligations and would take it into account as appropriate in conducting litigation on behalf of the United States.

- c. **In *Grutter*, Justice O’Connor stated that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” Do you agree with Justice O’Connor? Please explain.**

Response: The Court in *Grutter* made clear that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.” 539 U.S. at 327. Context is important, in part, because the Constitution only allows a race-based classification where such a classification is narrowly tailored to promote a compelling governmental interest. In certain situations, the passage of time may bring about changed circumstances that heighten or diminish the importance of an interest promoted by a particular program, or the need for race-conscious government action to accomplish the interest.

The passage quoted in the question seems to reflect this aspect of the federal courts’ typical strict scrutiny analysis:

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

539 U.S. at 343 (citations omitted). In context, the referenced quote represents a prediction that changed circumstances may alter the necessity of the consideration of race by the law school in admissions to pursue the compelling interest that supported the Court’s decision. The Court has therefore made clear that, in cases involving

classifications based on race, it is important to assess whether changed circumstances affect whether a program continues to promote a compelling governmental interest and remains necessary to do so.

- d. If, in the future, race based admissions policies are no longer necessary, will they then become unconstitutional? Please explain.**

Response: The Supreme Court has made clear that the government may not employ race-based classifications unless those classifications are narrowly tailored to promote a compelling governmental interest. So, in the absence of a compelling interest, a governmental entity may not employ a race-based admissions policy (whether in the future or in the present). Noting that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)), the *Grutter* Court emphasized that “race-conscious admissions policies must be limited in time” and that “[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity,” *id.* at 342.

- e. If something will be unconstitutional 25 years from now, how can it be constitutional today?**

Response: As noted above, the Supreme Court has made clear that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.” *Grutter*, 539 U.S. at 327. Thus, in certain situations, changed circumstances may heighten or diminish the importance of an interest promoted by a particular program, and may otherwise affect the analysis of the constitutionality of that program. The Supreme Court has recognized this principle in a variety of contexts. *See, e.g., Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924).

- 9. Please describe your involvement in the drafting of any “White Paper” related to the use of unmanned aerial vehicles to conduct targeted killings as well as your involvement in any FOIA litigation related to that issue.**

Response: I believe the question refers to a “Department of Justice White Paper” marked “Draft,” titled “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” and dated November 8, 2011. The Department released this document publicly in February 2013 and explained that

the draft was prepared as a possible vehicle to explain the Administration's legal views about the subject matter of the paper, but was not finalized; instead, on March 5, 2012, the Attorney General gave a speech at Northwestern University School of Law to convey those views. I was not the author of the draft "White Paper," but I led the drafting of the Attorney General's Northwestern speech when I worked in his office.

Under my supervision, the Civil Division is currently handling several FOIA cases related to the use of unmanned aerial vehicles in lethal counterterrorism operations. I argued one of those cases in the court of appeals, *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), and have otherwise been involved in briefing the cases.