Nomination of Aileen M. Cannon to the United States District Court for the Southern District of Florida
Questions for the Record
Submitted August 5, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. Among the ten most significant cases you listed on your Senate Judiciary Questionnaire was *United States v. Gibbs*, a criminal case in which you "authored the government's brief on appeal and presented oral argument before the U.S. Court of Appeals for the Eleventh Circuit." At a suppression hearing in the case, there was a dispute over whether officers drew their weapons: The officers testified that they did not; Mr. Gibbs' relatives on the scene testified that they did. Although denying the motion to suppress, the district court credited the testimony of the non-officer witnesses.

   In your brief on appeal, you argued "that the district court's finding that Detectives Lopez and Dweck drew their weapons and issued forcible commands is clearly erroneous based on a review of the record." You also argued that "[t]he [trial] court did credit (we believe incorrectly) the testimony of Gibbs's two relatives over the consistent testimony of Detectives Lopez and Dweck on the sole factual issue of whether they drew their weapons and issued commands."

   a. What evidence in the record—aside from the fact that Lopez and Dweck were police officers and Mr. Gibbs' relatives were not—supported your argument that the district court's finding was "clearly erroneous"?

   In *United States v. Gibbs*, the United States took the position that, based on the evidentiary record developed at the suppression hearing, the district court clearly erred by crediting the testimony of the defendant's two relatives over the consistent testimony of the two detectives on the sole issue whether the detectives drew their weapons and issued forcible commands as they approached the stopped car. During the suppression hearing, the detectives testified consistently that they did not draw their weapons upon approaching the vehicle because they did not possess a direct, actionable fear for their safety on their initial approach, and also because they knew they could draw their holstered weapons immediately if necessary. *See* United States Br. 13 & n.8. That testimony was corroborated by the investigating federal agent who also testified at the hearing. United States Br. 13. By contrast, it was the position of the United States that the defendants' two relatives offered inconsistent and internally contradictory statements about the number of police cars and officers that arrived on scene, and about the length of time that the driver of the stopped vehicle remained in the car prior to the detectives' arrival—testimony that itself was inconsistent with the district court's other factual findings. *See* United States Br. 34 & n.13. The defendant declined to adopt various aspects of his relatives' testimony on appeal, and the district court did not adopt wholesale the relatives' version of the facts. *See* United States Br. 34-35 & n.13.

Although the United States in *Gibbs* took the position that the district court clearly erred on the singular factual issue relating to the detectives' drawing of weapons, the United States was explicit in its brief that it accepted all of the district court's findings on appeal, and it defended the legality of the district court's order on the basis of the entire factual record as found by the district court. *See* United States Br. 18 ("Respectfully, the government submits that the district court's finding that Detectives … drew their weapons and issued forcible commands is clearly erroneous based on a review of the record, but in any event, accepting that fact, the district court properly determined that the officers' actions under the circumstances were reasonable under the Fourth Amendment.")).

b. Is it appropriate for a district court judge to credit the testimony of police officers simply because they are police officers?

No. The trier of fact should evaluate the credibility of all witnesses in the same manner, evaluating such factors as whether the witness had an opportunity to accurately observe the things about which he testified, whether his testimony differed from other testimony or other evidence, whether the witness had a particular reason not to tell the truth or a personal interest in the outcome of the case, and whether the witness answered questions clearly and directly. *See generally* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), B5 (Credibility of Witnesses) (2016).

c. Is it appropriate for a district court judge to give greater weight to the testimony of police officers than the testimony of other non-officer witnesses?

No.

d. Are police officers entitled to deference or a presumption of regularity when testifying?

No.

e. If you were reviewing credibility determinations made by a magistrate judge after a hearing at which the magistrate judge took live testimony, would you ever overturn those credibility determinations without re-hearing the live testimony yourself?

A district court commits legal error when it rejects a magistrate judge's credibility determinations without first holding a new hearing to rehear witness testimony. *See, e.g.*, *United States v. Powell*, 628 F.3d 1254, 1256 (11th Cir. 2010); *Amlong & Amlong, P.A. v. Denny's, Inc*., 500 F.3d 1230, 1245 (11th Cir. 2007).

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

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

It is never appropriate for lower courts to depart from Supreme Court precedent.

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

As a general matter, it is improper for a district judge to question Supreme Court precedent, including in the relatively rare instance in which a district judge has an opportunity to prepare a concurring or dissenting opinion, such as when sitting by designation on a court of appeals. Under limited circumstances, however, it may be appropriate for a district judge to question or probe Supreme Court precedents. For example, if the applicability of the precedent to the particular set of facts before the district judge is unclear, and the district judge concurs or dissents on the ground that the precedent should not apply to those facts, it may serve the development of the law for the district judge to explain any possible gaps in the precedent that underlie the district judge's analysis.

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

District court decisions are not binding on other district courts within the same district. *See, e.g.*, *Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co.*, 240 F.3d 956, 965 (11th Cir. 2001). The question whether a district court may reconsider and/or overturn its own prior rulings is controlled by Federal Rules of Civil Procedure 59 and 60 as well as various preclusion doctrines, including the law-of-the-case doctrine.

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

Only the Supreme Court of the United States may overturn its own precedent. As a judicial nominee to a district court, I would not presume to opine on when that prerogative was, or was not, appropriately exercised.

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

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

Roe v. Wade is binding Supreme Court precedent that all lower courts are required to apply fully and faithfully regardless of whether it is referred to as "super-stare decisis" or "superprecedent." If confirmed, I would fully and faithfully apply the Supreme Court's decision in *Roe* and all other Supreme Court and Eleventh Circuit precedent.

b. Is it settled law?

Yes. All Supreme Court decisions are settled law.

4. 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. All Supreme Court decisions are settled law.

5. 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?

   As a judicial nominee, it would be inappropriate for me to express a personal view on the merits or reasoning of a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Eleventh Circuit precedent.

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

   The Supreme Court in *Heller* stated: "We are aware of the problem of handgun violence in this country…. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns." 554 U.S. 570, 636 (2008); *see also id.* at 626-27 & n.26.

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

   As a judicial nominee, it would be inappropriate for me to offer a personal

view as to the merits or reasoning of a particular Supreme Court decision. If confirmed, I would fully and faithfully apply all Supreme Court and Eleventh Circuit precedent.

6. 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?

   In *Citizens United v. Fed. Election Comm'n*, the Supreme Court "recognized that First Amendment protection extends to corporations," and further held that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" 558 U.S. 310, 342 (2010) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). If confirmed, I will fully and faithfully apply all Supreme Court and Eleventh Circuit precedent, including *Citizens United*.

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

   Please see my response to Question 6(a).

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

   While the Supreme Court's decision in *Burwell v. Hobby Lobby, Stores, Inc.*, 573 U.S. 682 (2014), did not address the Free Exercise Clause of the First Amendment, the Court held that the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*., applies to for profit closely held corporations. *Id.* at 707–08. If confirmed, I will fully and faithfully apply all Supreme Court and Eleventh Circuit precedent, including *Hobby Lobby*.

7. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

   The relevant provisions of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The First Amendment also restricts the power of the government to legislate in certain respects, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Both of these constitutional amendments protect important liberties enjoyed in the United States. If confirmed, I will fully and

faithfully apply the Constitution and all Supreme Court and Eleventh Circuit precedent in any case that implicates these provisions. As a judicial nominee, it would be inappropriate for me to comment more specifically on this issue, as it may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

8. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

   The Supreme Court held in *Loving v. Virginia*, 338 U.S. 1 (1967), that state laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. If confirmed, I would fully and faithfully apply all Supreme Court and Eleventh Circuit precedent, including *Loving*. Further, various federal laws, including 42 U.S.C. § 1981, prohibit discrimination on the basis of race under color of State law.

9. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

   Please refer to my response to Question 8. In addition, various federal laws, including 42 U.S.C. § 1981, prohibit discrimination on the basis of race in nongovernmental commercial transactions.

10. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2005. 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 am not familiar with this statement, and I do not know what the Federalist Society meant by it.

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

    I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

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

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

In September 2019, after I had interviewed with attorneys from the White House Counsel's Office and the Office of Legal Policy in reference to a possible nomination to the United States District Court for the Southern District of Florida, I briefly met Lisa Ezell at a judicial investiture. Ms. Ezell is Vice President and Director of Lawyers' Chapters at the Federalist Society. I mentioned to Ms. Ezell in general terms that I had been interviewed for possible nomination to a federal court. We had no substantive discussion about my possible nomination. In addition, since approximately June 2019, I have spoken with friends and colleagues about the process, and I understand that some of those individuals are members of the Federalist Society.

e. Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No.

f. When you joined the Federalist Society in 2005—3 years before you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary? Please answer either "yes" or "no."

No.

i If your answer is "no," then why did you decide to join the Federalist Society in 2005, 3 years before you began practicing law?

I joined the Federalist Society in 2005 as a law student at the University of Michigan Law School. I did so because I enjoyed the diversity of legal viewpoints discussed at Federalist Society meetings and events. I also found interesting the organization's discussions about the constitutional separation of powers, the rule of law, and the limited role of the judiciary to say what the law is—not to make the law.

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that "membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct]." (*Draft Ethics Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

g. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

At some point in early 2020, I became generally aware of the Judicial Conference's draft ethics opinion, but I did not read it. More recently, I read in news articles that the Judicial Conference had abandoned the proposal.

h. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

Canon 4 of the Code of Conduct for United States Judges states that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and government activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." Code of Conduct for United States Judges, Canon 4. The accompanying commentary to Canon 4 states that "[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice," and that, to the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, including through organizations dedicated to the law. Canon 4 further states that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below." Code of Conduct for United States Judges, Commentary to Canon 4.

If confirmed, I will apply these standards and any other applicable canons, rules, or guidance to determine whether to be a member of the Federalist Society or any other organization.

11. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former 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?

No.

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?

No.

c. What are your "views on administrative law"?

The Supreme Court and the Eleventh Circuit have issued many opinions on the subject of administrative law. If confirmed, I will fully and faithfully apply those precedents.

12. Do you believe that human activity is contributing to or causing climate change?

As a judicial nominee, it would be inappropriate for me to comment on a political issue, particularly one that is the subject of political discussion or debate and that may be the subject of pending or impending litigation.

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

The Supreme Court and the Eleventh Circuit have on various occasions consulted legislative history when the relevant statutory language was ambiguous. I commit to fully and faithfully applying all Supreme Court and Eleventh Circuit precedent, including decisions about when to consult legislative history.

14. 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.

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

I received these questions on Wednesday, August 5, 2020. I reviewed them and prepared draft responses, conducting research where necessary. I submitted my draft responses to attorneys at the Office of Legal Policy at the Department of Justice. After I reviewed

comments that I received, I prepared a final draft of my answers as I thought appropriate and authorized personnel at the Department of Justice to file them on my behalf.

Questions for the Record for Aileen Mercedes Cannon
From Senator Mazie K. Hirono

1. In *United States v. Gibbs*, you argued that the district court was wrong to believe two relatives of the defendant over the police officers who claimed they did not approach a car with weapons drawn and yell "get down." This case involved a traffic stop in a predominately Black neighborhood. You claimed that even if the officers did that, their actions were reasonable for a traffic stop because it was "early evening hours" in a "high crime area," even though the officers testified they had no actionable fear.

   a. Is it your view that it is reasonable for police officers to conduct a traffic stop with guns drawn, yelling "get down" simply because they are in a high crime area?

   No, and the United States did not advance that position in *United States v. Gibbs*. In *United States v. Gibbs*, 917 F.3d 1289 (11th Cir. 2019), the Eleventh Circuit affirmed the denial of a motion to suppress a loaded firearm seized from a defendant during a brief traffic stop. The Eleventh Circuit concluded that the detectives were justified in briefly detaining the defendant while conducting the traffic stop because there was an undisputed vehicular violation that posed an ongoing and palpable safety risk; the defendant almost immediately told detectives spontaneously that he had a gun; and the detectives' drawing of weapons for safety "did nothing to denude the stop of its lawfulness." *Id.* at 1297 ("Under these circumstances, it was not unreasonable for Detectives … to briefly detain Gibbs in order to maintain control of the situation, cite the vehicle, and ensure the detectives' safety."). In addition, citing Supreme Court precedent, the Eleventh Circuit reaffirmed the danger inherent in traffic stops and the corresponding need for law enforcement to take reasonable safety measures. *Id.* (citing *Arizona v. Johnson*, 555 U.S. 323, 330 (2009); *Maryland v. Wilson*, 519 U.S. 408, 413–14 (1997)).

   b. Is it your view that individuals in high crime areas deserve different treatment by police officers simply because of where they live?

   No, and the United States did not advance that position in *United States v. Gibbs*. The United States argued that the sanction of exclusion under the Fourth Amendment should not apply because the detectives acted reasonably under the totality of the circumstances in conducting the brief traffic stop. Under *Illinois v. Wardlow*, 528 U.S. 119 (2000), and other authorities, the fact that a stop occurs in a high crime area can be considered among the relevant contextual considerations pertinent to the analysis under *Terry v. Ohio*, 392 U.S. 1 (1968), but certainly it is not enough, standing alone, to provide reasonable suspicion to support a seizure under the Fourth Amendment.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

   a. Do you agree that training on implicit bias is important for judges to have?

   Yes.

   b. Have you ever taken such training?

Yes.

c. If confirmed, do you commit to taking training on implicit bias?

Yes.

Nomination of Aileen Mercedes Cannon
United States District Court for the Southern District of Florida
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QUESTIONS FROM SENATOR BOOKER

1. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

   Yes. I understand originalism to be a judicial philosophy that interprets the text of a given legal provision based on the ordinary public meaning of the words as understood at the time of ratification or enactment. In this regard, I agree with Justice Kagan when she noted that "we apply what they say, what they meant to do. So in that sense, we are all originalists." *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, S. Hrg. 111-1044, at 62 (2010).

   The Supreme Court has considered the original public meaning of constitutional provisions in certain cases. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would fully and faithfully apply all precedents of the Supreme Court and the Eleventh Circuit regardless of whether a given decision adheres to an "originalist" approach.

2. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

   Yes. The Supreme Court has held that the starting point for statutory interpretation is the text of the statute. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (internal quotation marks and alternations omitted)). The Supreme Court also has stated that if "the statutory text is plain and unambiguous," it must be applied "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *see also Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). Textualism in my view refers in broad terms to the primacy of legal text in statutory interpretation. If confirmed, I would fully and faithfully apply all precedents of the Supreme Court and the Eleventh Circuit regardless of whether a given decision adheres to a "textualist" approach.

3. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

   a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

The Supreme Court and the Eleventh Circuit have on various occasions indicated that courts may consider legislative history when the relevant statutory language is ambiguous. I would fully and faithfully apply all Supreme Court and Eleventh Circuit precedent.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my answer to Question 3(a). If confirmed, I will carefully evaluate all relevant arguments raised by the parties in accordance with applicable precedent from the Supreme Court and the Eleventh Circuit, including precedents concerning the use of legislative history.

4. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes. My understanding of judicial restraint is that judges should exercise "neither force nor will but merely judgment." The Federalist No. 78. I understand judicial restraint to mean the application of enacted law to the facts as they are established by the evidence, without regard to whether the judge personally agrees with the result of that analysis. Judicial restraint also entails refraining from deciding questions that are unnecessary to resolving the case or controversy before the court.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[1] Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent that I will apply, if confirmed. As a judicial nominee, it would be inappropriate for me to offer my personal views as to the merits or reasoning of a particular Supreme Court decision.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[2] Was that decision guided by the principle of judicial restraint?

Citizens United is binding Supreme Court precedent that I will apply, if confirmed. As a judicial nominee, it would be inappropriate for me to offer my personal views as to the merits or reasoning of a particular Supreme Court decision.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[3] Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent that I will apply, if confirmed. As a judicial nominee, it would be inappropriate for me to offer my personal views as to the merits or reasoning of a particular Supreme Court decision.

5. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws

[1] 554 U.S. 570 (2008).
[2] 558 U.S. 310 (2010).
[3] 570 U.S. 529 (2013).

disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[4] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[5]

a. Do you believe that in-person voter fraud is a widespread problem in American elections?

It is my understanding that the issue of in-person voter fraud has been and continues to be a matter of public debate and has been and will continue to be the subject of pending or impending litigation in federal courts. For that reason, it would be improper for me to discuss any personal views that I may have on that issue. *See* Canons 3(A)(6) and 5(C) of the Code of Conduct for United States Judges.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to Question 5(a).

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 5(a).

6. 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.[6] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[7] 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.[8] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[9]

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

As a general matter, I am aware of evidence indicating that there is implicit racial bias in our criminal justice system.

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

As a general matter, I am aware that the percentage of persons of color in custody in our nation's jails and prisons exceeds the percentage of persons of color in the population as a whole.

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.

Prior to my nomination, I had not studied the issue of implicit racial basis in our criminal justice system.

[4] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org /analysis/debunking-voter-fraud-myth.
[5] *Id.*
[6] 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.
[7] *Id.*
[8] 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.
[9] *Id.*

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[10] Why do you think that is the case?

I am not familiar with the referenced report and have not studied this issue sufficiently to provide a more informed response. Equality under the law and the impartial administration of justice are fundamental principles in our judicial system, and if confirmed, I would adhere faithfully to that principle in accordance with my oath to "administer justice without respect to persons." *See* 28 U.S.C. § 453.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[11] Why do you think that is the case?

I am not familiar with that cited study, and I am unable to provide an explanation for that statistic. Please also see my response to Question 6(d).

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Federal judges should be aware of the potential for racial bias and must administer justice equally and impartially in every case. If confirmed, I will adhere faithfully to that principle in accordance with my oath to "administer justice without respect to persons." *See* 28 U.S.C. § 453.

7. 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.[12] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[13]

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 the statistics regarding the relationship between incarceration rates and crime rates, and I have not developed any well-formulated opinions on this issue.

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 a direct link, please explain your views.

Please see my response to Question 7(a).

8. 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.

9. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

   Yes.

10. Do you believe that *Brown v. Board of Education*[14] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    As I agreed at my hearing on July 29, 2020, I believe that *Brown v. Board of Education* was correctly decided. When the Supreme Court held that the separate-but-equal doctrine violated the Equal Protection Clause of the Fourteenth Amendment, and overruled *Plessy v. Ferguson*, it corrected a historic wrong. The Court's holding in *Brown* occupies a unique and settled place in American history that warrants an exception from the ordinary rule that federal judicial nominees will not comment on the correctness of particular Supreme Court precedents.

11. Do you believe that *Plessy v. Ferguson*[15] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Please refer to my response to Question 10.

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[10] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.
[11] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)
[12] 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.
[13] *Id.*
[14] 347 U.S. 483 (1954).
[15] 163 U.S. 537 (1896).

12. 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?

    No.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[16] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    As a judicial nominee, it would not be appropriate for me to comment on the political statements of elected officials, including President Trump. *See* Canon 5(C) of the Code of Conduct for United States Judges.

14. 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."[17] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    Please refer to my response to Question 13. Additionally, the Supreme Court has held that the Due Process Clause applies to all persons in the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I would fully and faithfully follow all Supreme Court and Eleventh Circuit precedents.

[16] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,*'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[17] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted August 5, 2020
For the Nomination of:

Aileen Mercedes Cannon, to be United States District Judge for the Southern District of Florida

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

    a. **What is the process you would follow before you sentenced a defendant?**

    If confirmed, I would follow the sentencing process dictated by Supreme Court and Eleventh Circuit precedent issued since *United States v. Booker*, 543 U.S. 220 (2005). *See, e.g.*, *Gall v. United States*, 552 U.S. 38 (2007), *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Peugh v. United States*, 569 U.S. 530 (2013). Under those precedents, a district court must commence all sentencing proceedings by considering the presentence report, resolving any objections thereto in accordance with the factual record and legal precedent, and correctly calculating the applicable Sentencing Guidelines range. *See* 18 U.S.C. § 3552(a); Fed. R. Crim. P. 32. The range produced by applying the Sentencing Guidelines is advisory only, however. *See, e.g.*, *Gall*, 552 U.S. at 49. Accordingly, after considering the parties' arguments, the factual record, and the statutory penalties authorized by Congress, a district court must apply the sentencing factors set forth in 18 U.S.C. § 3553(a) and impose a sentence that is "sufficient, but no greater than necessary" to comply with the purposes enumerated in 18 U.S.C. § 3553(a)(2). In determining an appropriate sentence, a district court cannot presume that the Sentencing Guidelines range is reasonable; it must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing," *Gall*, 552 U.S. at 50; and it must comply with the sentencing procedures listed in Rule 32 of the Federal Rules of Criminal Procedure.

    b. **As a new judge, how would you plan to determine what constitutes a fair and proportional sentence?**

    Please see my response to Question 1(a). In addition, if confirmed, I would study publications issued by the United States Sentencing Commission as well as all sentencing decisions rendered by the Supreme Court and the Eleventh Circuit.

    c. **When is it appropriate to depart from the Sentencing Guidelines?**

    Following *United States v. Booker*, 543 U.S. 220 (2005), a district court has authority to (1) vary from the advisory Sentencing Guidelines range when it fails properly to reflect the considerations in 18 U.S.C. § 3553(a) or (2) depart from the

Sentencing Guidelines range under the grounds specified for departures in Chapter 5 of the Sentencing Guidelines. *See, e.g.*, *Rita v. United States*, 551 U.S. 338, 351 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007). In all circumstances, a district court must impose a procedurally and substantively reasonable sentence as required by binding precedent, including by providing enough of an explanation on the record to allow for meaningful appellate review of the chosen sentence. *See Rita*, 551 U.S. at 356.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

i. **Do you agree with Judge Reeves?**

As a judicial nominee, it would not be appropriate for me to opine on the normative value of mandatory minimum sentences. Those judgments are policy choices committed to the legislative branch, subject to constitutional constraints. *See* Code of Conduct for United States Judges, Canons 2.A and 5. If confirmed, I would follow all relevant Supreme Court and Eleventh Circuit precedent on sentencing.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my response to Question 1(d)(i).

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my response to Question 1(d)(i).

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf.
[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html.

Congress has prescribed statutory mandatory minimum sentences for certain federal offenses. Congress can amend those penalties through legislation. If I were required to impose a mandatory minimum sentence under a congressionally mandated statutory sentence, it would be my duty to follow the law provided it comports with the Constitution.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   Subject to certain constitutional constraints, the decision whether or not to prosecute, and what charges to file or bring before a grand jury, generally rests entirely within the Executive's exercise of prosecutorial discretion. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Wayte v. United States*, 470 U.S. 598, 607–08 (1985). If confirmed, I would adhere to the limited role of the Judiciary in this area. That said, if I were confronted with a criminal charge that violated the Constitution or federal law, or if I had concerns about potential ethical improprieties or misconduct on the part of federal prosecutors, then I would render judgment according to the facts and the law and consult with the U.S. Attorney where necessary.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   Under our Constitution, the clemency power is committed to the authority of the President of the United States. *Harbison v. Bell*, 556 U.S. 180, 187 (2009) ("Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law." (citing U.S. Const., Art. II, § 2, cl. 1)). If confirmed, I would respect our constitutional separation of powers.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

   Pursuant to 28 U.S.C. § 994, Congress has directed the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." If confirmed, I will adhere fully and faithfully to all laws in the

area of sentencing and comply with Congress's mandate to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)]." 18 U.S.C. § 3553(a).

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

    a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

    Yes.

    b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

    I am aware that there are statistical reports showing racial disparities in our criminal justice system, such as incarceration rates.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

    a. **Do you believe it is important to have a diverse staff and law clerks?**

    Yes.

    b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

    Yes. All qualified applicants merit serious consideration.

Senator Josh Hawley
Questions for the Record

Aileen Mercedes Cannon
Nominee, U.S. District Court for the Southern District of Florida

1. **Under Supreme Court and U.S. Court of Appeals for the Eleventh Circuit precedent, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?**

   Under Supreme Court and Eleventh Circuit precedent, to prevail on a method-of-execution claim under the Eighth Amendment's ban on cruel and unusual punishment, a petitioner must establish (1) a substantial likelihood that the method of execution creates a demonstrated risk of severe pain, and (2) that the risk is substantial when compared to the known and available alternatives. *See Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion); *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016). The petitioner must plead and prove both prongs of that test. *Glossip*, 135 S. Ct. at 2739.

2. **Under the Supreme Court's holding in *Glossip v. Gross*, is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

   Yes.

3. **Have the Supreme Court or the U.S. Court of Appeals for the Eleventh Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

   To my knowledge, neither the Supreme Court nor the Eleventh Circuit to date has recognized a constitutional right to post-conviction DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime. In *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), the Supreme Court declined to decide whether such a right exists, concluding that even if such a claim were viable in habeas, the petitioner had not shown a due process problem with the discovery rules applicable in habeas proceedings. *Id*. at 71–72. In the Eleventh Circuit, habeas relief on a freestanding innocence claim is not available in non-capital cases. *See Cunningham v. Dist. Attorney's Office for Escambia Cty*., 592 F.3d 1237, 1272 (11th Cir. 2010); *Jordan v. Sec'y, Dep't of Corr*., 485 F.3d 1351, 1356 (11th Cir. 2007) ("[O]ur precedent forbids granting habeas relief based upon a claim of actual innocence, anyway, at least in non-capital cases.").

4. **Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

   I do not.

5.

   a. **Under Supreme Court and U.S. Court of Appeals for the Eleventh Circuit precedent, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

      In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that a neutral and generally applicable criminal law that burdened religious practice did not have to be justified by a compelling interest to withstand attack under the Free Exercise Clause of the First Amendment. *Id.* at 882–86; *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). To determine whether a state law satisfies the *Smith* requirements of neutrality and general applicability, courts must evaluate the record carefully to discern whether the state action impermissibly targets or burdens practices because of their religious motivation. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533–34. "Facial neutrality is not determinative." *Id.* at 544.

      If a state law is indeed neutral and generally applicable, the Eleventh Circuit has stated that rational basis review applies, requiring the plaintiff to show that the state lacks a legitimate governmental interest or that the law is not rationally related to protect that interest. *See GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1255 n.21 (11th Cir. 2012).

   b. **Under Supreme Court and U.S. Court of Appeals for the Eleventh Circuit precedent, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.**

      Under Supreme Court and Eleventh Circuit precedent, the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group is strict scrutiny. *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (internal quotation marks omitted); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022

(2017); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). To satisfy that stringent standard, government action "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Espinoza*, 140 S. Ct. at 2260 (internal quotation marks omitted).

c. What is the standard in the U.S. Court of Appeals for the Eleventh Circuit for evaluating whether a person's religious belief is held sincerely?

In evaluating whether a person's religious belief is held sincerely, the Eleventh Circuit "look[s] only to see whether the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold." *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015) (internal quotation marks omitted); *see id.* at 1205 (finding no evidence in summary judgment record that plaintiff had "fabricated" his stated religious belief). This follows from *Burwell v. Hobby Lobby*, 573 U.S. 682, 725 (2014), where the Supreme Court stated: "[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our narrow function in this context is to determine whether the line drawn reflects an honest conviction." *Id.* (internal quotation marks and ellipses omitted); *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

The Eleventh Circuit further explained in *Davila* that courts are a "poor forum to litigate the sincerity of a person's religious beliefs, particularly given that faith is, by definition, impossible to justify through reason." 777 F.3d at 1204; *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1297 (11th Cir. 2007) ("It is difficult to gauge the objective reasonableness of a belief that need not be acceptable, logical, consistent, or comprehensible to others.").

6. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller?*

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms for traditionally lawful purposes.

7. Please state whether you agree or disagree with the following statement and explain why: "Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted."

I agree with the foregoing statement. If we are to be a "government of laws, and not of men," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), then judges should interpret statutory text according to how a reasonable person familiar with the social and linguistic conventions of the English language would understand the text to mean, in context, at the time of enactment—not by the latent intentions of legislators, not by the hyper literal meaning of a word in isolation, and not by the policy preferences of judges. As noted, however, if confirmed, I would be bound as a lower court judge by all Supreme Court and Eleventh Circuit precedent, regardless of whether those decisions adhered to the principle espoused in the foregoing statement.