

**Nomination of Kyle Duncan to the U.S. Court of Appeals for the Fifth
Circuit Questions for the Record
December 6, 2017**

**QUESTIONS FROM SENATOR
FEINSTEIN**

1. Would you describe your approach to constitutional interpretation to be “originalist”? If so, what does that mean to you? If not, how would you describe your approach?

As a judge, I would be bound by oath to interpret the United States Constitution by applying all precedents of the Supreme Court and the Fifth Circuit. *See, e.g., Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (observing that “the Court of Appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions”); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016) (noting that courts of appeals “decline to get ahead of the Supreme Court”); *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999) (explaining a “panel is bound by the precedent of previous panels absent an intervening Supreme Court case explicitly or implicitly overruling that prior precedent”). If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and the Fifth Circuit, regardless of my own views about the merits of any particular precedent.

In my understanding, an “originalist” approach seeks to interpret constitutional provisions according to their original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 581-87 (2008) (interpreting Second Amendment terms “Arms,” “keep,” and “bear” by using founding-era dictionaries and other sources); *id.* at 576-77 (observing that “[t]he Constitution was written to be understood by the voters,” and that constitutional interpretation therefore “excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation”) (internal quotations omitted). Where the Supreme Court has interpreted specific constitutional provisions by seeking to discern their original public meaning, I would fully and faithfully follow those precedents. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (interpreting Sixth Amendment’s Confrontation Clause according to founding-era understanding of English common law).

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—including federal circuit courts—to depart from binding Supreme Court precedent. Please also see my response above to Question 1.

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

In rare circumstances, it may be proper for a circuit judge to question Supreme Court precedent in a separate opinion, provided that the opinion makes clear that the judge is nonetheless bound to follow all binding Supreme Court precedent regardless of the judge's view of its merits. For instance, it may be proper in an appropriate case for a circuit judge to write a separate opinion pointing out legal doctrines the Supreme Court might choose to develop or lower-court conflicts the Supreme Court might choose to resolve. *See, e.g., Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring) (questioning Supreme Court's then-controlling two-step requirement in qualified immunity cases); *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of *en banc* rehearing) (in light of "diametrically opposing" circuit court decisions, stating that "the Supreme Court should exercise its certiorari jurisdiction and resolve this circuit split"). In any event, it is the Supreme Court's prerogative to develop its own jurisprudence; circuit courts, by contrast, are always duty bound to follow it.

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

In the Fifth Circuit, a panel of circuit judges may not overrule a precedent of a previous panel. Consequently, the only circumstance in which the Fifth Circuit may overrule its own precedent is by taking the "extraordinary" step of hearing a case *en banc*. *See, e.g., United States v. Castillo-Rivera*, 853 F.3d 218, 227 (5th Cir. 2017) (Higginbotham, J., concurring) (explaining that, under the "'rule' of orderliness ... one panel may not overrule another," but that "[a] panel's application of the *stare decisis* rule is always reviewable by an *en banc* proceeding"); 5th Cir. I.O.P., *Petition for Rehearing En Banc* (explaining that "[a] petition for rehearing *en banc* is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent").

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

As a nominee to a lower federal court, it would be inappropriate for me to comment on what circumstances might justify the Supreme Court in overturning its own precedent. The Supreme Court has "the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484.

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?”

A circuit judge must treat all Supreme Court precedent as “superprecedent,” in the sense that all of the Supreme Court’s decisions—including *Roe v. Wade* and *Planned Parenthood v. Casey*—are binding on all lower federal courts.

b. Is it settled law?

Please see my response above to Question 3(a).

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.

Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

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

I have not studied this particular issue. Regardless, my personal views would have no bearing on my role in deciding the constitutionality of any particular government regulation of firearms. As with any other issue that might come before me, my role would be to decide such questions based on a full and faithful application of controlling precedent. With respect to the interpretation of the Second Amendment, *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully.

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

Heller expressly stated that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited”; it emphasized that “nothing in [the Court’s] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

conditions and qualifications on the commercial sale of arms”; and, finally, it explained that “the sorts of weapons protected [by the Second Amendment] were those in common use.” 554 U.S. at 626-27 (internal quotations omitted).

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

I have not studied that question, and I understand that the majority and dissent in that case had different views of it. Regardless, *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully, just as I would apply all binding Supreme Court precedent.

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

Obergefell “holds [that] same-sex couples may exercise the fundamental right to marry in all States” and “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” 135 S. Ct. 2584, 2607-08 (2015). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

6. At your nomination hearing, Senator Leahy asked you a number of questions about an article you wrote in which you argued that the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), had “imperil[ed] civic peace.” You responded that you were simply making a “plea” for civic peace between those on the both sides of the same-sex marriage issue. While your article does highlight the importance of civic discourse and the “robust, free, and open exchange of ideas on controversial topics,” the conclusion you draw about *Obergefell* as an “abject failure” is plain: “[T]he decision imperils civic peace.” (*Obergefell Fallout*, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE (ABC-CLIO 2016))

a. In the more than two years since the Supreme Court held that there is a nationwide right to same-sex marriage, has *Obergefell* “imperil[ed] civic peace”? If your answer is “yes,” please describe how it has done so.

In the referenced article, I discussed the value of civic peace in terms of fostering mutual respect for both sides in any sensitive public debate. I expressed concern that such civility could be diminished by dismissing one side’s view in a harsh manner, as in my view certain pre-*Obergefell* lower court opinions appeared to do. See *Obergefell Fallout*, *supra*, at 135-36. The article went on to recognize that *Obergefell* did affirm the “decent and honorable” character of those holding traditional views of marriage, but the article expressed the view that the Court could have done more to defuse the strong feelings on both sides. *Id.* at 136-37.

Regardless of any views expressed as a legal commentator, however, my role as a judge would be to apply all Supreme Court precedents fully and faithfully

(including *Obergefell*).

b. Have you expressed similar concerns about “imperil[ed] civil peace” regarding any other pending litigation you have worked on?

Not that I recall. For the context of that quotation, please see my response to Question 6(a) above. Whenever I have litigated sensitive legal issues over my twenty-year career, I have striven as an officer of the court to treat parties and counsel on the other side with respect, to avoid touching on political or personal matters, and to focus solely on the legal issues in the case. If I were confirmed as a judge, I would have an even greater duty to treat both sides of any dispute fairly and impartially and to decide cases based on objective legal rules and not my own personal preferences.

7. You delivered a speech in December 2014 to Brigham Young University’s chapter of the Federalist Society. According to speech notes that you provided to the Committee, you asked whether a trio of Supreme Court cases — *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safely* — together established a fundamental right to marry. You also wrote: “Do these cases add up to a right to marry someone of the same-sex? Well, ask yourselves this: do they add up to a right to marry your first cousin? A thirteen year old? If you say yes to the same-sex marriage question, don’t you also have to say yes to these other ones?”

a. In what way is granting LGBT couples the right to marry equivalent to allowing someone to marry a thirteen-year-old or their first cousin?

The referenced speech was one given to law students in which I discussed the analysis in the Supreme Court’s decision in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), which requires courts to articulate a “careful description” of an asserted fundamental right and to ask whether that asserted right is “objectively, deeply rooted in this Nation’s history and tradition.” The rhetorical questions in my speech notes were merely designed to illustrate how a court might apply the *Glucksberg* analysis to the question eventually decided in *Obergefell*, namely whether a “careful” description of the fundamental “right to marry” recognized in previous decisions encompassed same-sex couples. The questions were not designed to suggest any answer one way or the other but instead simply to illustrate how the substantive due process analysis works.

In any event, *Obergefell* subsequently held that “same-sex couples may exercise the fundamental right to marry in all States.” 135 S. Ct. at 2607. That is a precedent of the Supreme Court that, if confirmed, I would apply fully and faithfully.

b. Do you believe that in light of *Obergefell*, state laws prohibiting individuals of a certain age from getting married or laws prohibiting certain family members from marrying each other are not constitutionally sound?

While *Obergefell* did not address such laws, the Supreme Court stated in *Windsor v. United States*, 133 S. Ct. 2675, 2691-92 (2013), that the marriage laws vary in some respects from State to State,” such as laws concerning “the required minimum age” as well as “the permissible degree of consanguinity.” To the extent that such laws touch on the meaning of *Obergefell*, such matters could potentially come before me if I were confirmed as a judge. Therefore, I am ethically precluded from offering any opinion under the canons of judicial ethics applicable to judicial nominees.

8. In 2015, you submitted an amicus brief in *Obergefell v. Hodges* on behalf of fifteen states, including Louisiana. You urged the Court to reject the argument that the Fourteenth Amendment provides a right to same-sex marriage nationwide. Among other arguments, you claimed that defining marriage in “man-woman terms . . . rationally structure[s] marriage around the biological reality that the sexual union of a man and woman — unique among all human relationships — produces children.”

a. In light of the arguments you advanced in your amicus brief, do you believe that only people who can have children should be legally able to get married?

In representing clients I do not advance my personal views, but the interests of my clients. The arguments advanced in the referenced *amicus* brief were the arguments of the *amici* States concerning possible justifications for those States’ marriage laws.

In any event, regardless of the arguments I made on behalf of clients in that case, the Supreme Court has now decided in *Obergefell* that “same-sex couples may exercise the fundamental right to marry in all States” and “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” 135 S. Ct. at 2607-08. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully as a judge.

b. Do you believe that fewer heterosexual couples have gotten married or have had children as a result of the legalization of same-sex marriage nationwide?

I have not studied the matter and have no basis to opine on it.

9. At your nomination hearing, I asked you about an amicus brief you submitted in *Abbott v. Veasey*, which involved a Texas law imposing a stricter voter ID requirement. In responding about your work on *Abbott*, you mentioned your work on another voting rights case as well—*North Carolina v. North Carolina State Conference of the NAACP*. Representing the state of North Carolina, you sought to defend a number of restrictive voting regulations, including a voter ID requirement, that the Fourth Circuit had found “target[ed] African Americans with almost surgical precision.” (*North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016)) The Fourth

Circuit likewise concluded that “the General Assembly enacted legislation restricting all — and only — practices disproportionately used by African Americans.” (*Id.* at 230)

a. Do you believe it is lawful and legitimate for states to enact electoral laws that target voting practices disproportionately used by members of one race?

The Supreme Court has made clear that the Constitution and numerous federal laws, including the Voting Rights Act, limit state regulation of elections. In both the *Veasey* and *North Carolina* cases, I represent or represented clients arguing that certain state election laws—including voter identification requirements—did not run afoul of these federal constraints. The arguments I made in those cases are good-faith arguments about facts and law, and, as with any legal representation, did not necessarily reflect my personal views on any particular voting or election laws. If confirmed, I would apply the binding precedents of the Supreme Court and the Fifth Circuit governing those issues, quite apart from any personal policy views I hold or any argument I previously made as an attorney representing a client. (Additionally, the *Veasey* case is still pending, and so it would be inappropriate for me to comment further on it as an attorney for an *amicus*).

b. At your hearing, I asked whether you believed that voter fraud was a problem, and you replied that you did not have a “personal view” on the matter, but that “ID laws can act prophylactically to prevent voter fraud.” In light of your claim, what evidence do you have that voter ID requirements can help “prevent voter fraud”?

In my answer, I was referring to the Supreme Court’s decision upholding Indiana’s voter identification law in *Crawford v. Marion County Election Board* against an Equal Protection challenge. *See* 553 U.S. 181 (2008). Justice Stevens’ plurality opinion explained that “[t]here is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters,” and that “the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.” *Id.* at 196. Justice Stevens’ opinion also remarked that, whereas “[t]he record contains no evidence of any such [voter] fraud actually occurring in Indiana at any time in its history,” nonetheless “[i]t remains true ... that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists[.]” *Id.* at 194-95.

c. In *Abbott*, you also argued that voter ID requirements “foster public confidence in elections — thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy.” In your view, is the “peaceful, orderly transfer of power” possible without voter ID requirements?

Given that *Veasey v. Abbott* remains pending and I am counsel for an *amicus* in

the case, it would be inappropriate for me to express a personal opinion on this matter.

d. How did you come to represent the state of North Carolina in *North Carolina v. North Carolina State Conference of the NAACP*?

I already represented the leaders of the North Carolina General Assembly in other litigation when they retained my firm to file a petition for writ of certiorari in this matter in the United States Supreme Court.

10. When you served as Louisiana’s Solicitor General, you defended the state in *Connick v. Thompson*, 563 U.S. 51 (2011). The facts of that case are quite troubling — a prosecutor deliberately withheld physical evidence that would have exonerated Thompson, who had been convicted of robbery and capital murder. After that exculpatory evidence was disclosed—and Thompson’s execution stayed—he sued the District Attorney’s (DA’s) Office. A jury awarded Thompson \$14 million on the theory that the DA had been “deliberately indifferent” to training prosecutors on their *Brady* obligations. The Fifth Circuit upheld the jury’s award, and Fifth Circuit, *en banc*, affirmed the panel decision. You urged the Supreme Court to reverse, and argued that the DA’s office could not be held liable on this failure-to-train theory “absent a history of violations.” You also argued that as “trained professionals,” prosecutors in the DA’s Office were already “subject to a licensing and ethical regime designed to reinforce their duties as officers of the court,” and “absent powerful evidence to the contrary, a district attorney is entitled to rely on prosecutors’ adherence to these standards.” In a 5-4 opinion, the Court sided with you. In dissent, Justice Ginsburg wrote, “What happened here, the Court’s opinion obscures, was no momentary oversight, no single incident of a lone officer’s misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*’s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the [DA’s] Office bears responsibility under § 1983.”

a. If you are confirmed as a judge serving on the Fifth Circuit, you will consider appeals by individuals who allege that prosecutors committed *Brady* violations. What evidence can you offer the Committee that you take *Brady* violations seriously?

A prosecutor’s failure to disclose material exculpatory or impeaching evidence as required by the Supreme Court’s landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963), is a grave violation of a prosecutor’s ethical duties and seriously compromises an accused’s due process rights under the Constitution. There is no question that the facts of *Connick v. Thompson* were “quite troubling”—indeed, in the opening moments of my oral argument to the Supreme Court, I noted that Mr. Thompson had suffered “terrible injuries” because of prosecutorial misconduct. Tr. of Oral Arg. in *Connick v. Thompson*, No. 09-571 (U.S. Oct. 6, 2010), at 3:14. As your question points out, however, the *Brady* violation was not the legal issue before the Supreme Court, and the Court ultimately ruled in my client’s favor.

Connick was an extremely difficult case, and my experience in that case only reinforced for me the importance of a prosecutor's *Brady* obligations to the fair administration of our criminal justice system. Since *Connick*, I have taught a Continuing Legal Education course to Louisiana prosecutors emphasizing the importance of *Brady* obligations, and I have provided those materials to the Committee. If confirmed as a judge, I would conscientiously apply *Brady* to claims that prosecutors may have failed in their constitutional obligations to disclose all material exculpatory and impeaching evidence to the accused.

- b. The full Fifth Circuit upheld the jury's award to Thompson, yet Louisiana chose to appeal that decision to the Supreme Court. Did you make the decision to seek Supreme Court review even after the Fifth Circuit had affirmed en banc? If so, what was your rationale? If not, whose decision was it?**

The decision to seek certiorari in *Connick* was made by my client, the Orleans Parish District Attorney's Office, in conjunction with my employer, the Louisiana Attorney General.

- c. A brief filed on behalf of the respondent in the case on behalf of former DOJ civil rights officials from both Democratic and Republican Administrations stated that "Petitioners' suggestion that no training is necessary because prosecutors are educated professionals blinks reality." Do you still believe that prosecutors' offices should not be required to train prosecutors specifically in the requirements of *Brady*, simply because prosecutors are officers of the court?**

My client's argument in *Connick* was never that a district attorney's office has no obligation to provide its prosecutors with *Brady* training. Rather, the argument was that, where a rogue prosecutor deliberately buries obviously exculpatory evidence, the district attorney's office cannot be vicariously liable for that malfeasance unless a pattern of similar *Brady* violations puts the office on notice. The Supreme Court agreed with my client's argument. But the arguments I made on behalf of my clients in this case, like any other case, do not necessarily reflect my own personal views. Nor would they have any bearing on my role as a judge. If confirmed, I would fully and fairly apply *Brady*, *Connick*, and any other binding precedents of the Supreme Court.

- d. On what basis did you conclude that the New Orleans District Attorney's Office did not have a "history of [*Brady*] violations"?**

I argued on behalf of my client that the record evidence in the case did not reveal the requisite pattern of previous *Brady* violations by the office required to put the district attorney on notice of a deficient training regime, an argument which the Supreme Court accepted in ruling for my client.

- e. **The miscarriage of justice in *Connick* very nearly led the state to execute a man who had not in fact committed murder. In your view, is it appropriate to provide financial remuneration for those who face such a monumental miscarriage of justice at the hands of a prosecutor's office?**

That is a policy question on which it would be inappropriate for me to comment as a nominee to federal judicial office. I am aware of a Louisiana statute providing compensation in such circumstances, and my understanding is that Mr. Thompson received compensation under the version of that statute in force at the time.

- f. **If you are confirmed, what steps will you take to ensure that all prosecutors understand—and fulfill—their obligations under *Brady*?**

Please see my response above to Question 10(a).

11. At your nomination hearing, I asked you about your defense of Texas and Louisiana laws severely limiting women's access to reproductive healthcare. Our exchange focused on those statutes' admitting privileges provision, and I asked how admitting privileges enhance the safety of women. But the Louisiana law also had provisions concerning informed consent and reporting requirements for medication abortions. In defending this statute, you argued that these provisions also made clear the law "focused on enhancing the safety of women seeking abortion."

- a. **How do these informed consent and reporting requirement provisions enhance the safety of women seeking access to reproductive healthcare?**

The litigation to which your question refers is still pending in federal court, and so it would be inappropriate for me to comment on it given that I remain counsel to a party in the case.

12. Beginning in 2016, you represented the North Carolina General Assembly in *United States v. North Carolina*, defending the state's anti-transgender bathroom bill, known as HB2. In a brief that you submitted in that case, you made a number of claims about the dangers posed by allowing transgender individuals to use the restroom that corresponds to their gender identity. You wrote, for instance, that preventing HB2 from taking effect "would inflict upon North Carolina's citizens a substantially increased risk of privacy violations and sex crimes that, in various ways, would invade their legitimate expectations of privacy and bodily security."

- a. **How does allowing transgender individuals to use the bathroom that corresponds to their gender identity cause an increased risk of sex crimes?**

The litigation to which your question refers is still pending in federal court, and so it would be inappropriate for me to comment on it given that I remain counsel

to a party in the case.

b. What evidence did you rely on to support this argument?

Please see my response above to Question 12(a).

c. Do you continue to hold this belief?

Please see my response above to Question 12(a). In addition, I am acting as counsel for a party in that case, advancing not my own personal beliefs but legal arguments on behalf of my client's interests, just as I have done in every case to the best of my ability.

13. You also represented the Gloucester County School Board before the U.S. Supreme Court after it implemented a discriminatory policy that required transgender individuals to use separate facilities—a policy that was struck down by the Fourth Circuit. In your brief, one of the rationales you provided for interpreting Title IX to prohibit treating transgender individuals in accordance with their gender identity is to preserve sex separation in athletics; your brief argued that “[s]ex separation in athletics only works, however, if ‘sex’ means physiological sex; if it means ‘gender identity,’ nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women.” **Are you aware of any cases where an individual has pretended to be transgender for the purpose of obtaining a competitive advantage?**

Because the litigation to which your question refers is still pending in federal court, it would be inappropriate for me to comment on it given that I remain counsel to a party in the case. However, I can state that the sentence you quote from the Supreme Court brief in that case referenced a CBS news story from 2016 reporting that an “18-year old runner ... [who] was born male and identifies as female” competed in “Class 3A girls’ sprints.” Petitioner’s Br. in *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273 (U.S. Jan. 3, 2017), at 41 (citing *Transgender Track Star Stirs Controversy Competing in Alaska’s Girls’ State Meet Championships*, CBS New York, June 8, 2016).

14. As Louisiana Solicitor General, you filed amicus briefs in *Graham v. State of Florida*, in which the Supreme Court considered the constitutionality of life without the possibility of parole (LWOP) sentences for juvenile offenders who commit non-homicide crimes, and *Schwarzenegger v. Entertainment Merchants Association*, which concerned a California law prohibiting the sale or rental of “violent video games” to minors. You also submitted amicus briefs in *Davenport v. American Atheists*, which urged the Court to decide whether to abandon the “endorsement test,” used to determine violations of the Establishment Clause, and joined an amicus brief in *Brown v. Plata*, arguing that a three-judge panel had violated the Prison Litigation Reform Act (PLRA) by ordering the release of prisoners from California’s overcrowded prisons. In short, you have submitted many amicus briefs that pertained to other states’ statutes, or to matters that

did not directly implicate Louisiana.

a. As a general matter, how did you decide which amicus briefs to join or lead as Solicitor General of Louisiana?

The decision to join or lead in any multi-state amicus brief was ultimately made by the Louisiana Attorney General, based on his assessment of whether the issues presented in a particular case could potentially implicate the institutional interests of the State. As I recall, the briefs that Louisiana filed or joined during my tenure were virtually always joined by many other states and often by attorneys general from across the political spectrum. For instance, the amicus brief your question references in the *Brown v. Plata* case involving the California prison system was joined by five Democrat Attorneys General, including Delaware Attorney General Joseph Biden, III, Massachusetts Attorney General Martha Coakley, and Ohio Attorney General Richard Cordray. Similarly, the amicus brief your question references in the *Schwarzenegger* case involving California's violent video games law was joined by six Democrat Attorneys General, including Senator Blumenthal when he was Connecticut Attorney General.

b. Why did you decide to file or join amicus briefs in each of the cases listed in this question?

Please see my response above to Question 14(a).

15. You were the lead lawyer for Hobby Lobby when it challenged the Affordable Care Act's contraceptive coverage requirement. Your Supreme Court brief argued, in part, that the requirement ran afoul of the Religious Freedom Restoration Act (RFRA), as applied to your clients, in part because the federal government had created an accommodation for other religious entities. Your brief stated that "the exceptions for the religious exercise of other groups and grandfathered plans are devastating to the government.... They are devastating because RFRA itself demands that the government consider the feasibility of making exceptions to otherwise general rules in order to accommodate religious exercise." Shortly thereafter, you represented the Eternal Word Television Network in *Zubik v. Burwell*, where you claimed that the accommodation itself was a violation of RFRA.

a. Do you see any tension between the position you advanced in *Hobby Lobby* and the position you advanced in *Zubik*?

No. RFRA requires an analysis of the burden imposed by the government on the religious exercise of the specific religious adherent. To my recollection, as a for-profit corporation my client in *Hobby Lobby* was never offered an accommodation with respect to the mandate, and so whether any accommodation would have removed the burden on its religious exercise was never presented or decided in that case. By contrast, my client in the *Zubik* litigation was offered an accommodation by the federal government, but had a religious objection to that specific

accommodation and, accordingly, took the position that RFRA required something different.

b. Do you dispute that women’s access to preventative health services—including contraception—is a compelling state interest?

This is an open question. In *Hobby Lobby* the Supreme Court assumed without deciding that the federal government has a compelling interest in furthering women’s access to contraceptives through the mandate. Given that the issue is one that could come before me if confirmed as a judge, it would be inappropriate for me to express an opinion.

c. The *Zubik* petitioners advocated a very broad theory of RFRA. As the Government’s brief stated, “Under petitioners’ view of RFRA, all such accommodations—indeed, any systems that require religious objectors to register their objections—could be reframed as substantial burdens on religious exercise. A conscientious objector to the draft could claim that ‘the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then ‘trigger’ the draft of a fellow selective service registrant in his place. An employee who objects to working on the Sabbath could object to a requirement that he request time off in advance because the request would ‘facilitate... someone else working in his place.’” Do you disagree that the arguments you advanced in *Zubik* would have allowed virtually any religious accommodation to be reframed as a substantial burden on religious exercise?

I do not agree with that characterization of the RFRA arguments made on behalf of my clients in that case. In any event, regardless of the arguments I made on behalf of clients concerning RFRA (or any other statute), as a judge I would follow all binding precedents of the Supreme Court and the Fifth Circuit concerning RFRA (or any other statute).

16. At your hearing, you told Senator Leahy that you were not on any of the Supreme Court shortlists that President (or candidate) Trump have issued. Of course, the President also issued an updated Supreme Court shortlist on November 17, 2017, adding five new judges to the original list of 20 judges or justices that were on his 2016 shortlists.

a. Has anyone at the White House or the Department of Justice spoken with you about potentially naming you to a Supreme Court vacancy?

No.

b. Has anyone at the White House or the Department of Justice spoken with you about adding your name to a subsequent shortlist?

No.

- c. Have you spoken with anyone at the Federalist Society or the Heritage Foundation about being named to a Supreme Court vacancy, or adding your name to a subsequent shortlist?**

No.

17. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

- a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?**

Without disclosing specific advice by any attorneys, it was my understanding that the instructions were to disclose responsive material truthfully and to the best of my ability.

- b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did not need to disclose certain material, including material “published only on the Internet,” as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.**

It was and remains my understanding that I was required to disclose responsive material, including material “published only on the Internet,” and I have done so truthfully and to the best of my ability.

- c. Have you ever posted commentary—under your own name or a pseudonym— regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.**

It was and remains my understanding that I was required to disclose responsive material, including material “published only on the Internet,” and I have done so truthfully and to the best of my ability.

- d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what**

edits were made.

No.

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

My understanding is that, according to governing Supreme Court precedent, courts may have recourse to legislative history when the relevant statutory text is ambiguous. As a judge, I would fully and faithfully follow any binding precedents that relied on legislative history to construe a statutory provision.

19. According to your Senate Questionnaire, you have been a member of the Federalist Society since 2012. The Federalist Society's "About Us" webpage, states that, "[l]aw 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." The same page states 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. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

I did not author that statement and am not aware of what its author meant by it. When I was in law school at Louisiana State University and Columbia University, and when I subsequently taught at the University of Mississippi Law School, I encountered a broad array of viewpoints on a variety of subjects from both law professors and students.

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

I did not author that statement and am not aware of what its author meant by it. My understanding is that the Federalist Society takes no position on specific issues but rather serves as a forum to encourage the informed presentation of a variety of viewpoints on matters such as the rule of law, the role of judges in our Constitutional system, and the separation of powers.

c. As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.

I did not author that statement and am not aware of what its author meant by it. In my experience, the Federalist Society takes no position on specific issues but instead encourages informed debate and discussion of matters such as the rule of law, the role of judges in our Constitutional system, and the separation of powers.

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

I received the questions from the Justice Department in the evening of Wednesday, November 6. I personally drafted answers to all of the questions, solicited comments from the Justice Department attorneys working on my nomination, and revised my draft answers as I deemed appropriate in light of those comments.

**Written Questions for Stuart Kyle Duncan
Submitted by Senator Patrick Leahy
December 6, 2017**

1. **Chief Justice Roberts wrote in *King v. Burwell* that**

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

I agree with the Chief Justice that well-accepted rules of statutory construction require judges to read statutory provisions in the context of their overall place in the statutory scheme and not as isolated provisions. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (explaining this approach to statutory interpretation). If confirmed as a judge, I would fully and faithfully follow all binding precedents of the Supreme Court and the Fifth Circuit concerning the rules of statutory interpretation, including *King v. Burwell*.

2. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

(a) Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?

As a judicial nominee, it would be inappropriate for me to comment on a political matter under the canons of judicial ethics. As a general matter, I strongly believe that an independent federal judiciary is critical to preserving our constitutional system of individual rights and separation of powers, and provides an indispensable check on legislative and executive power at both the Federal and State levels.

(b) While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?

Please see my response above to Question 2(a).

3. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and*

will not be questioned.” (Emphasis added.)

(c) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

I am not aware of any such provision or precedent, but one should be extremely cautious in offering general statements about the complex area of national security law. No one, not even the President, is above the law. If confirmed, I would decide cases implicating national security like all other cases—namely by carefully considering the arguments of both sides, by listening to my judicial colleagues, and by fully and faithfully applying all applicable laws and precedents.

4. Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?

My understanding is that litigation concerning these kinds of issues remains pending in the federal courts, and so it would be inappropriate for me to comment on them under the canons of judicial ethics. If confirmed, I would decide cases concerning the First Amendment and immigration like all other cases—namely by carefully considering the arguments of both sides, by listening to my judicial colleagues, and by fully and faithfully applying all applicable laws and precedents.

5. Many are concerned that the White House’s denouncement earlier this year of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President’s first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

The question is a grave one, but impossible to answer outside the context of a specific legal dispute. Generally speaking, if such a situation presented itself in federal litigation, a court would be bound to fully and faithfully apply any applicable precedent to resolve the situation within the bounds of its jurisdiction, including all applicable tools available to federal courts to enforce compliance with their orders. Full and prompt compliance with federal court orders is indispensable to the proper functioning of our legal system.

6. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

(e) Do you agree that the Constitution provides Congress with its own war

powers and Congress may exercise these powers to restrict the President– even in a time of war?

Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

The Constitution states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States[.]” U.S. Const., art. II, § 2 cl. 1. But the Constitution also vests Congress with powers concerning war, such as the power “[t]o declare War,” *id.* art. I, § 8, cl. 11, “[t]o raise and support Armies,” *id.* art. I, § 8, cl. 12, “[t]o provide and maintain a Navy,” *id.* art. I, § 8, cl. 13, and “[t]o make Rules for the Government and Regulation of the land and naval Forces,” *id.* art. I, § 8, cl. 14. If called upon to decide an issue in litigation concerning the relationship between Congress’s and the President’s authority in this area, I would fully and faithfully apply all applicable precedent, including *Hamdan*.

- (f) **In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

Please see my response above to Question 6(e).

7. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

- (g) **Do you agree with that view? Does the Constitution permit discrimination against women?**

I am not familiar with the referenced statement and so cannot comment on what was meant by it. The Supreme Court has long held that laws discriminating on the basis of sex are subject to “intermediate” scrutiny under the Equal Protection Clause and therefore demand an “exceedingly persuasive justification” to survive judicial review. *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

8. **Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”**

I am not familiar with the referenced statement and so cannot comment on what was meant by it. If a case involving the Voting Rights Act came before me, I would fully

and faithfully apply applicable Supreme Court and Fifth Circuit precedent.

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

The Constitution provides that “no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind what ever, from any King, Prince, or foreign State.” U.S. Const. art. I, § 9, cl. 8. My understanding is that the meaning of this Clause is the subject of pending federal litigation (*see, e.g., Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. 2017), and I therefore am precluded from any further comment.

10. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

(h) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

As a nominee to a lower federal court, it would be inappropriate for me to offer any opinion on how the Supreme Court should treat Congress’s factual findings. If confirmed, I would fully and faithfully follow *Shelby County* and all other binding precedent.

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

Those amendments grant Congress the “power to enforce [them] by appropriate legislation.” *See* U.S. Const. amend. XIII, § 2; *id.* amend. XIV, §5; *id.* amend. XV, § 2. If faced with an issue in litigation concerning the extent of Congress’s authority to enforce those amendments, I would fully and faithfully follow any applicable Supreme Court and Fifth Circuit precedent.

12. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

(i) Do you believe the Constitution protects that personal autonomy as

a fundamental right?

Lawrence v. Texas, 539 U.S. 558 (2003), is a binding precedent of the Supreme Court and, if confirmed, I would follow it fully and faithfully.

13. In the confirmation hearing for Justice Gorsuch earlier this year, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

- (j) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

This matter could not be clearer: lower federal judges, include circuit judges, are bound to fully and faithfully follow *all* binding Supreme Court precedent. That obligation does not vary whether the question is one of statutory or constitutional interpretation. Additionally, if confirmed as a Fifth Circuit judge, I would be bound to follow all binding circuit precedent.

14. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

- (k) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.**

I would follow the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. For instance, pursuant to those rules I would be required to recuse myself “[w]here in private practice [I] served as lawyer in the matter in controversy, or a lawyer with whom [I] previously practiced law served in such association as a lawyer concerning the matter[.]” 28 U.S.C. § 455(b)(2). Furthermore, as a safeguard against acting “in any proceeding in which [my] impartiality might reasonably be questioned,” *id.* § 455(a), I would voluntarily recuse myself for a period of time in any matter in which my current law partners will serve as lawyers, even if I would not be otherwise recused from the matter under section 455(b)(2), *supra*.

15. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the

constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

- (l) Can you discuss the importance of the courts’ responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

Federal courts have a solemn obligation to vindicate the civil rights of individuals protected by the Constitution or federal statutes. As a lawyer in private practice, I have repeatedly advocated for the civil rights of individual litigants—including the poor, minorities, and prisoners—on the basis of the First Amendment and federal civil rights statutes such as the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. If confirmed as a judge, I would be vigilant in protecting the civil rights of all persons, and in doing so fulfill my oath to “administer justice without respect to persons, and do equal right to the poor and the rich.” 28 U.S.C. § 453.

16. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration’s conflicts of interest, we make sure that we exercise our own power properly.

- (m) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

I agree that our constitutional system of checks and balances is an indispensable means of ensuring that all three branches of the Federal government remain in their appropriate spheres of authority. That system provides a critical protection for all Americans’ freedom from the arbitrary abuse of government power.

- 17. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Article I, section 8 of the Constitution enumerates Congress’s powers in seventeen separate

clauses and additionally grants Congress authority “[t]o make all laws which shall be necessary and proper for carrying into Execution [those] Powers[.]” U.S. Const. art. I, § 8, cl. 1-17, 18. The interpretation of the scope of those powers has been perennially addressed by the Supreme Court, going back to Chief Justice Marshall’s seminal opinion in *M’Culloch v. Maryland*, where in discerning whether Congress had the authority to charter a national bank, he famously remarked that “we must never forget that it is a *constitution* we are expounding.” 17 U.S. 316, 407 (1819). The Court has often had occasion to interpret the scope of Congress’s authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian tribes,” U.S. Const. art. I, § 8, cl. 3, in decisions such as *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 898 (1964); *United States v. Lopez*, 514 U.S. 549 (1995); and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Finally, the Court has held that Section 5 of the Fourteenth Amendment is “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” *Katzebach v. Morgan*, 384 U.S. 641, 651 (1966). The Court has subsequently interpreted the scope of Section 5 in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); and *Tennessee v. Lane*, 541 U.S. 509 (2004). I would fully and faithfully follow these precedents of the Supreme Court and any applicable precedents of the Fifth Circuit, if confirmed.

Senator Dick Durbin
Written Questions for David Stras, Kyle Duncan, and Andre Iancu
December 6, 2017

For questions with subparts, please answer each subpart separately.

Questions for Kyle Duncan

1. On November 13, 2016, then-President-elect Trump was asked on *60 Minutes* about same-sex marriage. He said “it was already settled. It’s law. It was settled in the Supreme Court. I mean it’s done.” **Do you agree with President Trump that same-sex marriage is settled law?**

Obergefell “holds [that] same-sex couples may exercise the fundamental right to marry in all States” and “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” 135 S. Ct. 2584, 2607-08 (2015). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

2. In 2016, you wrote an article entitled “*Obergefell* Fallout” in which you said “I find *Obergefell* to be an abject failure” in terms of the grounds on which the Supreme Court decided the case. You said that the *Obergefell* decision “repudiated more than a century of precedent recognizing states as the central source of family law;” that it “sweeps away the value of the democratic process;” and that it “imperils civic peace” because “the grounds of the decision effectively marginalize the views of millions of Americans at exactly the wrong time, when standards of civic discourse are rapidly degenerating.”

Do you still believe that the *Obergefell* decision was an “abject failure” in terms of the way the case was decided?

For a discussion of the context of these quotations, please see my response to Senator Feinstein’s Question 6. In any event, the views I expressed in the referenced article were in my capacity as a legal commentator and would have no bearing on how I would apply *Obergefell* if confirmed to the Fifth Circuit. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

3. In a 2015 article entitled “Marriage, Self-Government and Civility,” you wrote about the *Obergefell* case, which was then pending before the Supreme Court, and said “the plaintiffs are same-sex couples who assert that the Fourteenth Amendment removes same-sex marriage from democratic deliberation and compels all fifty states to adopt it. They are profoundly mistaken.” **Does this statement still reflect your views?**

The views expressed in the referenced article were adapted from an amicus brief I filed on behalf of fifteen states. The arguments I made in the course of that representation would have no bearing on how I would apply *Obergefell* if confirmed to the Fifth Circuit. *Obergefell* is a

precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

4. You also wrote in your article “Marriage, Self-Government and Civility” that “[i]t is often asked by proponents of same-sex marriage what ‘harms’ would flow from judicial recognition of their claims. From the perspective of democratic self-government, those harms would be severe, unavoidable, and irreversible.”

- a. **Do you stand by this statement?**

Please see my response above to Question 3.

- b. **Has the *Obergefell* decision created any harms that are severe, unavoidable or irreversible? If so, please discuss these harms.**

Please see my response above to Question 3.

5. In a 2014 speech to the Brigham Young University Federalist Society about the Supreme Court’s right-to-marry cases in *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safely*, you said “[w]ell, ask yourselves this: do they add up to a right to marry your first cousin? A thirteen year old? If you say yes to the same-sex marriage question, don’t you also have to say yes to these other ones?” **Does this statement still reflect your views post-*Obergefell*?**

Please see my response to Senator Feinstein’s Question 7.

6. **Do you believe sexual orientation is an immutable characteristic or does someone choose to be gay or lesbian?**

I have not studied this matter, nor am I an expert on this subject. If I were required to decide any case touching on this issue, I would carefully review the arguments of parties and *amici*, consult with my judicial colleagues, and fully and faithfully apply any applicable precedent of the Supreme Court and the Fifth Circuit.

7. **Is being transgender something that someone chooses, or is it an aspect of their identity that cannot be changed?**

Please see my answer above to Question 6. Additionally, I remain counsel to a party in pending federal litigation that may involve such issues and, as such, it would be inappropriate for me to comment on them.

8. **Do you believe that families formed by LGBTQ couples are less legitimate than other families?**

No.

- 9.

a. **Was the Supreme Court’s decision in *Obergefell* rightly decided?**

As a legal commentator, I have offered measured criticisms of the legal grounds on which the Supreme Court decided this case, while expressly taking no position on the policy question of whether the law should recognize same-sex marriage. *See, e.g., Obergefell Fallout*, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE (ABC-CLIO 2016). However, my views as a legal commentator would have no bearing on how I would apply *Obergefell* if confirmed to the Fifth Circuit. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

b. **Do you pledge, if you are confirmed, that you will not take steps to undermine the Court’s decision in *Obergefell*?**

Please see my response above to Question 9(a).

10. You joined with North Carolina District Court nominee Thomas Farr to author a cert petition on behalf of North Carolina in *North Carolina v. North Carolina State Conference of the NAACP* seeking review of the 4th Circuit’s decision to strike down the state’s 2013 voting reform law. The 4th Circuit held that this law’s provisions “targeted African Americans with almost surgical precision” and concluded that the law was enacted with discriminatory intent.

Your brief argued that the 4th Circuit’s decision “is an affront to North Carolina’s citizens and their elected representatives and provides a roadmap for invalidating election laws in numerous States.” The Supreme Court denied your petition.

Can you please explain what you meant when you said that the 4th Circuit’s decision was an “affront to North Carolina’s citizens.”

As counsel for the North Carolina General Assembly in that case, I advanced my client’s sincere belief that the laws at issue were sensible election reform laws that—as the district court found—resulted in an *increase* in African-American voter participation in North Carolina elections and were not intended to discriminate against minority voters. *See* Petition for Writ of Certiorari, *State of North Carolina v. North Carolina State Conference of the NAACP*, No. 16-833 (U.S. Dec. 27, 2016), at 1, 4-13. My client viewed it as an affront to North Carolina’s citizens and elected representatives to suggest otherwise. As counsel for a party, it was my obligation to zealously advance my client’s position. Furthermore, in an unusual statement regarding the denial of certiorari in that case, Chief Justice Roberts wrote that “it is important to recall our frequent admonition that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.” 137 U.S. 1399 (Mem.) (statement of C.J. Roberts respecting the denial of certiorari).

11. In the 1886 case *Yick Wo v. Hopkins*, the Supreme Court said that “the political franchise of voting...is regarded as a fundamental political right, because preservative of all rights.” **Do you agree that voting is a fundamental political right?**

The Supreme Court has held in numerous cases that voting is a fundamental right. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’”) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). If confirmed, I would apply all voting rights precedents of the Supreme Court and the Fifth Circuit fully and faithfully.

12. Are you troubled by President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election – a claim that is wholly unsubstantiated?

As a federal judicial nominee, I am constrained by the canons of judicial ethics from commenting on political matters.

13. You have taken positions in litigation in opposition to DACA (Deferred Action for Child Arrivals) and DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents). Did the litigation positions you advocated in these cases represent your personal views or the positions of your clients?

In representing clients, I do not advance my personal views but the interests of my clients. I regard that as a fundamental value in our adversarial litigation system.

14. In 2001 when you were Assistant Solicitor General in Texas, you co-authored a cert petition in the case *Cockrell v. Burdine*. This case involved the question of whether prejudice should be presumed when a defense counsel in a capital case “intermittently dozed and actually fell asleep during portions of trial.” The 5th Circuit had held that prejudice was presumed under the circumstances of this case because such deficient performance amounted to an actual denial of counsel. Your brief argued that the Supreme Court should grant certiorari and clarify that “an actual conflict of interest is the only instance of deficient attorney performance that merits a presumption of prejudice. Intermittent episodes of an attorney sleeping are indistinguishable from other kinds of impaired attorney performance that, while lamentable, are subject to a general requirement that the defendant affirmatively prove prejudice.” Can you please discuss the facts of this case and your role in it?

I was an Assistant Solicitor General in the Texas Attorney General’s Office, working under the direction of the Deputy Solicitor General and the Solicitor General. As a government attorney representing the State of Texas (and particularly as one of the junior attorneys on the brief), it was my obligation as a lawyer to present the best arguments for my client’s position. My recollection of that case is that it involved a highly unusual example of deficient attorney performance, namely an attorney who intermittently slept during a capital murder trial. No party disputed that the attorney’s conduct was egregiously deficient. The dispute was whether this kind of attorney misconduct should be evaluated under the usual “prejudice” standard of *Strickland v. Washington*, 466 U.S. 668 (1984), or the “presumption of prejudice” standard of *United States v. Cronin*, 466 U.S. 648 (1984). The Fifth Circuit *en banc* held that it should be evaluated under the latter standard, and the Supreme Court denied a writ of certiorari. If confirmed to the Fifth Circuit, I would fully and faithfully apply the Fifth Circuit’s *en banc* decision in *Burdine*, as well as all other Supreme Court and Fifth Circuit precedents concerning claims of ineffective assistance of counsel.

15.

a. **Is waterboarding torture?**

I have not had occasion to study the matter, but my understanding is that Congress enacted legislation for the express purpose of clarifying that waterboarding is illegal under U.S. law.

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

Please see my response above to Question 15(a).

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

Please see my response above to Question 15(a).

16. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting President Trump's Circuit Court nominees.

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

As a federal judicial nominee, I am constrained from commenting on political or policy matters by the canons of judicial ethics.

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

As a federal judicial nominee, I am constrained from commenting on political or policy matters by the canons of judicial ethics.

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

As a federal judicial nominee, I am constrained from commenting on political or policy matters by the canons of judicial ethics.

17.

a. **Can a president pardon himself?**

I have not had any occasion to study this question. If confirmed and such case were to come before me, I would carefully study the text of the Constitution and any relevant federal statutes or precedents, consider the briefs and arguments of the parties, discuss the matter with my judicial colleagues and clerks, and render a decision based on the facts and law before me.

b. **Can an originalist view of the Constitution provide the answer to this question?**

I have not had any occasion to study this question.

c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

A lower court judge should always look first to applicable Supreme Court or circuit precedent, which he or she would be bound to apply. If precedent does not resolve the question, the judge should then have recourse to other interpretive guidance such as the original public meaning of the applicable constitutional text; the place of that text within the constitutional structure; and any relevant historical practices, both at the time of the framing and thereafter.

18. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

Judges are human and having empathy for others—especially for those who suffer—is a natural and praiseworthy human response. It cannot, however, lead a judge to privilege one side of a legal dispute over the other, because that would violate the judge’s oath to “administer justice without respect to persons, and do equal right to the poor and the rich, and ... [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge].” 28 U.S.C. § 453.

19. **In your questionnaire you list yourself as having been a member of the Federalist Society since 2012.**

a. **Why did you join?**

I joined the Federalist Society because it provided a forum for hearing expert debate and discussion of important topics such as the rule of law, the role of judges in our Constitutional republic, and the separation of powers.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview

with Breitbart News' Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

As a federal judicial nominee, I am constrained by the canons of judicial ethics from commenting on political or policy matters.

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

To the best of my recollection, I attended the convention each year from 2012 to 2017.

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

I did not attend the speech in person, but I saw parts of it on television. I do not remember whether I had any reaction to the referenced comments.

**Nomination of Kyle Duncan to the
United States Court of Appeals for
the Eighth Circuit
Questions for the Record
Submitted December 6, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

I agree with the metaphor to the extent it means that judges must resolve disputes before them according to objective rules of law and not the judges’ own policy or political preferences.

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

If the legal doctrine governing a particular case requires a judge to take into account the practical consequences of a ruling, then the judge must do so. For example, the standard for entering a preliminary injunction requires a judge to consider, among other things, whether there is “a substantial threat that [a person] will suffer irreparable harm if the injunction is not entered.” *Bluefield Water Ass’n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 252-53 (5th Cir. 2009).

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

Under well-settled principles, a court must find that “[a] genuine dispute as to a material fact exists ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 350 (5th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). That is an objective standard. Which facts are material is determined by the underlying substantive law. *Anderson*, 477 U.S. at 248. And the Supreme Court has emphasized that “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.* at 249.

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

- a. What role, if any, should empathy play in a judge’s decision-making process?
- b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?
- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

My answer to all three of these related questions is the same. Judges are human and having empathy for others—especially for those who are marginalized or suffering or mistreated—is a natural and praiseworthy human response. It cannot, however, lead a judge to privilege one side of a legal dispute over the other, because that would violate the judge’s oath to “administer justice without respect to persons, and do equal right to the poor and the rich, and ... [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge].” 28 U.S.C. § 453.

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

No.

4. Given your work on the *Hobby Lobby* case, your amicus brief in *Obergefell*, and your defense of transgender bathroom bills, how can you assure women and the LGBTQ community that you will defend their constitutionally recognized rights?

If confirmed, I would be duty bound to fully and faithfully apply all binding Supreme Court and Fifth Circuit precedents, including *Hobby Lobby* and *Obergefell*. I would do so unflinchingly, and without regard to any positions I previously took as counsel for a party in litigation or as a legal commentator. That is the essence of the judicial oath.

5. As a circuit judge, how would you weigh any potentially competing considerations between religious liberty and the equal protection clause?

As I attempted to explain at my hearing, the guarantees of religious liberty in the First Amendment and various federal civil-rights statutes are not absolutes. There are well-known limitations on the constitutional right of religious exercise requiring compliance with neutral laws of general applicability (*see, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990)), and federal statutes—such as RFRA and RLUIPA—expressly provide that even substantial burdens on religious exercise may be justified by laws narrowly tailored to further compelling government interests (*see, e.g., Holt v. Hobbs*, 135 S. Ct. 853 (2015)). As a circuit judge, I would fully and faithfully apply all binding precedents and laws concerning the scope of a claimant’s religious liberty.

6. What do you understand to be the holding of *Obergefell*? As a circuit court judge, would you be bound by that decision? When, if ever, would it be appropriate for you to disregard

that decision?

Obergefell “holds [that] same-sex couples may exercise the fundamental right to marry in all States” and “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” 135 S. Ct. 2584, 2607-08 (2015). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully. It would never be appropriate to disregard *Obergefell* or any binding precedent of the Supreme Court or the Fifth Circuit.

7. In reference to North Carolina’s transgender bathroom bill HB2, you argued that enjoining HB2 “would subject the people of North Carolina — and especially women and girls — to serious safety and privacy risks.”

- a. What “serious safety and privacy” risks arise from allowing transgender individuals to use the bathroom consistent with their gender identity?

Because this matter remains pending in federal court and I am counsel for a party, it would be inappropriate for me to comment on it.

- b. Do you personally know anyone who is transgender? If so, have your views about issues affecting transgender Americans changed at all as a result of these relationships?

Please see my response above to Question 7(a). Additionally, as an attorney for a client, I do not advance my own personal views but my client’s interests.

8. In a piece you wrote for the Federalist Society, you described your views on statutory interpretation, saying, “How a court interprets statutes is a bellwether of its restraint. This is so because, under the guise of technical ‘rules’ of statutory construction, activist courts may subtly rewrite laws to further the judges’ own policy preferences. Such favored approaches include the search for laws’ ‘spirit’ or ‘purposes’ that override the purposes gathered from the plain terms of the laws themselves.”

- a. What did you mean by that?

As a legal commentator, I was expressing the view that judges should not misuse the rules of statutory interpretation to reach a preferred result at odds with the plain terms of a statute. By doing so, judges would usurp from the legislature its authority to choose from among competing policy preferences.

- b. What influence do policy preferences play in statutory interpretation? Is such bias avoidable?

As a general matter, choosing among competing policy preferences is the job of legislators, not judges. That is especially true of federal judges, who are granted judicial, not legislative, power by the Constitution. Thus, judges should strive to interpret statutes in accordance with the policy preferences of the enacting

legislature as expressed by the plain terms of the statute.

- c. When, if ever, is it permissible for a judge to interpret a statute by looking beyond its plain text?

When the plain text of a statute is ambiguous, the Supreme Court has explained that judges should look to other interpretive tools—such as the place of the statute in the overall statutory structure, accepted canons of statutory construction, and legislative history.

9. Throughout your career, you have defended restrictive voting regulations, such as those in North Carolina that the Fourth Circuit found “targeted African Americans with almost surgical precision” and those in Texas that the district court concluded were discriminatory. Given this background, how can you assure this committee that you will protect and defend the voting rights of all individuals, especially those who have historically been disenfranchised?

In two cases throughout my twenty-year career, I served as counsel for clients whose election laws were challenged under the Voting Rights Act and the Equal Protection Clause. In those cases, my role was to make the best arguments possible for my clients’ interests. If confirmed as a judge, my role would be entirely different: to impartially apply binding precedents, regardless of the parties before the Court. I grasp that fundamental distinction between advocate and judge and, if confirmed, I would unflinchingly abide by it. With respect to voting and election cases, I would fully and faithfully apply all binding precedents of the Supreme Court and the Fifth Circuit.

Nomination of Kyle Duncan, to be United States Circuit Judge for the Fifth Circuit
Questions for the Record
Submitted December 6, 2017

QUESTIONS FROM SENATOR COONS

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

I would apply the governing framework from the most closely applicable decision of the Supreme Court, which has addressed this question in a variety of settings over a long period of our history. *See, e.g., Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

Yes.

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

Yes. As instructed *Glucksberg*, a court would "examin[e] our Nation's history, legal traditions, and practices," 521 U.S. at 710, as evidenced for instance by long-established state legislative and judicial practices, *id.* at 710-11, by the "Anglo-American common law tradition," *id.* at 711-12, and by American colonial practices, *id.* at 712-16.

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

Yes, as a Fifth Circuit judge I would be bound by a previous recognition of the asserted right by the Supreme Court or the Fifth Circuit. If the issue were not settled by Supreme Court or Fifth Circuit precedent, I would consider precedent from other circuits for its persuasive value.

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

Yes. The Supreme Court has explained that courts are bound to apply not only the result of binding precedent but also its governing rationale. *See, e.g., Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66-67 (1996) (collecting decisions).

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

Both *Casey* and *Lawrence* are binding precedents of the Supreme Court, and I would apply them fully and faithfully as well as all other applicable precedents.

- f. What other factors would you consider?

I would consider any other factors that appear relevant under applicable Supreme Court or Fifth Circuit precedent.

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

It is black-letter law that the Equal Protection Clause of the Fourteenth Amendment applies to discrimination on the basis of gender as well as race. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

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

In my role as a judge, I would respond that this is a purely academic question. If confirmed, I would be bound to apply Supreme Court precedent governing gender discrimination.

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

I do not know why the litigation that led to the Supreme Court’s decision in *United States v. Virginia* was not filed until the 1990s.

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

Obergefell held that the Fourteenth Amendment requires same-sex couples to be afforded the right to marry “on the same terms accorded to couples of the opposite sex.” 135 S. Ct. at 2607.

- d. Does the Fourteenth Amendment require that states treat transgender people the same

as those who are not transgender? Why or why not?

I currently represent a party in pending litigation that addresses questions of this nature and accordingly cannot ethically opine on this issue.

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

Yes, as enunciated by the Supreme Court in decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, as enunciated by the Supreme Court in decisions such as *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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

Yes, as enunciated by the Supreme Court in decisions such as *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

Please see my responses above to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

As a lower court judge, my role would be to fully and faithfully apply binding

Supreme Court and Fifth Circuit precedents as well as the rationales governing those precedents. Consequently, where applicable precedent considers evidence of changing societal understandings, I would follow that analysis.

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

Generally speaking, a federal district court may consider expert evidence of such matters where it may assist the trier of fact in resolving a question at issue and where the evidence meets the standards of reliability set forth by governing Supreme Court precedent. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

5. You are a member of the Federalist Society, which advocates an “originalist” interpretation of the Constitution.

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

My understanding is that this question has been the subject of scholarly dispute. *Compare, e.g.,* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995), *with* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995). As a judge, I would view the question as purely academic, given the binding force of *Brown*.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited December 5, 2017).

I would agree that discerning the original public meaning of certain provisions of the Constitution can be a difficult endeavor. *Compare, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358 (Thomas, J., concurring), *with id.* at 371 (Scalia, J., dissenting) (disagreeing on original meaning of First Amendment concerning anonymous pamphleteering). Furthermore, applying that original public meaning to modern circumstances unforeseen by the framing generation requires a careful exercise of judgment. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33-34

(2001) (applying Fourth Amendment to infrared heat imaging of home and observing that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology”).

6. In the amicus brief you filed in *Obergefell v. Hodges*, you argued that finding a constitutional right to marriage equality would “undermine the democratic process.”
- a. Do you agree that the purpose of enshrining rights in the Constitution is to protect those rights from infringement by the government?

Yes. At the time I made those arguments in litigation, a constitutional right to same-sex marriage had not yet been recognized by the Supreme Court in *Obergefell*. It is now axiomatic that the right recognized in *Obergefell* is not subject to legislative revision through the democratic process.

- b. Objectors made the same argument when the Supreme Court struck down laws banning interracial marriage, which a majority of states had when *Loving* was decided. Do you agree that it a federal court’s job to strike down laws that violate due process and equal protection?

Yes, I strongly agree that “[i]t s emphatically the province and duty of the judicial department to say what the law is,” *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and that in fulfilling that duty in cases and controversies, federal judges are obligated to invalidate laws that violate the Constitution’s guarantees of due process and equal protection.

7. In the petition for certiorari you filed in *Schaefer v. Bostic*, you suggested that finding a right to marriage equality would require the Court to also find a “fundamental right to marry a 13- year-old or a first cousin.” Does this remain your view?

In that certiorari petition, which I filed as a lawyer representing a client, I was making arguments under the *Glucksberg* analysis concerning the scope of the fundamental right to marry recognized by previous Supreme Court cases. The Supreme Court has now decided in *Obergefell* that “same-sex couples may exercise the fundamental right to marry in all States.” 135 S. Ct. 2584, 2607-08 (2015). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

8. In *United States v. North Carolina*, you submitted a motion arguing against a preliminary injunction that would have blocked portions of North Carolina’s HB2 law. Your motion argued that allowing transgender individuals to use the bathroom corresponding with their gender identities would “ignore potential criminal activity.” What data, if any, demonstrates that criminal activity due to transgender individuals using the bathroom matching their gender is a widespread problem?

That litigation—in which I represent the North Carolina General Assembly and make legal arguments to further my client’s interests in defending duly enacted North Carolina laws—remains pending in federal court and, as such, it would be ethically inappropriate for me to comment on it as a federal judicial nominee.

9. On several occasions, you have defended objections to the Affordable Care Act’s contraceptive mandate based on religious objections.

- a. Do you agree that contraceptives serve a valid health purpose?

As counsel for various parties in that litigation, I advanced my clients’ interests, not my personal views. If this issue were to come before me as a judge, I would fully and faithfully apply all governing laws and precedents.

- b. Do you agree that women can face economic hardship if contraceptives are not covered by their health plan?

Please see my response above to Question 9(a).

10. As both a former solicitor general and in private practice, you have represented the state of Louisiana. Those representations include writing an amicus brief for the state in *Obergefell*; defending Louisiana’s same-sex marriage ban before the Fifth Circuit; defending the state’s restrictive abortion law in *June Medical Services v. Gee*; and representing the state before the Supreme Court in *Montgomery v. Louisiana*.

- a. If confirmed, do you agree there are circumstances under which it may be appropriate to recuse yourself from cases in which the state of Louisiana is a party?

Yes. If confirmed I would follow the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. Pursuant to those rules, I would be required to recuse myself “[w]here in private practice [I] served as lawyer in the matter in controversy, or a lawyer with whom [I] previously practiced law served in such association as a lawyer concerning the matter[.]” 28 U.S.C. § 455(b)(2). Furthermore, I would be required to recuse myself “in any proceeding in which [my] impartiality might reasonably be questioned.” *Id.* § 455(a). As a former lawyer for the State of Louisiana in both government and private practice, I anticipate that there may be cases in which I would be required to recuse myself, and I would do so.

- b. Do you commit to following all applicable judicial ethics rules in determining whether to recuse yourself in cases where former clients are parties?

Yes.

11. In 2009, you wrote a law review article titled “Misunderstanding Freedom from Religion: Two Cents on Madison’s Three Pence” that argued that the Establishment Clause

“originally served to quarantine church-state issues at the state level” and does not contain a “theory of substantive church-state relationships.”

- a. Does the First Amendment contain a substantive right to the free exercise of religion, or does it merely bar the federal government from regulating religion?

The First Amendment contains a substantive, judicially-enforceable right that “Congress shall make no law ... prohibiting the free exercise [of religion],” U.S. Const. amend. I, which applies against the States. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940). If confirmed as a judge, I would fully and faithfully apply all precedents of the Supreme Court and the Fifth Circuit concerning the free exercise of religion.

- b. Does the First Amendment limit the types of laws that states can pass restricting the exercise of religion?

Yes. Please see my response above to Question 11(a).

12. In the amicus brief you filed in *Obergefell v. Hodges*, you argued that marriage is “rationally structure[d] around the biological reality that the sexual union of a man and a woman – unique among all human relationships – produces children.”

- a. Do you view marriage to provide any benefits to society beyond procreation?

In the referenced amicus brief, I was advancing legal arguments on behalf of State clients, not my own views. In any event, *Obergefell* has now held that same-sex couples may exercise the fundamental right to marry in all States, which is a binding precedent of the Supreme Court that I would apply fully and faithfully, if confirmed.

- b. Could a state require heterosexual couples to state an intention to have children in order to get married?

My understanding of the governing canons of judicial ethics is that, as a federal judicial nominee, I should refrain from opining on hypothetical cases.

Questions for the Record for Stuart Kyle Duncan
Submitted by Senator Richard Blumenthal
December 6, 2017

1. In a February 2012 presentation at Belmont Abbey College on “Legal Challenges to Religious Liberty,” you responded to an audience member who expressed concerns about preventative health care such as birth control supposedly being used to induce abortions. In response, you said:

You’re absolutely right. Of course when the government says preventative they mean preventing illness or disease. They apparently also mean preventing pregnancy. Which I suppose the government regards as a disease, just judging from their actions. Right so they have this world view about what women’s health means and it’s a world view that is profoundly at odds with the world view of people at Belmont Abbey and others. And you know what can you do about that? We can get the law changed. We can have a different President, we can get a different Congress. Or we can go forward with lawsuits and say your world view about what preventative health means stops at the First Amendment.

- a. **What do you see as the “world view” of the government with regard to women’s health?**

In the referenced presentation I was speaking as a lawyer representing Belmont Abbey College (among other plaintiffs) in challenges to the federal regulatory mandate that required health plans to include all FDA-approved contraceptives in their health insurance plans. Numerous plaintiffs challenged that requirement under, *inter alia*, the First Amendment and the Religious Freedom Restoration Act on the grounds that the mandate violated their right to refrain from performing acts forbidden by their religious faith. By referring to the “world-view” of the federal government in the presentation, I was referring to the position the government advanced in those cases that it could require private employers to provide contraceptive coverage regardless of any sincerely-held religious objections to such coverage.

There is a profound difference between serving as a counsel for a party in litigation—which was the capacity in which I was representing Belmont Abbey College when I made that presentation—and serving as a federal judge. If confirmed as a judge, I would assiduously and unflinchingly apply all governing precedents of the Supreme Court and the Fifth Circuit concerning religious liberty, the First Amendment, and the Affordable Care Act.

b. You said, “We can get the law changed.” How would you like to see the law changed?

Please see my response above to Question 1(a) for the context of this presentation. My client sought an exemption from the contraceptive coverage mandate.

c. We have a different President and different Congress than we did in 2012. What changes do you expect to see?

Please see my response above to Questions 1(a) and 1(b).

2. In an article you wrote for CNS News in 2013, you referred to the Affordable Care Act’s contraceptive coverage requirement as “the HHS abortion-drug mandate,” claiming that it “severely burden[s] the religious liberty of millions of Americans.” In a 2012 article, you also attacked the exemption for religious employers as “a pitifully small fig leaf.” And, in a 2013 article in EWTN News, you were quoted attacked the government for “treat[ing] contraceptives as ‘the sacrament of our modern life,’ necessary for ‘the good life,’ health and economic success of society, particularly women.”

a. Do you believe that the contraceptive coverage mandate is a severe burden on religious liberty?

All of the statements referenced above were made in my capacity as a lawyer representing clients who were challenging the contraceptive coverage mandate. In that litigation, I argued on behalf of clients that the mandate violated their religious liberty under the Religious Freedom Restoration Act (RFRA) by substantially burdening their religious exercise. As with any legal representation, those arguments were made on behalf of my clients’ interests, not my personal policy preferences.

If confirmed to the federal bench, I would fully and faithfully apply any applicable Supreme Court and Fifth Circuit precedent, without regard to my personal views or any arguments on these matters I may have made when representing clients in litigation. That is the essence of the judicial duty, and if confirmed I would embrace it unflinchingly.

b. Do you support the DOJ and HHS guidance allowing employers to refuse to provide contraceptive coverage?

This guidance is currently being litigated before the federal courts, and therefore as a federal judicial nominee, I am precluded by the canons of judicial ethics from commenting.

c. Do you believe a business should be able to decline to serve gay customers?

Aspects of that question are currently being litigated before the Supreme Court and other federal courts, and therefore as a federal judicial nominee, I am precluded by the canons of judicial ethics from commenting.

Questions for the Record for Stuart Kyle Duncan

Senator Mazie K. Hirono

1. After *Shelby County v. Holder*, 570 U.S. 2 (2013), several states passed laws, including voter ID laws, that were challenged as discriminatory. In reference to your participation in a case involving the Texas voter ID law that was challenged as discriminatory, Senator Feinstein asked you at the hearing about what evidence you had that voter fraud is a widespread problem. You responded that you had participated in two cases involving challenges to voter ID laws in North Carolina and Texas, and that in those cases, you had in mind voter ID laws as a prophylactic measure based on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). But in the North Carolina case, the U.S. Court of Appeals for the Fourth Circuit found that North Carolina's voter ID law and other voting laws "were enacted with racially discriminatory intent" and targeted African-American voters with "almost surgical precision."

a. Do you believe that even if there is no significant evidence of voter fraud, all voter ID laws are valid as a prophylactic measure?

I have never taken that position on behalf of a client in litigation, and I certainly did not mean to convey that view in my answer to Senator Feinstein's question. In my answer to Senator Feinstein, I was referring to the Supreme Court's decision upholding Indiana's voter identification law in *Crawford v. Marion County Election Board* against an Equal Protection challenge. See 553 U.S. 181 (2008). Justice Stevens' plurality opinion explained that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," and that "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196. In that case, although "[t]he record contain[ed] no evidence of any such [voter] fraud actually occurring in Indiana at any time in its history," Justice Stevens' opinion stated, "It remains true ... that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists[.]" *Id.* at 194-95.

If confirmed as a judge, I would fully and faithfully apply *Crawford* and any other governing precedents of the Supreme Court and the Fifth Circuit concerning voter identification or other election laws.

b. To determine whether a voting law is discriminatory, do you believe it is important to look at the context in which the law was passed and the impact that the law has?

My understanding of governing Supreme Court precedent under the Voting Rights Act is that, in assessing whether a voting or election law is discriminatory, courts must consider factors such as the context in which the law was passed and the law's

impacts on minority voters, among numerous other factors. *See, e.g., Thornburgh v. Gingles*, 478 U.S. 30 (1986). If confirmed, I would fully and faithfully apply all binding Supreme Court and Fifth Circuit precedents under the Voting Rights Act.

2. At the hearing, I noted that you had expressed a lot of concern regarding the decision in *Obergefell v. Hodges*, 576 U.S. (2015), which affirmed the right of same-sex couples to marry. In a piece titled *Obergefell Fallout*, for instance, you wrote that the *Obergefell* decision was “an abject failure” that “imperil[ed] civic peace” and “marginalize[d] the views of millions of Americans,” based on your concerns that the decision undermined democratic processes.

a. How did the *Obergefell* decision imperil civic peace and marginalize the views of millions of Americans? Please be specific.

Please see my response to Senator Feinstein’s Question 6(a).

b. What types of rights do you think should be subject to democratic vote by States or voters instead of courts?

Constitutional rights are, by definition, not subject to democratic vote because the people have removed them from the majoritarian process. As Justice Jackson eloquently observed, “[o]ne’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” *West Va. State Bd. of Elections v. Barnette*, 319 U.S. 624, 638 (1943).

c. Does the Supreme Court have to wait until States agree by democratic vote to recognize a constitutional right?

No. Please see my response above to Question 2(b).

d. How do you determine whether the Supreme Court has overstepped its bounds in recognizing a constitutional right that has not yet been recognized by States?

As a nominee to a lower federal court, I would not presume to instruct the Supreme Court on when it has overstepped its bounds in reaching any particular decision. My role as a circuit judge would be to fully and faithfully apply all binding Supreme Court precedents, regardless of my personal view of the merits of those precedents.

e. Do you think the Court undermined democratic processes in *Brown v. Board of Education*?

No.

f. In your view, what makes *Obergefell* different from *Brown*?

Brown held that the Fourteenth Amended prohibits *de jure* racial segregation in public schools. *Obergefell* held that the Fourteenth Amendment guarantees to same-sex couples the fundamental right to marry. Both *Brown* and *Obergefell* are binding precedents of the Supreme Court that I would fully and faithfully apply if confirmed to the Fifth Circuit.

- g. Do you believe that the right of same-sex couples to marry is not a constitutional right?

Obergefell held that same-sex couples have the fundamental right to marry in all States. It is a binding precedent of the Supreme Court that, if confirmed, I would apply fully and faithfully.

3. You stated at the hearing that you agree that “gay marriage . . . [is] settled law.” And yet, after the Supreme Court’s ruling in *Obergefell v. Hodges*, 576 U.S. (2015), you wrote a two-page letter to the U.S. Court of Appeals for the Fifth Circuit indicating that *Obergefell* was wrongly decided. In the letter, you conceded that, in light of the Supreme Court’s ruling, the Louisiana same-sex marriage ban had to be overturned, but you made it a point to say that “Appellees agree with the four dissenting justices in *Obergefell* that it is wrongly decided,” noting that the right recognized in *Obergefell* “has no basis in the Constitution or [the Supreme] Court’s precedent.”

- a. **What was your purpose or intent in highlighting the view that *Obergefell* was wrongly decided? Were you hoping or implying that the Fifth Circuit should adopt the same view, even as it technically complied with *Obergefell*?**

No. The letter referenced by your question was written on behalf of my client, the State of Louisiana, in response to an order directing it to advise the Fifth Circuit how it should proceed with Louisiana’s case in light of the Supreme Court’s decision in *Obergefell*, which was issued while Louisiana’s case was pending in the Fifth Circuit. Because my client had been defending its traditional marriage laws for several years—including in briefs filed in the Supreme Court—my client reiterated its support for its previous litigation position. But the letter could not have been clearer regarding Louisiana’s and the Fifth Circuit’s obligations in the matter: it stated that *Obergefell* “compel[ed]” the licensing and recognition of same-sex marriages in Louisiana.

- b. **What do you believe is the role of a federal circuit court judge in deciding whether or not the Supreme Court got a case wrong?**

It is not the role of a federal circuit court judge to decide whether or not the Supreme Court got a case wrong. It is the role of a federal circuit judge to fully and faithfully apply binding Supreme Court precedent to the best of his or her ability.

- c. **Do you think it is appropriate for a circuit court judge to point out that a Supreme Court case is wrongly decided?**

Generally speaking, I do not think that is appropriate for a federal circuit judge to do

so. In limited cases, circuit judges may write separate opinions pointing out areas of Supreme Court jurisprudence that, in the judge's view, may be developed or clarified, provided the separate opinion makes clear that circuit courts are bound to apply Supreme Court precedent regardless of a circuit judge's view of the merits of such precedent. Please also see my response to Senator Feinstein's Question 2(b).

- d. In the letter you wrote to the Fifth Circuit, you seemed to hold the *Obergefell* dissents in high regard. In your view, what weight should judges give dissenting opinions in Supreme Court cases?**

None. Dissenting opinions in Supreme Court cases are not the law.

- e. Should federal circuit court judges seek to narrow the Supreme Court decisions with which they disagree or should they always seek to apply the decisions as narrowly or broadly as the Court intends in its controlling opinions?**

It is not appropriate for a circuit judge to "seek to narrow" Supreme Court decisions with which the judge may disagree. Circuit judges are duty bound to fully and faithfully apply all Supreme Court precedents.

- f. Are there any other cases that you believe were wrongly decided, like *Obergefell*, that you think should be scaled back or narrowed?**

I have never taken the position, either as an advocate or commentator, that *Obergefell* should be "scaled back or narrowed." If confirmed as a circuit judge, I would fully and faithfully apply all Supreme Court precedents, including *Obergefell*.

4. At the hearing, I asked you about your statement you made in a publication by the Institute on Religion and Public Life after the Tenth Circuit ruled in your client's favor in *Hobby Lobby*. In the article, you had argued that "[t]his is a watershed moment in American religious liberty," and predicted that this case could affect coverage of "all manner of controversial practices from surgical abortion to euthanasia to sex-change surgery." You were unable to answer my question at the hearing, stating that you did not remember the context of that statement. I hope you have had a chance to refresh your recollection.

- a. Do you believe that the "religious liberty" rights for closely held corporations recognized in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), should be applied to other areas?**

I wrote the article referenced in your question in my capacity as General Counsel for the Becket Fund. As a federal judicial nominee, I am precluded by the canons of judicial ethics from offering opinions on hypothetical cases and issues that might come before me if confirmed.

- b. Do you believe private hospitals could refuse to perform abortions or sex-change surgeries, or insurance companies could deny coverage to same-sex spouses, based on the *Hobby Lobby* decision?**

Please see my response above to Question 4(a).

- c. If so, where would you draw the line?**

Please see my response above to Question 4(a).

- 5. As General Counsel for The Becket Fund for Religious Liberty, you argued in *Hobby Lobby* that for-profit corporations have religious rights that can override the government's interest in ensuring gender equality in health care. Specifically, you advocated for a position that placed a company's religious rights over women's right to access contraceptives through their employer healthcare plan.**

- a. Is your work for the Becket Fund for Religious Liberty representative of your views on religious liberty?**

As a lawyer representing clients, my role was to advance my clients' interests, not my own views. If confirmed as a judge, my role would be entirely different: to impartially apply the law and all governing precedents to disputes before me, without regard to the parties involved or any previous arguments I may have made as a lawyer for clients.

- b. How does your view on religious liberty inform your views on the law and constitutional rights?**

Please see my response above to Question 5(a).

- c. How do you think courts should balance the need to protect religious exercise with other constitutional rights?**

Courts should impartially apply the law and all governing precedents to such cases. Please also see my response to Senator Whitehouse's Question 5.

- 6. You noted that you were lead counsel and appellate counsel for the North Carolina General Assembly in defending North Carolina's law restricting transgender people's ability to access public restrooms (known as HB2). In arguing against a motion for a preliminary injunction, you relied on a former federal agent's declaration to argue that "[a]llowing a man to use [a] woman's rest room, locker room, dressing room, shower, or dormitory room simply because he says he feels like a woman would seem to be reckless, to ignore thousands of years of human experience, and to ignore potential criminal activity."**

- a. What evidence did you have that allowing a transgender person to use a women's restroom, locker room, dressing room, shower, or dormitory room leads to**

criminal activity? Please be specific and itemize in as much detail as you can each piece of evidence.

Because I continue to represent a party in this litigation that is still pending in federal court, I cannot opine on the question posed.

b. Why would allowing a transgender person to use a women's restroom be "reckless"?

Please see my response above to Question 6(a).

7. In your Senate Judiciary Questionnaire, you commit to recusing yourself from "any litigation where [you] have ever played a role." You also commit to recusing yourself from all cases where your firm represents a party for a "period of time."

a. When you say you'll recuse yourself from cases where your firm "represents a party," does that include amici?

Yes.

b. How long is this period of time for which you would recuse yourself from cases involving your firm, if you are confirmed?

I have not decided on a specific period of time. If confirmed, I would consult with my colleagues and any other resources available to Fifth Circuit judges about the typical recusal practices for lawyers taking the bench from private practice. In all events, I would faithfully follow the requirements of the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and any other relevant recusal rules and guidelines.