Nomination of Kurt Engelhardt to the U.S. Court of Appeals for the Fifth Circuit Questions for the Record
January 17, 2018

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 district judge, and a prospective Circuit Judge, I have been and will be bound by oath to interpret the United States Constitution by applying all binding authority from the United States Supreme Court and the United States Fifth Circuit. I believe an originalist approach to Constitutional interpretation means simply that its provisions are understood in the context of their original public meaning. Where the Supreme Court has interpreted constitutional provisions by discerning their original public meaning, I have and will faithfully follow those precedents.

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

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

   It is never appropriate for lower courts to depart from the binding precedent of Supreme Court holdings.

   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?

   Under truly rare circumstances, a circuit court panel or judge may, in a concurring or dissenting opinion, respectfully suggest that the Supreme Court might review its prior holding. In this unique circumstance, it is incumbent upon the judge to (a) follow the Supreme Court precedent even though he/she believes it might be in error, and (b) while following the Supreme Court's majority opinion, respectfully suggest it be revisited by explaining specifically why, including legal authorities supporting such suggestion.

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

   Generally, to overrule a decision rendered by a prior panel of the Fifth Circuit, the entire *en banc* court must vote to review the matter *en banc*, and take the action of overruling the previous panel. *See United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (*en banc*).

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

   As a nominee for a Circuit court, and a sitting United States District Judge, it is inappropriate for me to express a view or opinion on when the Supreme Court should

appropriately overturn its own precedent. S*ee Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (only the Supreme Court has "the prerogative of overruling its own decisions").

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?"

   As a sitting United States District Judge (and Circuit Judge, if confirmed), there is no distinction between precedent of the Supreme Court. *All* Supreme Court precedent, including *Roe*, is equally binding.

   b. Is it settled law?

   See answer to question 3a.

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?

   Although I have read the Supreme Court's opinion in *Heller*, including the dissenting opinions, I have not sufficiently researched the voluminous material available to answer this question. As a United States District Judge, and as a prospective Circuit Judge, I will faithfully apply the controlling precedent of *Heller* and other Supreme Court opinions, without regard to my personal views as to the merits of those opinions.

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

   The Supreme Court in *Heller* expressly stated, "the right secured by the Second Amendment is not unlimited," adding, "nothing in our 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." 554 U.S. 570, 626-27 (2008).

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

See answer to question 4a. I note that the majority and dissenting opinions disagreed on this question, however I will fully and faithfully apply the binding precedent of the majority opinion.

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 is a binding precedent of the Supreme Court, and should be applied fully and faithfully by judges of lower courts.

6. At your nomination hearing, several Senators asked you questions about your opinion in *United States v. Bowen*. You granted defendants in that case a new trial, but without making a finding of specific prejudice, as is typically required under Federal Rule of Criminal Procedure 33. Appealing your decision, the Justice Department argued that if the Fifth Circuit upheld your grant of a new trial, it should nevertheless reassign the case to a different judge, in part because you had "attempted to act simultaneously as a neutral arbiter of defendants' new trial motion and as an independent investigator of government misconduct," dual roles that might lead "an objective observer [to] reasonably question [your] impartiality." (Corrected and Redacted Brief for the United States, at *170, *United States v. Bowen*, 2014 WL 4386627 (5th Cir. 2014))

a. Do you agree that an "objective observer" might have "reasonably question[ed] [your] impartiality" given your dual role, ruling over the defendants' Rule 33 motion and acting "as an independent investigator of government misconduct"?

No. This issue was presented by the government to the United States Fifth Circuit Court of Appeals, and the Fifth Circuit held that the government's motion to remove me as the presiding judge of a new trial was "meritless." 799 F.3d 336, 359 (5th Cir. 2015). Moreover, the government had never presented this argument to me, nor objected to my inquiries at the district court level. My approach was consistent with my ethical duties not to serve "as an independent investigator of government misconduct" other than as to those representations made to me as the presiding judge in that particular case. *See* La. R. Prof'l Conduct 3.3 (imposing a duty of candor to the Court).

b. What steps did you take to ensure that you did in fact remain impartial in considering the defendants' Rule 33 motion?

Among other things, I repeatedly sought the government's clarification, and further

details regarding alleged government misconduct. I also afforded the government several opportunities to respond fully and candidly under seal, and on the basis of an in-camera review.

7. In *Truvia v. Julien*, you considered claims that the Orleans Parish District Attorney's Office "had a policy, custom, or practice of violating criminal defendants' constitutional rights, under *Brady*, by purposefully withholding exculpatory evidence," and that the District Attorney, Harry Connick, had "failed to train and supervise his prosecutors on the requirement of *Brady* such that his failure constitutes deliberate indifference actionable under" federal law. (*Truvia v. Julien*, 2012 WL 3948613 (E.D. La. Sept. 10, 2012)) Those claims stemmed from the office's 1976 prosecution of Truvia for murder.

   Your opinion gave great weight to testimony from Connick and other prosecutors in the office, including the lead Assistant District Attorney (ADA) in Truvia's case, stating that the office's "official policy recognized prosecutors' legal and ethical obligations to comply with applicable law concerning evidence disclosure, including *Brady* . . . and the Louisiana Code of Professional Responsibility." You also appeared to credit deposition testimony and affidavits explaining "that Connick never 'encouraged, directed, or even hinted, that anyone should cover up, destroy, or hide *Brady* material,'" and you emphasized policies and practices in place during the 1970s that addressed the need to disclose exculpatory evidence interoffice updates, "in house" group training sessions, and consultation and partnership between junior and senior ADAs. Finally, you concluded that plaintiffs had identified "no reported instance of similar *Brady* violations, occurring prior to 1976 that arguably may have alerted Connick to a need at that time for additional training of his ADA's regarding disclosure of exculpatory evidence."

   On the other hand, you appeared to give very little weight to allegations in the plaintiff's complaint, including that new ADAs conducted trials during their first week of service without supervision; that Connick "implemented a specific unwritten policy and custom that the District Attorney's office would come up with any reason whatsoever not to provide criminal defendants with exculpatory *Brady* materials"; and that it was "[t]he custom and practice of the District Attorney's office . . . to deny requests for *Brady* information as 'not entitled' . . . and therefore to attempt to shift the burden to the criminal defendant and/or the judge to protect their Constitutional rights to *Brady* exculpatory evidence." (Amended Complaint, *Truvia v. Julien*, 2004 WL 2687315)

   In addition, at your nomination hearing, you stated that the Supreme Court had in *Connick v. Thompson* given you a "road map" of what the plaintiff in *Truvia* had to show in order to recover financially. But *Connick* did more than just provide this "road map." As the majority itself noted — despite putting up a roadblock to Mr. Thompson's recovery of financial damages — "no prosecutor remembered any specific training session regarding *Brady* prior to 1985." (*Connick v. Thompson*, 563 U.S. 51, 58 (2011))

   a. Given the allegations in the plaintiff's complaint, along with prosecutors' acknowledgment — as stated by the Supreme Court in *Connick* — that the office did not conduct any training sessions on *Brady* in the period when Mr.

Truvia was prosecuted, why did you choose to credit the claims of Connick, Julien, and the other ADAs?

While the case was pending, the parties agreed that the anticipated *Connick v. Thompson* opinion, 563 U.S. 51 (2011), would have great bearing in the *Truvia* matter pending before me, and I stayed the *Truvia* matter until the Supreme Court ruled. Following the Supreme Court's opinion in *Connick v. Thompson*, I requested and received additional extensive briefing from both parties. My role was not "to credit the claims of Connick, Julien, and other ADA's," but rather, pursuant to Federal Rule of Civil Procedure 56, to evaluate whether the plaintiff presented sufficient evidence to meet his burden and overcome the defendants' submissions. For the reasons stated in my ruling, the plaintiff was unsuccessful. My ruling was affirmed. *Truvia v. Connick*, 577 F. App'x 317 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1550 (2015).

b. **In *Connick v. Thompson*, Justice Ginsburg, dissenting from the majority, wrote that "the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish." Do you disagree with this assessment?**

The majority opinion in *Connick v. Thompson* is binding precedent, and I applied it to the matter presented to me in the *Truvia* case.

c. **In your more than 16 years on the bench, have you ever awarded financial or other damages to a plaintiff who alleged police or prosecutorial misconduct? If so, please provide examples of any such cases, including citations.**

No, but the parties in such cases regularly reach settlements prior to a damages assessment by a court.

d. **Truvia asserted claims under 42 U.S.C. § 1983, among other statutes. In your more than 16 years on the bench, in how many § 1983 lawsuits have you <u>denied</u> a defendant's motion for summary judgment? Please provide examples of any such cases, including citations.**

I have denied a defendant's motion for summary judgment on claims brought pursuant to 42 U.S.C. § 1983 in at least five cases:

In *Claudia Sims v. City of New Orleans*, No. Civ.A.03-3169, 2005 WL 1400440 (E.D. La. 2005), I denied the defendant's motion for summary judgment as to plaintiff's claims arising out of alleged strip searches conducted by New Orleans Police Department officers. The case settled shortly after my denial of summary judgment.

In *August v. Gusman*, No. 06-3962, 2008 WL 466202 (E.D. La. Feb. 13, 2008), I denied a defendant's motion for summary judgment on a plaintiff's § 1983 claim of medical indifference. The plaintiff alleged that a prison doctor was indifferent to his medical needs when he was left in the medical unit without medical attention for his

infected knee and high blood pressure during and immediately following Hurricane Katrina. I later denied a second motion for summary judgment by the doctor. No. 06-3962, 2009 WL 166653 (E.D. La. Jan. 22, 2009).

In *Beckett v. Serpas*, No. 12-910, 2013 WL 2921639 (E.D. La. June 12, 2013), I denied defendants' motion for summary judgment on a plaintiff's § 1983 claim of retaliation. The plaintiff, a police officer with the New Orleans Police Department, alleged that she was fired after providing testimony favorable to a criminal defendant.

In *De La Cruz v. Edwards*, No. 14-1729, 2015 WL 6696427 (E.D. La. Nov. 3, 2015), I denied the defendants' motion for summary judgment on a plaintiff's § 1983 claim of excessive force. The plaintiff alleged that a Tangipahoa Parish deputy used excessive force, and committed assault and battery, against the plaintiff. This case was resolved short of trial.

In *Morris v. McKessie*, No. 14-1741, 2016 WL 740340 (E.D. La. Feb. 25, 2016), I denied a defendant's motion for summary judgment on a plaintiff's § 1983 claim of excessive force and battery. The plaintiff alleged that a Gretna, Louisiana police officer used excessive force when arresting the plaintiff.

8. At your nomination hearing, you were asked about several employment discrimination lawsuits. One such suit was *Ellzey v. Catholic Charities Archdiocese of New Orleans*. Despite granting summary judgment on procedural grounds — Ellzey had failed to exhaust her administrative remedies — you still considered the merits of Ellzey's claims. You found that her allegations of sexual harassment — "sensual back rubs" every 1-2 weeks, and comments on her physical appearance — did "not rise to the level of actionable harassment." You concluded that "under existing case law, these alleged instances and any other unwelcomed physical-touching allegations were neither severe nor physically threatening, though quite unwelcome and indeed inappropriate." (833 F. Supp. 2d 595 (E.D. La. 2011)) In reaching this conclusion, the "existing case law" you cited consisted of only two cases.
One was a 2003 case from the Eastern District of Texas. The other was a 1993 case from the Seventh Circuit.

a. Why did you decide to consider the merits of Ellzey's claims when you had already determined her suit should be dismissed for failure to comply with Title VII's exhaustion requirement?

The defendant's motion for summary judgment argued several grounds for dismissal, including the exhaustion requirement of Title VII as well as on the substantive merits. Because the Court's ruling might be reviewed by the Fifth Circuit on appeal, I frequently address all or most grounds raised in a motion for summary judgment for the benefit of the Court of Appeals, and in the interest of judicial economy (*i.e.*, to avoid later piecemeal appeals in the same case). Therefore, in order to present the full disposition of the plaintiff's claims under the law, I proceeded to the defendant's motion as to the merits of the plaintiff's claim.

b. At the time you issued your opinion, was there any controlling Fifth Circuit precedent holding that conduct similar to that alleged in *Ellzey* did "not rise to the level of actionable harassment"?

Yes. As noted in my opinion, the Fifth Circuit's decision in *Shepherd v. Comptroller of Public Accounts of State of Texas*, 168 F.3d 871, 874 (5th Cir. 1999) included comments by the plaintiff's colleague that the Fifth Circuit considered "boorish and offensive," but nonetheless, did not rise to the level of actionable harassment.

c. At the time you issued your opinion, were there any cases from within the Fifth Circuit — whether at the circuit or district court level — that suggested conduct similar to that alleged in *Ellzey* could in fact give rise to a Title VII harassment claim?

See my answer to Question 8.b. above.

9. In addition to *Ellzey*, you also granted summary judgment to the defendant in several other Title VII suits that alleged, among other things, pregnancy discrimination and a hostile work environment. These cases included *Taylor v. Jotun Paints* and *EEOC v. Rite-Aid*, both of which were discussed at your nomination hearing, and *Kreamer v. Henry's Marine*, a same- sex sexual harassment suit.

a. In your more than 16 years on the bench, in how many Title VII cases have you <u>denied</u> a defendant's motion for summary judgment? Please provide examples of any such cases, including citations.

It is not possible to quantify how many unsuccessful motions for summary judgment appeared on my docket in Title VII cases. In Title VII cases, settlements are frequently reached, with the assistance of the Court, early in the proceedings. Moreover, settlements in Title VII cases are also frequently reached once a motion for summary judgment has been filed and is pending at the time of settlement. In addition, such motions may be subject to denial from the bench, without any written opinion.

Nonetheless, a search of the Westlaw and LEXIS databases indicates that I denied motions for summary judgment in cases involving claims under Title VII in at least the following cases:

In *Templet v. Hard Rock Const. Co.*, No. 02-0929, 2003 WL 181363 (E.D. La. Jan. 27, 2003), I denied the defendant's motion for summary judgment where a plaintiff asserted, among other claims, a Title VII pregnancy discrimination claim.

In *Burrell v. United State Postal Serv.*, No. 00-3273, 2002 U.S. Dist. LEXIS 6886

(E.D. La. 2002), I denied the defendant's motion for summary judgment with respect to a plaintiff's Title VII claim of retaliatory discrimination claim based on appointment to a new position following a reorganization.

In addition, to the cases cited above, in *Baricuatro v. Indus. Pers. & Mgmt. Servs.*, No. 11-2777, 2014 U.S. Dist. LEXIS 92356 (E.D. La. July 7, 2014), I denied the defendant's motion for summary judgment on the plaintiffs' claim of discrimination in the conditions of their employment because of their race. This case was brought pursuant to 42 U.S.C. § 1981. As I noted in my decision, summary judgment is governed in § 1981 cases pursuant to the same standards employed in Title VII cases.

10. You have denied the certification of a class in at least three cases over which you have presided. In one, *In re FEMA Trailer Formaldehyde Products Liability Litigation*, you claimed that plaintiffs — residents displaced by Hurricanes Katrina and Rita who lived temporarily in certain trailers that contained high levels of formaldehyde — had failed to show numerosity with respect to certain subclasses, as well as commonality, typicality, and adequacy of the proposed class representatives. You likewise denied class certification in *Baricuatro v. Industrial Personnel and Management Services, Inc.*, a suit alleging violations of the Fair Labor Standards Act, Trafficking Victims Protection Act of 2003, and RICO, and in *In re American Commercial Lines, LLC*, in which plaintiffs alleged physical and emotional damages arising from the release of diesel fuel into the Mississippi River.

    a. **In your more than 16 years on the bench, in how many total cases have you granted class certification? Please provide examples of any such cases, including citations.**

    It is incomplete to state that I denied class certification in FEMA Trailer Formaldehyde Products Liability Litigation. While I denied class certification at one stage in the litigation, I later granted class certification in order to facilitate the extensive settlement agreement reached. *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. 2:07-MD-1873, 2011 WL 11677126 (E.D. La. Nov. 17, 2011).

    I have also granted class certification in at least the following cases:

    Merrick v. Moneyquest Corp., No. 05-cv-1904 (E.D. La. Nov. 8, 2006) (unpublished order)

    White v. Imperial Adjustment Corp., No. 99-3804, 2002 U.S. Dist. LEXIS 26610 (E.D. La. Aug. 6, 2002).

11. In 2008 and 2009, you presided over a school desegregation case involving public schools in Jefferson Parish—*Dandridge v. Jefferson Parish School Board*. Although unavailable on Westlaw, an opinion you wrote in that case was summarized in an article in the *New Orleans Times-Picayune*: "In March [2008], [Judge] Engelhardt rejected the district's original consent order, which sought to equalize services, faculty, facilities and student assignments across the parish, representing the combined aims of the School Board and the

plaintiffs. His denouncement of the order temporarily relieved a small contingent of magnet school parents who had opposed the boundary changes." (Jenny Hurwitz, *Federal judge takes big role in fight over Jefferson Parish schools*, Jan. 24, 2009)

a. **Why did you reject the original consent order in this case, as the *Times-Picayune* reported?**

The original draft Consent Order submitted was overburdened with various matters that served no purpose to, or even prolonged, the goal of reaching unitary status, which is the standard under the law. S*ee Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19 (1969); *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (1969). The focus of the Court was to oversee, with the help of the appointed monitor, efforts at desegregation of the Jefferson Parish school system, and to achieve such result as promptly as was practical. The Court did not object to the general principles of the submitted Consent Order, but rather rejected it as unduly cumbersome and not sufficiently tailored to achieve the result as dictated by the jurisprudence.

b. **Please provide the Committee with a copy of the opinion cited in the *Times- Picayune* report.**

There is no written opinion rejecting the draft Consent Order. The Court's ruling was made orally from the bench after a hearing in open court on March 14, 2008.

12. 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 <u>not</u> 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.

No.

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.

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

The Fifth Circuit has held that it is appropriate "to look to . . . legislative history only when the text of the statute is ambiguous." *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405 (5th Cir. 2014).

14. According to your Senate Questionnaire, you have been a member of the advisory board of the Federalist Society's New Orleans Chapter since 2002. 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.

The cited language from the Federalist Society's webpage was not written nor specifically adopted by me. I am not aware of who authored the cited language, and am uncertain of the source, factual basis, or other support for such a belief.

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

See answer to question 14a.

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

See answer to question 14a.

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

I received five (5) questionnaires from Senators on the Senate Judiciary Committee on January 17, 2018. I reviewed each of the questions, personally drafted answers after researching or reviewing matters referenced in such questions, and submitted my responses to the Office of Legal Policy at the Department of Justice. After receiving suggestions from OLP, I made edits I considered appropriate. I then authorized the submission of my response.

Senator Dick Durbin
Written Questions for Kurt Engelhardt, Howard Nielson and Barry Ashe
January 17, 2018

For questions with subparts, please answer each subpart separately.

Questions for Kurt Engelhardt

1. When you appeared before this Committee in 2001 for your district court nomination, I asked you in writing whether you agreed with the Supreme Court's decisions in *Griswold*, *Roe* and *Casey*. You responded as follows:

> I agree that the Supreme Court's decisions in *Griswold v. Connecticut*, *Roe v. Wade*, and *Planned Parenthood v. Casey* are well-settled law as enunciated by the Supreme Court. I further agree that the doctrine of stare decisis counseled the Court against overruling *Roe* [in] 1989, thus reaffirming the correctness of those decisions. If confirmed as a district court judge, I will, without reservation, apply the law as enunciated by the Supreme Court, in all respects, including the constitutionally-recognized rights set forth in *Griswold*, *Roe* and *Casey*.

   a. **Do you still stand by your answer today?**

   Yes, the Supreme Court's decisions are binding precedent, and I have taken an oath as a district judge (and if confirmed, will take an oath as a Circuit Judge) to faithfully apply the law as enunciated by the Supreme Court.

   b. **Would your answer still apply if you are confirmed as a circuit court judge?**

   See answer to question 1a.

2. You say in your questionnaire that the *Dandrige v. Jefferson Parish School Board* case was "concluded successfully in a minimum amount of time." **How successful would you say the effort has been to desegregate the Jefferson Parish school system has been?**

   My responsibility as the presiding judge was to oversee the Consent Order to achieve unitary status, as that term is defined by the United States Supreme Court and Fifth Circuit. S*ee Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19 (1969); *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (1969). In this regard, I believe the effort to desegregate the Jefferson Parish school system by achieving unitary status has been successful.

3. In 2010 you presided over the case *Taylor v. Jotun Paints, Inc.*, in which an employee named Brandi Taylor sued her employer for pregnancy discrimination when she was fired two weeks after giving birth.

The employer argued that Ms. Taylor was not qualified for the position from which she was fired because she had been unable to come to work. She wasn't able to go to work because she was placed on bed rest for her pregnancy by her obstetrician. You agreed with the employer, holding that "the fact that plaintiff's absences were caused by pregnancy does not dispense with the general requirement that employees must show up for work." You granted summary judgment for the employer.

Do you believe that Ms. Taylor was treated fairly in this case?

A district judge's mandate is to judge each case based on the evidence presented and in accordance with controlling legal principles established by Congress and judicial precedent including controlling precedent of the Supreme Court and the applicable circuit court. The result in this case was based upon the provisions of 42 U.S.C. §§ 2000(e)(2)(a) and 2000(e)(k). I applied the analysis set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and binding Fifth Circuit precedent set forth in *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856 (5th Cir. 2002) and *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998).

4. When you ordered a new trial for the police officers who had been convicted for the Danziger Bridge shootings and cover-up, you emphasized the prosecutors' misconduct which included their posting of anonymous online comments about the cases.

   a. **Have you presided over other cases in which you have seen prosecutorial misconduct?**

      No.

   b. **Have you ordered new trials in any other cases on the basis of prosecutorial misconduct? If so, please describe these cases.**

      See answer to question 4a.

5. 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 a number President Trump's nominees, including Joan Larsen, David Stras, and others.

   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 sitting United States District Judge and potential Circuit Judge, I do not believe it appropriate for me to comment on political issues or positions of advocacy which may arise in future litigation.

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

See answer to question 5a. As a sitting United States District Judge, I am familiar with and would consider the provisions of 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other considerations bearing on the issue of recusal.

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

See answer to question 5a.

6.

a. **Is waterboarding torture?**

I have not had occasion to study this specific legal question. Generally, under 18 U.S.C. § 2340, waterboarding would constitute torture if it were "intended to inflict severe physical or mental pain or suffering" upon a detainee. Waterboarding may also constitute "cruel, inhuman, or degrading treatment" within the meaning of Section 1003 of the Detainee Treatment Act of 2005. Beyond those broad statements, I must refrain from expressing a personal view on a subject of controversy that may result in litigation. Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

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

See answer to question 6a.

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

See answer to question 6a.

7. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on "political questions"?**

As a sitting United States District Judge and a nominee to serve as a Circuit Judge, Canon 5 of the Code of Conduct for United States Judges does not permit me to answer this question.

8. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

   As a sitting United States District Judge and a nominee to serve as a Circuit Judge, Canon 5 of the Code of Conduct for United States Judges does not permit me to answer this question.

9. In your questionnaire you list yourself as having been a member of the Federalist Society since 2002.

   a. **Why did you join?**

      I joined the New Orleans Chapter of the Federalist Society after talking with a few of my new judicial colleagues and friends who were active in the local chapter. I joined because it is an organization of lawyers that encourage and enjoy debate on numerous issues, particularly Constitutional questions, and the speakers/lunch programs offered in New Orleans were intellectually stimulating and inclusive of different viewpoints.

   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 sitting United States District Judge and a nominee to serve as a Circuit Judge, Canon 5 of the Code of Conduct for United States Judges does not permit me to answer this question.

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

      I have never attended the Federalist Society's annual convention.

   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?**

      No. See answer to question 9c.

10.

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

I have not had the occasion to research this question. However even had I done so, it would be inappropriate for me, as a sitting United States District Judge, to comment under the Judicial Canons of Ethics.

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

See answer to question 10a.

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

See answer to question 10a.

11. **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?**

My oath as a federal judge requires me to "administer justice without respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all of the duties incumbent upon me . . . ." Based upon my experience, in discharging that oath, and consistent with it, there are occasions, particularly at the time of sentencing, when empathy for the victims of the alleged crime, for the defendant involved, and/or their loved ones, might be considered.

Nomination of Kurt Engelhardt to the
United States Court of Appeals
For the Fifth Circuit
Questions for the Record
Submitted January 17, 2018

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?

    To the extent Chief Justice Roberts' metaphor implies objective law and jurisprudence (that is, a "strike zone") which an umpire can apply to each and every pitch (the facts) in determining whether a ball or strike has been thrown, I agree. The judge is not in the role of an adversary (*i.e.*, the pitcher or the batter).

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

    The judge's ruling should be based upon the guidance provided by statute and precedent interpreting such statute. In some cases, precedent instructs a judge to consider the consequences when making a ruling. For example, when deciding whether to issue a preliminary injunction, a judge should take into consideration the consequences (whether movant will suffer irreparable harm if an injunction is not granted).

    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?

    Federal Rule of Civil Procedure 56 requires a judge to determine whether a genuine dispute as to any material fact exists. A judge does not make a subjective determination (*i.e.*, one guided by the feelings or intuition of the judge) that such a dispute exists. Rather, a judge evaluates the allegations and factual assertions made by each party, takes into consideration precedent and prior decisions involving analogous facts, and decides whether summary judgment is appropriate based on this evaluation.

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?

My oath as a federal judge requires me to "administer justice without respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all of the duties incumbent upon me." Based upon my experience, in discharging that oath, and consistent with it, there are occasions, particularly at the time of sentencing, when empathy for the victims of the alleged crime, for the defendant involved, and/or their loved ones, might be considered.

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

Having been a United States District Judge for over 16 years, I know that each judge's personal life experience impacts his or her decision-making process, however such process is always bound by controlling jurisprudence.

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. You have spoken out against judicial activism and of the importance for judicial restraint. In your view, was *Brown v. Board of Education* an example of judicial activism at the time it was decided? What about *Obergefell v. Hodges*?

As a sitting United States District Judge, and pursuant to the Canons of Ethics governing conduct of federal judges, it is inappropriate for me to characterize the Supreme Court's rulings in *Brown* and *Obergefell* as "judicial activism" or otherwise, at the time they were decided and thereafter. Both *Brown* and *Obergefell* are binding precedent which I would apply as a District Court Judge or, if I am confirmed, as a Circuit Court Judge.

Nomination of Kurt D. Engelhardt, to be United States Circuit Judge for the Fifth Circuit
Questions for the Record Submitted January 17, 2018

QUESTIONS FROM SENATOR COONS

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

   The analytical framework has been applied by the United States Supreme Court in a number of cases. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992); *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. In addition to the cases cited in response to question 1a., *see also Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

      Yes. I would consider binding precedent from the United States Supreme Court and the Fifth Circuit. If the issue of whether such right should be recognized has not been settled by either of these courts, the persuasive value of opinions from other circuits would be considered.

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

      Yes. The United States Supreme Court has explained that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996).

      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 precedent of the United States Supreme

Court. As with all other binding precedent, I would apply these decisions fully and faithfully.

f. What other factors would you consider?

I would consider all other factors deemed relevant for consideration under applicable United States Supreme Court precedent and 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?

The Fourteenth Amendment applies to discrimination on the basis of gender as well as race. *See 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?

As a United States District Judge, and as a prospective Circuit Judge, I would apply all binding United States Supreme Court precedent with regard to 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 am not aware of the reasons why the *Virginia* case was not presented to the United States Supreme Court prior to 1996.

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

In *Obergefell*, 135 S. Ct. at 2607, the United States Supreme Court held that the Fourteenth Amendment "does not permit the state to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."

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

As a sitting United States District Judge, and pursuant to the Canons of Ethics governing my position, it would be inappropriate for me to opine in responding to this question, as it may well be the subject of pending or reasonably anticipated litigation.

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

The United States Supreme Court has held that there is a constitutional right to privacy that affords such protection. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *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?

The United States Supreme Court has so held in *Planned Parenthood of Southeastern Penn. v. Casey*, 502 U.S. 833 (1992), among other cases.

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?

The United States Supreme Court has so held in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

Please see my answers 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 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

As a sitting United States District Judge and a prospective Circuit Judge, I have applied, and would continue to fully and faithfully apply, binding precedent of the United States Supreme Court and the Fifth Circuit, including any precedent suggesting it appropriate to consider such evidence.

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

Rule 702 of the Federal Rules of Evidence provides that an expert may testify "[i]f the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue." This rule has been the subject of Supreme Court opinions governing the admissibility of such evidence, based upon its reliability, and thus its usefulness in any requisite analysis in a case

before a federal court. *See e.g., Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).

5. You are a member of the Federalist Society, a group whose members often advocate 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?

      As a sitting United States District Judge and prospective Circuit Judge, and pursuant to the Judicial Canons of Ethics, it would be inappropriate for me to opine on a subject of scholarly debate, other than to state forthrightly that *Brown v. Board of Education* is binding precedent on all judges, and I would apply it faithfully.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic- constitutionalism (last visited January 16, 2018).

      The United States Supreme Court has recognized this concern. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 854 (2010), *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995).

6. You have praised Justice Thomas' dissent in *Lawrence v. Texas*, 539 U.S. 558 (2003), which would have refused to overturn a Texas law criminalizing same-sex intimacy, as "example of one man's submission of personal preference in favor of adherence to constitutional principle."

   a. What is the constitutional principle to which you were referring?

      The passage I quoted from Justice Thomas's dissent in *Lawrence v. Texas* was simply the acknowledgment that a judge's personal preference could not overrule *any* Constitutional or statutory principle. That is, judges do not have leeway to substitute their opinion as to what the law should be for that which has been proclaimed to be the law by Congressional enactment or binding precedent. In my speech citing Justice Thomas's statement, I neither discussed, praised, nor condemned the holding in *Lawrence v. Texas*, or any dissenting opinion, including Justice Thomas's dissent.

b. Do you subscribe to this constitutional principle?

I subscribe to the principle that a judge must set aside his personal preference in favor of adherence to binding precedent.

7. In *United States v. Bowen* (commonly known as the "Danziger Bridge case"), there was no evidence that jurors saw improper online postings about the case, and jurors selected were ordered not to read anything about the case.

a. Have you relied on the jury instruction not to read about the ongoing case in other trials before you as a mechanism to ensure that a jury is not prejudiced by publicity occurring during the proceedings?

Yes.

b. Do you agree that the Danziger Bridge incident and corresponding trial received a substantial amount of public attention, separate and apart from the improper comments of the prosecutors?

Yes.

Questions for the Record for Kurt Damian Engelhardt

Senator Mazie K. Hirono

1. At the hearing, I asked you about your 2004 decision in *EEOC v. Rite-Aid*. In that case, you rejected a sexual harassment claim brought by the EEOC on behalf of a female security officer at a Rite-Aide store. In denying that claim, you found that the harassment was neither "severe nor physically threatening" and that the plaintiff "liked her job" and performed well in it. When I asked you about your reason for denying the sexual harassment claim, you justified your decision based on the fact that you had to employ a burden-shifting framework. You agreed to review the case and respond to my questions. I hope you have had a chance to refresh your memory.

   a. Which burden-shifting framework did you apply to the sexual harassment claim and how did it affect your decision to dismiss this claim?

   My reference to the "burden-shifting framework" was a general answer regarding the several employment discrimination-related cases brought up at my hearing.

   In *EEOC v. Rite-Aid*, the burden under 42 U.S.C. § 2000(e)(2)(a)(1) as set forth in Fifth Circuit and United States Supreme Court jurisprudence, required the plaintiff to establish a *prima facie* case for a hostile work environment claim based on a co-worker's conduct. The plaintiff must establish that (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege of the employment"; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *See Jones v. Flagship Int'l.*, 793 F.2d 714, 719-20 (5th Cir. 1986); *see also Shepherd v. Comptroller of Public Accounts of the State of Tex.*, 168 F.3d 871, 873 (5th Cir. 1999).

   In considering the motion for summary judgment in *EEOC v. Rite-Aid*, I assumed for purposes of the motion that no genuine issue of material fact existed regarding plaintiff's burden as to the first three requisite elements and that she could meet her burden as to those elements. The employer moved for summary judgment as to the fourth and fifth elements and, under the relevant jurisprudence cited in the opinion, I concluded that the plaintiff failed to meet her initial burden as to the fourth element.

   b. Is it your view that a woman who does her job well and has stated that she likes her job cannot bring a sexual harassment claim because the alleged harassment has not interfered with her work performance?

   The Fifth Circuit has stated that "Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace." *Shepherd*, 168 F.3d at 874 (quoting *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996); *see also Faragher v. City of Boca Raton*, 524

U.S. 775, 778 ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment"); *DeAngelis v. El Paso Mun. Police Officers Assoc'n.*, 51 F.3d 591, 593 (5th Cir. 1995). In determining whether a viable *prima facie* hostile work environment claim exists, whether the alleged conduct has interfered with work performance is one of the several factors set forth by the United States Supreme Court and the Fifth Circuit to evaluate whether alleged conduct is sufficiently severe or pervasive to alter the terms and conditions of employment. *See EEOC v. Rite Aid Corp.*, No. 03-2079, 2004 WL 1488578, at *5 (E.D. La. June 30, 2004) (*citing Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21(1993); *Weller v. Citation Oil & Gas Corp*., 84 F.3d 191, 194 (5th Cir. 1996)).

c. In this case, the female employee complained that two male employees had, among other things, brushed up against her multiple times, tried to kiss her, cupped her breast, and suggested that they were going to go to her house. Is it your view that such sexual harassment is not severe enough to be banned in the workplace under Title VII of the Civil Rights Act?

In any case, a court's assessment of the viability of a particular Title VII sexual harassment claim turns on the sufficiency of the relevant evidence evaluated in the context of controlling legal principles. I faithfully conducted that assessment and concluded that the plaintiff had failed to meet her burden as to the fourth element of the *prima facie* case.

d. You also pointed out that the alleged harassment was not physically threatening. Do you believe that cornering a female employee, touching her breast, or trying to kiss her without permission, as alleged in the case, is not physically threatening?

My ruling was guided by *Hockman v. Westward Commc'ns, LLC,* 282 F. Supp. 2d 512 (E.D. Tex. 2003) and *Weiss v. Coco-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993), as well as the evidence submitted by the parties in connection with the subject motion, and the totality of the circumstances.

e. You denied the plaintiff's sexual harassment claim by explaining that comments made to the plaintiff were "equivalent of a mere utterance of an epithet that engender offensive feelings." What did you mean by that?

The quoted language is a specific reference to the jurisprudential guidance of *Harris v. Forklift Sys., Inc.,* 510 U.S. at 23.

2. I also asked you at the hearing about your decision in *Ellzey v. Catholic Charities Archdiocese of New Orleans*. You decided this case on procedural grounds but went further to comment on the merits of the sexual harassment allegations. You pointed out that the supervisor's conduct was "unwelcome" and "inappropriate" but found that the "alleged instances and any other unwelcomed physical touching-allegations were neither severe nor physically threatening." You agreed to respond in writing about Fifth Circuit precedent that requires "physical threat" to establish a sexual harassment claim.

What Fifth Circuit precedent is there that requires "physical threat" as an element of establishing a sexual harassment claim?

The United States Fifth Circuit Court of Appeals is bound by Supreme Court precedent. The element of whether a "physical threat" was present is part of the totality of circumstances that courts consider when performing the proper analysis, and it comes from the Supreme Court decisions in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). *See also Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191 (5th Cir. 1996). In addition, that language is set forth in the Fifth Circuit Pattern Jury Instructions, at § 11.2.

3. At the hearing, I asked you about your membership in the Louisiana Lawyers for Life. Before you became a district court judge, you were a member of this organization for about seven years. This organization describes itself as "support[ing] the legal protection of human life, born and unborn, from abortion."

While you were a member of the Louisiana Lawyers for Life, what activities did you participate in? How did you further its mission of "support[ing] the legal protection of human life, born and unborn, from abortion"?

I paid annual dues during the term of my membership, and had my name, as a practicing lawyer, associated among many other members of the local bar who also joined Louisiana Lawyers for Life.

4. In *Maradiago v. Castle*, you pointed out that Louisiana need not recognize all common law marriages considered valid in other states "[w]hen the relationship offends some strongly established public policy of the state." You then went further to note that "the Louisiana Legislature has clearly stated the 'strong public policy' of this state against recognition of same-sex marriages."

This case did not involve same-sex marriage so why did you feel the need to point out same-sex marriage as an example of offending public policy? Is that your view of same- sex marriage?

In considering the issues presented in 2008 in *Maradiago v. Castle*, involving the position of the state of Louisiana on "common law" marriages, the parties presented argument, which I considered and analyzed, directly addressing the scope of marriage in the state of Louisiana. In denying the defendants' motion for partial summary judgment, I explained, citing Louisiana jurisprudence, that Louisiana will recognize common law marriages validly confected in states authorizing such marriages *unless* "the relationship offends some strongly established public policy of the state." The statement in question, which appropriately is set forth in a footnote, not the body of the opinion, was merely included as an example of a relationship that the Louisiana Legislature had expressly declared, in Louisiana Civil Code article 3520, to "violate[] the strong public policy of the state of Louisiana[.]" My note regarding the statutory "strong public policy" against recognition of same-sex marriages was based upon the then-existing law, which has subsequently been

directly addressed by the United States Supreme Court in *Obergefell* in 2014. As *Obergefell* is binding precedent, I will faithfully follow it with regard to the issue of same-sex marriage.

5. Some studies have found that school voucher programs can make it more likely that school segregation will increase. In 1993, you wrote a letter to the editor of the New Orleans Times- Picayune supporting vouchers for private and parochial schools.

   a. Is it still your view that parents should have the option to use public fund vouchers to enroll their children in private or parochial schools?

   This question presents a policy question. Upon taking the judicial oath in December 2001, I became and remain bound by the Judicial Canons of Ethics, which make it inappropriate for me to respond to questions of public policy such as that presented in this question.

   b. What role do you think school choice should play in desegregation cases?

   School choice is one of several considerations available to the parties in fashioning a consent decree in desegregation cases, in an attempt to achieve unitary status.