

**Nomination of Taylor B. McNeel to the United States District Court for the
Southern District of Mississippi
Responses to Questions for the Record
Submitted September 23, 2020**

QUESTIONS FROM RANKING MEMBER FEINSTEIN

1. You serve on your local school board. In June, you voted to reopen schools for in-person classes and supported a plan that would have required any student who wanted to learn remotely to submit a doctor's note. (WLOX NEWS (July 20, 2020))

Some neighboring school districts moved to 100% distance learning, while more than 75% of students in your district have attended in person. Only 11 days into the new school year, at least 27 students in your district have had to be quarantined after three students, one teacher and two staff members tested positive for COVID-19. (FOX LOCAL NEWS WXXV (Aug. 21, 2020)).

- a. **Why did you vote for a plan that required families to get a doctor's note in order to attend school remotely?**

The administration of the Pascagoula-Gautier School District is made up of educational professionals. From the outset of the COVID-19 outbreak, these educational professionals have made clear that the school district must remain flexible and adaptable to meet the needs of the students, staff, and parents.

A preliminary reopening plan was proposed by these educational professionals at the June meeting. At the beginning of the June meeting, the superintendent stated that the preliminary plan will continue to be revised. At various times during the meeting, there were references to how feedback would be sought out from various groups to potentially change the preliminary plan. At the end of the meeting, it was recognized that the administration would consult with the medical community and potentially change the preliminary plan. That was consistent with my understanding that the preliminary plan would be revised after comments from the local community, including comments from the local medical community.

School was not scheduled to begin until August. There were numerous additional discussions. Further, there were other school board meetings in between June and when schools were reopened in August. As expected, the preliminary plan was changed. Traditionally, it is standard practice for a school district to allow for the presentment of a doctor's note related to a student's absence from in-person school attendance. The final reopening plan – that was implemented prior to the reopening of schools – did not include any requirement for a doctor's note in order to attend school remotely. The WLOX article, that is referenced, recognizes that any requirement for a doctor's note was eliminated from the preliminary plan. As such, students and parents were

not required to present a doctor's note in order to opt-in to the virtual learning option that the school district provided.

b. Why should families have to give any reason at all in order to engage in distance learning?

Please see my response to Question 1.a.

i. If you agree that they shouldn't have to give any particular reason, then why did you vote for a plan that required them to do so?

Please see my response to Question 1.a.

2. Mississippi's State Health Officer, Dr. Thomas Dobbs — who is the state's top health official — advised against reopening schools for in-person instruction. (JACKSON FREE PRESS (Aug. 25, 2020)). The Mississippi chapter of the American Academy of Pediatrics also urged schools not to reopen for in-person instruction until COVID-19 cases were on a “downward trajectory.” (THE SUN HERALD (Jul. 27, 2020))

Why didn't you follow the advice of these medical professionals?

Pascagoula-Gautier School District's administration consists of trained educational professionals that have previously recognized the number one priority is the health and safety of the students and staff of the Pascagoula-Gautier School District. After considering numerous factors, the educational professionals of the Pascagoula-Gautier School District recommended reopening schools with a virtual learning option and with an in-person learning option. The options provide flexibility and allow for parents to choose the specific option that best addresses the health, safety, and educational needs for particular students.

On June 26, 2020, the American Academy of Pediatrics (AAP) stated that the “AAP strongly advocates that all policy considerations for the coming school year should start with a goal of having students physically present in school.”¹ The AAP recognized “the fundamental role of schools in providing academic instruction, social and emotional skills, safety, nutrition, physical activity, and mental health therapy.” *Id.* The AAP also stated the following:

Schools are critical to addressing racial and social inequity. School closure and virtual educational modalities have had a differential impact at both the individual and population level for diverse racial, ethnic, and vulnerable groups, according to the guidance. Evidence from spring 2020 school closures points to negative impacts on learning. Children and adolescents also have been placed at higher risk of morbidity and mortality from physical and sexual abuse, substance use, anxiety, depression, and suicidal ideation.

¹ See American Academy of Pediatrics News, *AAP interim guidance on school re-entry focuses on mitigating COVID-19 risks*, June 26, 2020. <https://www.aappublications.org/news/2020/06/26/schoolreopening062620>.

Id.

On July 23, 2020, the Centers for Disease Control and Prevention (CDC) stated that the “available evidence provides reason to believe that in-person schooling is in the best interest of students . . .”² The CDC recognized the benefits that in-person school provides for educational instruction, the development of social and emotional skills, creating a safe environment for learning, addressing nutritional needs, and facilitating physical activity.

Id.

In addition to the issues identified above, the administration considered the education inequities of virtual learning and whether certain students in our particular community could successfully learn virtually because of access or other reasons. The vast majority of the Pascagoula-Gautier School District qualifies for free lunch based on household income. The demographics of the Pascagoula-Gautier School District are 48% African-American, 31% White, 20% Hispanic, and 1% Asian. The Pascagoula-Gautier School District has the second highest number of students in the State of Mississippi where English is not the student’s first language.

The administration, as educational professionals, recommended providing an option for remote virtual learning. These educational professionals also recommended providing an option of in-person learning. The proposal provided options to fit the needs of the parents and students. The administration’s recommendation was based on the consultation with the local medical community in considering the overall health and safety of the students and staff of the Pascagoula-Gautier School District. On July 27, 2020, the superintendent informed the school board that the administration’s recommendation and reopening plan was reviewed and considered by Singing River Health System, the local healthcare system for Jackson County.

On August 4, 2020, Governor Tate Reeves issued Executive Order 1517. That Executive Order recognized that the State Health Officer (Dr. Thomas Dobbs) identified eight counties in Mississippi that had a higher risk of community transmission of COVID-19. As a result, Governor Reeves ordered the delayed start of school in those counties for grades seven through twelve. Jackson County was not one of those eight counties. The Pascagoula-Gautier School District is located in Jackson County.

The reopening plan of the Pascagoula-Gautier School District is a comprehensive plan that was approved by the State of Mississippi. The plan includes a virtual learning option that allows for parents and students to opt-in to virtual and remote learning for any reason. For students and parents who choose the in-person option, the plan requires the use of masks. Temperatures are checked every day prior to entry into the school for students. Other mitigation measures are implemented as well.

² See Centers for Disease Control and Prevention, *The Importance of Reopening America’s Schools this Fall*, July 23, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

The Pascagoula-Gautier School District reopened schools on August 10, 2020. Less than 1% of the students of the Pascagoula-Gautier School District have tested positive for COVID-19. At the time schools reopened, the COVID-19 cases in Mississippi were on a downward trajectory.³ Since schools reopened, the COVID-19 cases in Mississippi have remained on a downward trajectory. *Id.*

3. At the June 30th school board meeting where you voted to reopen the schools, the superintendent argued that kids needed to attend school in person in order to get the economy moving — by allowing their parents to go to work. The superintendent said, “if this economy doesn’t get moving, then there will be consequences financially for all of us on the other side of the economy.” (Pascagoula-Gautier School Board Meeting (June 30, 2020)). The vast majority of economists have argued that the best way to get the economy moving again is to stop the spread of COVID-19.

a. Do you agree with the superintendent’s remarks?

The superintendent of the Pascagoula-Gautier School District is an educational professional who was recognized in 2019 as Mississippi’s Superintendent of the Year. The superintendent has repeatedly stated that the number one priority is the health and safety of the students and staff of the Pascagoula-Gautier School District. At the June meeting, the superintendent referenced the letter put forward by the American Academy of Pediatrics (AAP) where the AAP advocated that all policy considerations for the coming school year should start with a goal of having students physically present in school. The superintendent also stated there are multiple dimensions of health consideration relating to the children, including mental health and physical health. After those comments were made by the superintendent, the superintendent referenced the economy. The superintendent specified that any reference to the economy represented what he believed to be the “poorest argument.” I have had numerous conversations with the superintendent and have participated in many school board meetings. I am confident that the Pascagoula-Gautier School District’s educational professionals placed health and safety as the number one priority. Please see my response to Question 2.

i. If not, why didn’t you say so at the school board meeting?

Please see my response to Question 3.a.

4. Experts have suggested that certain criteria should be met before schools reopen for in-person attendance during the COVID-19 pandemic. For example, some experts have proposed that schools should only reopen for in-person instruction if two conditions are met: (1) that the region has had fewer than 75 COVID-19 cases per 100,000 people cumulatively over the previous seven days; and (2) that the region has a test positivity rate

³ See Mississippi State Department of Health, *Interactive Charts: COVID-19 Epidemiological Charts and Trends*, https://msdh.ms.gov/msdhsite/_static/14,21995,420,873.html.

below 5%. (Op-Ed, Ezekiel Emanuel, Saskia Popescu, James Phillips; New York Times (July 29, 2020)).

When you voted on June 30th to reopen schools in Mississippi, did Mississippi meet the above criteria? If not, why did you vote to reopen schools?

I am not aware if, on June 30th, Mississippi met that criteria. Please see my response to Question 2.

5. 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?

Never.

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

District judges are ordinarily not faced with preparing a concurring or dissenting opinion. However, there are uncommon times when a district court judge can sit by designation on a court of appeals or on a specially constituted three-judge panel of the district court. There also may be times when it is helpful for a district court judge to identify gaps in the law. A district court judge is required to faithfully apply all Supreme Court precedent.

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

“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). The question whether a district court may reconsider and/or overturn its own prior rulings is controlled by Federal Rules of Civil Procedure 59 and 60 as well as various preclusion doctrines, including the law-of-the-case doctrine.

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

Only the Supreme Court of the United States may overturn its own precedent. The Supreme Court has identified factors that it considers in determining whether to overturn its own precedent.

6. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to

Roe v. Wade as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

Roe v. Wade is binding precedent, and if I am fortunate enough to be confirmed, I will faithfully apply it. As a District Judge nominee, I am both bound to apply all Supreme Court precedent and prohibited from commenting as to the degree to which I may believe any decision has obtained greater precedential status than another.

b. Is it settled law?

Yes.

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

Yes.

8. 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?

It is inappropriate for me to express my agreement or disagreement with Supreme Court decisions or dissents. See Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply the opinion of the Court in *Heller*, which is controlling precedent.

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

The Court in *Heller* acknowledged that the rights secured by the Second Amendment are “not unlimited” and cited “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.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). If confirmed, I will faithfully apply the majority decision in *Heller*. As a nominee to the District Court, it would be inappropriate for me to comment further on this issue. See Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

Please see my response to Question 2.a.

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

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

The Supreme Court stated that “First Amendment protection extends to corporations.” *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). That decision is controlling precedent, and I would be bound to faithfully apply it if confirmed.

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

Please see my response to Question 9.a. As a District Judge nominee, it would be improper for me to comment further on this issue. See Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

The Supreme Court has determined that the Religious Freedom Restoration Act of 1993 applies to closely held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The Court also stated that the “decision on that statutory question makes it unnecessary to reach the First Amendment claim.” *Id.* at 736. Because that issue may arise in the future, it would be inappropriate to comment further on this issue. See Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

This question is the subject of pending and impending litigation in federal courts. It also has been debated and discussed by Congress. Accordingly, it would be

inappropriate for me to comment on it. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

The Supreme Court has held that state laws prohibiting interracial marriage violate the Equal Protection Clause. *Loving v. Virginia*, 388 U.S. 1 (1967). Further, various federal laws, including but not limited to 42 U.S.C. § 1981, have for many years prohibited discrimination on the basis of race under color of State law.

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

Please see my response to Question 11. In addition, federal civil rights statutes, including but not limited to 42 U.S.C. § 1981, prohibit discrimination on the basis of race in nongovernmental commercial transactions. If confirmed, I will faithfully apply all Supreme Court and Fifth Circuit precedent. It would be improper for me, as a District Judge nominee, to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

13. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2020. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I was not aware of the quote. I had not previously seen that quote. I am not aware of the quote's meaning, and I have not heard any discussion of such a quote. I cannot speak to the quote's meaning.

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

Please see my response to Question 13.a.

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

Please see my response to Question 13.a.

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

No.

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

No.

- f. What did your role as member of the DRI entail?**

My role in DRI has been extremely limited. I do not recall ever attending a DRI meeting or DRI event. I receive the DRI’s magazine titled *For The Defense*. I also receive the DRI’s email publication titled *The Voice*.

- g. When you joined the Federalist Society in 2020—12 years after you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary or within the Trump Administration? Please answer either “yes” or “no.”**

No.

- i. If your answer is “no,” then why did you decide to join the Federalist Society in 2020, 12 years after you began practicing law?**

The Mississippi Gulf Coast Chapter of the Federalist Society is fairly new. It is my understanding that the Mississippi Gulf Coast Chapter did not host its first event until 2019. I was invited to join the Federalist Society by attorneys in our local community. I gained a renewed interest in the Federalist Society through the National Constitution Center’s Interactive Constitution. I joined the Federalist Society for opportunities with continuing legal education and professional networking. These are similar reasons for why I joined the Federal Bar Association and the American Inns of Court.

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

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

I was not aware of the draft until recently. I have also recently become aware that hundreds of judges drafted a letter in response to the Committee’s request for comments. My understanding is that these judges opposed that draft opinion. It is also my understanding that the draft opinion has been withdrawn.

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

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

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

15. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience,

if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

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

Not that I recall.

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

No.

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

As a judicial nominee, it is inappropriate to offer my personal views on any area of the law. The Supreme Court and the Fifth Circuit have issued many opinions on the subject of administrative law. If confirmed, I will faithfully follow all precedent.

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

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

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

Ordinarily, the text of the statute should control the interpretation of a statute. Statutory interpretation begins and ends with the text if the text is unambiguous. *See, e.g., Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If a statute is ambiguous, then a district court judge may consider a number of statutory interpretation methods. Precedent can also allow for the consideration of legislative history as one of those methods. *See Exxon Mobile Corp. v. Allapatah Servs., Inc.*, 545 U.S. 546, 567-71 (2005).

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

No.

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

I received these questions on Wednesday, September 16, 2020. I reviewed the questions and the responses of prior nominees. I prepared draft responses, which I sent to attorneys at the Office of Legal Policy at the Department of Justice. After I reviewed comments that I received, I prepared a final draft of my answers and authorized personnel at the Department of Justice to file it.

**Nomination of Taylor B. McNeel
to the United States District Court for the Southern District of Mississippi
Responses to Questions for the Record
Submitted September 23, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Prior to preparing responses to these questions, I had not read the Washington Post article. I also had not listened to the recording. I have now read the article and listened to the recording.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

I am unfamiliar with the events described in the Washington Post’s article and, to the extent the question calls for opinions on matters of policy or political debate, or on the subject of pending or impending litigation, it would be inappropriate for me to comment further. *See* Canons 1, 2(A), 3(A)(6) and 5(C) of the Code of Conduct for United States Judges.

- c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my response to Question 1.b.

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

Please see my response to Question 1.b.

2. 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?

Chief Justice Roberts’ metaphor accurately captures the role of the judge. A judge should apply the law to the facts without favor or bias. The Oath for judges states that each “judge of the United States shall” swear or affirm to “administer justice without respect to persons, and do equal right to the poor and to the rich,” and “will faithfully and impartially discharge and perform all the duties” that is required “under the Constitution and laws of the United States.” 28 U.S.C. § 453.

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

The precedents of the Supreme Court and Fifth Circuit, as well as federal statutes, dictate when a federal district court judge in Mississippi should consider the practical consequences of a particular ruling. For example, federal district court judges may consider practical consequences in ruling on a request for preliminary injunctive relief and whether granting the relief requested is necessary to prevent immediate, irreparable harm to the party seeking that relief. If I am confirmed, I will faithfully follow all precedents.

3. 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 trial judge to make a subjective determination?

There is a well-settled body of binding precedents from the Supreme Court and Fifth Circuit that provide instruction as to when there is a genuine dispute of material fact that precludes summary judgment. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). If I am confirmed, I will faithfully follow those precedents.

4. 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?

Empathy plays an important role in how judges treat litigants and attorneys who appear before the court. The parties benefit from a judge who treats everyone in the courtroom with respect and works diligently to have a full understanding of the arguments, positions, and disputes before the court. A judge’s empathy should not supplant the judge’s duty to follow the law.

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

Personal life experiences are not a substitute for a judge’s sworn duty to follow the law. Personal life experiences may allow a judge to understand or empathize with a litigant

before the court. However, a judge is required to administer justice without respect to persons, to do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all the duties incumbent upon the judge under the Constitution and laws of the United States.

5. 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.

6. The Seventh Amendment ensures the right to a jury “in suits at common law.”

- a. What role does the jury play in our constitutional system?

The right to trial by jury in civil cases is constitutionally enshrined in the Seventh Amendment. Juries have always played a critical role in our constitutional system. In the civil jury trials I have tried to verdict, I have had the privilege of witnessing the important role that juries have.

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

The relationship between the Seventh Amendment and the Federal Arbitration Act is the subject of impending or pending litigation in federal courts. Further, this may be considered a political question that is debated in Congress. Accordingly, it would be inappropriate to comment on Questions 6.b. and 6.c. *See* Canons 2(A), 3(A)(6) and 5(C) of the Code of Conduct for United States Judges.

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 6.b.

7. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The precedents of the Supreme Court and Fifth Circuit should dictate the deference provided. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I will faithfully follow all binding precedent.

8. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

Advisory Opinion 116 states that such decisions should be undertaken on a case-by-case basis. Additionally, the canons of the Code of Conduct for United States Judges apply to a judge's decision whether to attend a particular educational seminar or conference. I commit to consider each and every seminar that I attend carefully and to apply the standards and considerations set forth in the applicable canons. I will also consider the information contained in Advisory Opinion 116.

- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to Question 8.b.i.

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to Question 8.b.i.

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 8.b.i.

- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to Question 8.b.i.

- c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 8.b.i.

9. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct drafted a proposed advisory opinion concluding that a judge's ongoing "membership in . . . the Federalist Society is inconsistent with obligations imposed by the Code [of Conduct.]" After an aggressive lobbying campaign by Federalist Society-affiliated judges, the Committee ultimately voted to table the proposed opinion. In doing so, the Committee observed: "The nation depends on a judiciary that is impartial and independent. Consistent with the judge's oath, each individual judge should take care to make all membership decisions in a way that is consistent with the highest ideals of the profession as expressed in the Code of Conduct." (emphasis added.)

- a. If confirmed, do you plan to continue your membership in the Federalist Society?

The Code of Conduct for United States Judges states that "[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and government activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." Code of Conduct for United

States Judges, Canon 4. The accompanying commentary to Canon 4 states that “[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice.” Canon 4 further states that “a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.” Code of Conduct for United States Judges, Canon 4.

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

- b. In the draft of Advisory Opinion #117, the Committee concluded that official affiliation with ACS or the Federalist Society “could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge’s impartiality on subjects as to which the organization has taken a position; and generally frustrates the public’s trust in the integrity and independence of the judiciary.”

- i. Do you think the Federalist Society is an organization “that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency”? Why or why not?

I am now aware of the draft of Advisory Opinion #117. I have also recently become aware that hundreds of judges drafted a letter in opposition to Advisory Opinion #117. It is my understanding that the draft opinion has been withdrawn. My experience with the Federalist Society is fairly new. It is my understanding that the Mississippi Gulf Coast Chapter of the Federalist Society did not host its first event until 2019. I was invited to join the Federalist Society by attorneys in our local community. I gained a renewed interest in the Federalist Society through the National Constitution Center’s Interactive Constitution. I joined the Federalist Society for opportunities with continuing legal education and professional networking. These are similar reasons for why I joined the Federal Bar Association and the American Inns of Court.

If confirmed, I will abide by the applicable canons, rules, or guidance to determine whether to be a member of the Federalist Society or any other organization

- ii. Do you think the Federalist Society “is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations”? Why or why not?

Please see my response to Question 9.b.i.

- iii. Do you believe that a judge’s membership in the Federalist Society may reasonably be seen by the public as engendering indirect advocacy of the organization’s political, social, or civic objectives? Why or why not?

Please see my response to Question 9.b.i.

- iv. Do you believe that reasonable members of the public would perceive a judge who has membership in the Federalist Society, a self-described group of conservatives and libertarians, to be partial or impartial? Why?

Please see my response to Question 9.b.i.

- v. The draft opinion notes “the Federalist Society’s funding comes substantially from sources that support conservative political causes.” Do you believe that membership in an organization tied to such funding could give rise to the appearance of impropriety or partiality? Why or why not?

Please see my response to Question 9.b.i.

**Nomination of Taylor B. McNeel, to be United States District Court Judge for the Southern
District of Mississippi
Responses to Questions for the Record
Submitted September 23, 2020**

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?

There are Supreme Court precedents that address this question. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 576 U.S. 644 (2015). I would faithfully apply all applicable Supreme Court and Fifth Circuit precedents, if I am confirmed.

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

Yes. The Supreme Court has said that whether the right is expressly enumerated is relevant for purposes of applying the incorporation doctrine under the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010). I would faithfully apply that precedent.

- 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 general, "the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Court directed inquiry to historical practice under the common law, the practice in the American colonies, historical state statutes, judicial decisions, and long-established traditions.

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

If the right had been previously recognized by the Supreme Court or the Fifth Circuit, then I would be bound by that precedent. If there were not binding precedent, I would consider out-of-circuit decisions.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes, as to both questions.

- 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*).

Yes.

- f. What other factors would you consider?

I would faithfully apply all Supreme Court and Fifth Circuit precedent. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

The Supreme Court has held that the Fourteenth Amendment applies to both race and gender. See *United States v. Virginia*, 518 U.S. 515 (1996). Additionally, the Supreme Court held that the Fourteenth Amendment protects the right of same sex couples to marry “on the same terms accorded to couples of the opposite sex.” *Obergefell v. Hodges*, 576 U.S. 644 (2015). If I am confirmed, I would faithfully apply and follow these and other binding precedents.

- 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?

I understand there is debate about the intent of the individuals who passed the Fourteenth Amendment on this issue. However, Supreme Court precedent controls. If I am confirmed, I would faithfully apply all Supreme Court and Fifth Circuit precedents.

- 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 this issue was not decided by the Supreme Court until 1996.

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

The Supreme Court held that the Fourteenth Amendment protects the right of same sex couples to marry “on the same terms accorded to couples of the opposite sex.” *Obergefell v. Hodges*, 576 U.S. 644 (2015). If I am confirmed, I would faithfully apply this and all other binding precedents.

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

It is my understanding that the Supreme Court has not decided this issue yet. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1783 (2020). As a result, it would be inappropriate for me to comment on an issue that may be pending or impending in litigation. *See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6)*. If confirmed, I will faithfully apply all Supreme Court and Fifth Circuit precedents on the Fourteenth Amendment and concerning how transgender people are treated.

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

The Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to use contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). If confirmed, I will faithfully apply this precedent and all precedents of the Supreme Court and the Fifth Circuit.

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

The Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to obtain an abortion. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). If confirmed, I will faithfully apply these precedents and all precedents of the Supreme Court and the Fifth Circuit.

- 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 Supreme Court has held that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will faithfully apply these precedents and all precedents of the Supreme Court and the Fifth Circuit.

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

Please see my responses to 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, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And

hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

It is appropriate for federal district courts to consider evidence that sheds light on our changing understanding of society when Supreme Court precedents direct lower courts to consider such evidence. If I am confirmed, I will follow and faithfully apply *Virginia, Obergefell*, and all other Supreme Court and Fifth Circuit precedents on this issue.

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

A district court judge often encounters issues involving the admission of scientific evidence. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). If confirmed, I will faithfully follow all Supreme Court and Fifth Circuit precedent on the role of sociology, scientific evidence, and data in judicial analysis.

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

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

I would faithfully apply *Obergefell* and all binding precedent. The Supreme Court has held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Supreme Court has also recognized that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018). If I am confirmed, I will faithfully apply these precedents and all precedents of the Supreme Court and Fifth Circuit.

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

Please see my response to Question 5.a.

6. 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?

This is an academic question that I have not studied closely. I am aware there is scholarship that indicates *Brown’s* holding is consistent with the original meaning of the Fourteenth Amendment. I can state unequivocally that *Brown* was correctly decided.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Sept. 16, 2020).

I have not read this article, and I have not studied these issues. If I am confirmed, I will faithfully apply all precedents of the Supreme Court and Fifth Circuit.

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

It is rare for a district court judge to be presented with a constitutional provision that has not been previously interpreted by the Supreme Court or Fifth Circuit. If I am fortunate enough to be confirmed, then how the Supreme Court and the Fifth Circuit have interpreted a particular constitutional provision will determine my interpretation. The Supreme Court has looked to the original public meaning in interpreting constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If I am confirmed, I will faithfully apply all precedents of the Supreme Court and Fifth Circuit.

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

Please see my response to Question 6.c.

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

If I am called upon to discern the contours of a constitutional provision, I will look to binding precedents of the Supreme Court and Fifth Circuit for guidance and instruction.

Nominations
Hearing before the Senate Committee on the Judiciary
Responses to Questions for the Record
Submitted September 23, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Mr. Taylor B. McNeel

- 1. Please describe whether you believe *Brown v. Board of Education* was correctly decided.**

Yes. *Brown v. Board of Education* was correctly decided. *Brown v. Board of Education* occupies a unique status in American history that warrants an exception from the ordinary rule that federal judicial nominees will not comment on the correctness of particular Supreme Court precedents.

**Responses to Questions for the Record for Taylor B. McNeel
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.
 - b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

No.
2. Earlier this year, you voted as a member of the Board of Trustees for the Pascagoula-Gautier School District to reopen schools for in-person classes beginning August 6. Medical experts, including the Mississippi chapter of the American Academy of Pediatrics, urged schools not to reopen for in-person instruction until COVID-19 cases were on a “downward trajectory.” Yet, you cast your vote as Mississippi was seeing an increase in new cases of COVID-19 and only a few days after Mississippi set a single-day record with 611 new cases.

What was your rationale for voting to reopen schools for in-person classes? What experts did you consult? What information did you have?

Pascagoula-Gautier School District’s administration consists of trained educational professionals that have previously recognized the number one priority is the health and safety of the students and staff of the Pascagoula-Gautier School District. After considering numerous factors, the educational professionals of the Pascagoula-Gautier School District recommended reopening schools with a virtual learning option and with an in-person learning option. The options provide flexibility and allow for parents to choose the specific option that best addresses the health, safety, and educational needs for particular students.

On June 26, 2020, the American Academy of Pediatrics (AAP) stated that the “AAP strongly advocates that all policy considerations for the coming school year should start with a goal of having students physically present in school.”¹ The AAP recognized “the fundamental role of schools in providing academic instruction, social and emotional skills, safety, nutrition, physical activity, and mental health therapy.” *Id.* The AAP also stated the following:

Schools are critical to addressing racial and social inequity. School closure and virtual educational modalities have had a differential impact at both the individual and population level for diverse racial, ethnic, and vulnerable groups, according to the guidance. Evidence from spring 2020 school closures points to negative impacts on learning. Children and adolescents also have been placed at higher risk

¹ See American Academy of Pediatrics News, *AAP interim guidance on school re-entry focuses on mitigating COVID-19 risks*, June 26, 2020. <https://www.aappublications.org/news/2020/06/26/schoolreopening062620>.

of morbidity and mortality from physical and sexual abuse, substance use, anxiety, depression, and suicidal ideation.

Id.

On July 23, 2020, the Centers for Disease Control and Prevention (CDC) stated that the “available evidence provides reason to believe that in-person schooling is in the best interest of students . . .”² The CDC recognized the benefits that in-person school provides for educational instruction, the development of social and emotional skills, creating a safe environment for learning, addressing nutritional needs, and facilitating physical activity. *Id.*

In addition to the issues identified above, the administration considered the education inequities of virtual learning and whether certain students in our particular community could successfully learn virtually because of access or other reasons. The vast majority of the Pascagoula-Gautier School District qualifies for free lunch based on household income. The demographics of the Pascagoula-Gautier School District are 48% African-American, 31% White, 20% Hispanic, and 1% Asian. The Pascagoula-Gautier School District has the second highest number of students in the State of Mississippi where English is not the student’s first language.

The administration, as educational professionals, recommended providing an option for remote virtual learning. These educational professionals also recommended providing an option of in-person learning. The proposal provided options to fit the needs of the parents and students. The administration’s recommendation was based on the consultation with the local medical community in considering the overall health and safety of the students and staff of the Pascagoula-Gautier School District. On July 27, 2020, the superintendent informed the school board that the administration’s recommendation and reopening plan was reviewed and considered by Singing River Health System, the local healthcare system for Jackson County.

On August 4, 2020, Governor Tate Reeves issued Executive Order 1517. That Executive Order recognized that the State Health Officer (Dr. Thomas Dobbs) identified eight counties in Mississippi that had a higher risk of community transmission of COVID-19. As a result, Governor Reeves ordered the delayed start of school in those counties for grades seven through twelve. Jackson County was not one of those eight counties. The Pascagoula-Gautier School District is located in Jackson County.

The reopening plan of the Pascagoula-Gautier School District is a comprehensive plan that was approved by the State of Mississippi. The plan includes a virtual learning option that allows for parents and students to opt-in to virtual and remote learning for any reason. For students and parents who choose the in-person option, the plan requires the use of masks. Temperatures are checked every day prior to entry into the school for students. Other mitigation measures are implemented as well.

The Pascagoula-Gautier School District reopened schools on August 10, 2020. Less than 1% of the students in the Pascagoula-Gautier School District have tested positive for COVID-19.

² See Centers for Disease Control and Prevention, *The Importance of Reopening America’s Schools this Fall*, July 23, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>.

At the time schools reopened, the COVID-19 cases in Mississippi were on a downward trajectory.³ Since schools reopened, the COVID-19 cases in Mississippi have remained on a downward trajectory. *Id.*

3. In advocating to reopen schools within the Pascagoula-Gautier School District, the district's superintendent placed the local economy over the health and well-being of students, faculty, and staff. He said, "Our economy relies on their children being in school and being able to go to work as part of this. And the reality of that is, if this economy doesn't get moving, then there will be consequences financially for all of us on the other side of the economy." No one on the Board of Trustees challenged the superintendent's statement.

As a member of the Board of Trustees for the Pascagoula-Gautier School District, why didn't you speak out against the superintendent's statement and in support of the health and well-being of the children, faculty, and staff of the school district?

The superintendent of the Pascagoula-Gautier School District is an educational professional who was recognized in 2019 as Mississippi's Superintendent of the Year. The superintendent has repeatedly stated that the number one priority is the health and safety of the students and staff of the Pascagoula-Gautier School District. At the June meeting, the superintendent referenced the letter put forward by the American Academy of Pediatrics (AAP) where the AAP advocated that all policy considerations for the coming school year should start with a goal of having students physically present in school. The superintendent also stated there are multiple dimensions of health consideration relating to the children, including mental health and physical health. After those comments were made by the superintendent, the superintendent referenced the economy. The superintendent specified that any reference to the economy represented what he believed to be the "poorest argument." I have had numerous conversations with the superintendent and have participated in many school board meetings. I am confident that the Pascagoula-Gautier School District's educational professionals placed health and safety as the number one priority. Please see my response to Question 2.

4. On your Senate Judiciary Committee questionnaire, you reported that you are a member of The Revelers Carnival Organization, a group that discriminates against women to this day. You stated that you "have not taken any action to change the membership requirement of The Revelers Carnival Organization."

a. Why do you consider it appropriate to be a member of an organization that discriminates against women?

While the Revelers Carnival Organization traditionally has had a male membership, I am not aware of discrimination by the Revelers Carnival Organization. It is my understanding that the Revelers Carnival Organization does not have bylaws that prohibits the membership of women. I am not aware of an instance where a woman has requested to be a member of The Revelers Carnival Organization and been turned down. There are various organizations that may traditionally have a male or female membership. These include

³ See Mississippi State Department of Health, *Interactive Charts: COVID-19 Epidemiological Charts and Trends*, https://msdh.ms.gov/msdhsite/_static/14,21995,420,873.html.

sororities, fraternities, and charitable organizations (such as the Junior Auxiliary and Junior League).

The Revelers Carnival Organization is a Mardi Gras organization. It is my understanding that Mardi Gras organizations, with a traditionally male or female membership, are common where Mardi Gras is celebrated. It is my understanding that there are various judges who are members of Mardi Gras organizations with a male or female membership.

The purpose of The Revelers Carnival Organization is to provide an Annual Carnival Ball on the Saturday night prior to Mardi Gras day. Men and women are equally welcome to attend the Annual Carnival Ball. There is a court presented at each Annual Carnival Ball. Men and women are equally invited to participate in the court.

b. Why didn't you make any effort to change the discriminatory membership practices of The Revelers Carnival Organization?

Please see my response to Question 4.a.

5. According to your Senate Judiciary Questionnaire, you joined the Federalist Society earlier this year, around the same time you started the process that led to your nomination.

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

The Mississippi Gulf Coast Chapter of the Federalist Society is fairly new. It is my understanding that the Mississippi Gulf Coast Chapter hosted its first event in 2019. I was invited to join the Federalist Society by attorneys in our Mississippi Gulf Coast community. I gained a renewed interest in the Federalist Society through the National Constitution Center's Interactive Constitution. I joined the Federalist Society because of opportunities with continuing legal education and professional networking. These are similar reasons for why I joined the Federal Bar Association and the American Inns of Court.

b. Did anyone tell you that you would increase your chances of being nominated to the federal bench if you joined the Federalist Society?

No.

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

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

Yes.

b. Have you ever taken such training?

No.

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

Yes.

Nomination of Taylor B. McNeel
United States District Court for the Southern District of Mississippi
Responses to Questions for the Record
Submitted September 23, 2020

QUESTIONS FROM SENATOR BOOKER

1. In 2019, you were part of an informal committee for Michael Watson’s campaign for Secretary of State of Mississippi.¹ According to Watson’s campaign website, he supports strict Voter ID laws.²

- a. What role did the informal committee play in Watson’s campaign for Secretary of State of Mississippi?

The informal committee helped organize one fundraiser.

- b. Did the informal committee play any role in developing Watson’s platform? If so, what policy issues did the informal committee discuss and provide advice on?

No. The informal committee did not play a role in developing a platform or policy issues.

- c. Did the informal committee advocate for Watson to be a proponent of strict Voter ID laws?

No.

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

I am reluctant to adopt a doctrinal label as a label may not accurately capture a particular viewpoint or the nuances contained within certain viewpoints. The term originalism is often associated with the interpretation of the Constitution with a view toward the original public meaning at the time of ratification. If I am confirmed, I will follow all binding precedents of the Supreme Court and the Fifth Circuit concerning constitutional interpretation, including those that rely on the original public meaning of the Constitution.

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

I am reluctant to adopt a doctrinal label as a label may not accurately capture a particular viewpoint or the nuances contained within certain viewpoints. Textualism is often associated with a view of interpreting a statute according to the text of the statute. The Supreme Court has repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If I am confirmed, I will follow all binding precedents of the Supreme Court and the Fifth Circuit concerning statutory

¹ SJQ at pp. 11-12.

² Ballotpedia, Michael Watson (Mississippi) (last visited Sept. 16, 2020), [https://ballotpedia.org/Michael_Watson_\(Mississippi\)](https://ballotpedia.org/Michael_Watson_(Mississippi)).

interpretation, including those that rely on interpreting a statute pursuant to the text of that statute.

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

Statutory interpretation begins and ends with the text if the text is unambiguous. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If I am fortunate enough to be confirmed, then I will consider legislative history in construing a statute when the Supreme Court or Fifth Circuit precedent provides instruction to do so. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567-71 (2005). If confirmed, I will faithfully apply all Supreme Court and Fifth Circuit precedent.

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

Please see my response to Question 4.a.

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

Yes. The principle of judicial restraint is important to sustain a limited, independent judiciary, which is a cornerstone of our constitutional system. My understanding of judicial restraint is that judges should apply the law to the record evidence presented in that case. The judge's personal views should not control. Additionally, judges should ordinarily refrain from deciding questions that are not necessary for the judge to decide the case or controversy before the court.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.³ Was that decision guided by the principle of judicial restraint?

If I am confirmed, I will faithfully apply all Supreme Court precedent. Beyond that, it would be improper for me as a nominee to comment on what type of principles potentially guided a Supreme Court decision. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

³ 554 U.S. 570 (2008).

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁴ Was that decision guided by the principle of judicial restraint?

If I am confirmed, I will faithfully apply all Supreme Court precedent. Beyond that, it would be improper for me as a nominee to comment on what type of principles potentially guided a Supreme Court decision. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

If I am confirmed, I will faithfully apply all Supreme Court precedent. Beyond that, it would be improper for me as a nominee to comment on what type of principles potentially guided a Supreme Court decision. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

6. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁶ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁷

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

Voting is a fundamental constitutional right that must be protected. I am aware that the issue of in-person voter fraud has been and will continue to be debated in state legislatures and in Congress. Also, the issue has been and may continue to be the subject of pending or impending litigation in federal courts. Accordingly, it would be improper for me to comment. *See* Canons 3(A)(6) and 5(C) of the Code of Conduct for United States Judges.

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

Please see my response to Question 6.a.

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

⁴ 558 U.S. 310 (2010).

⁵ 570 U.S. 529 (2013).

⁶ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁷ *Id.*

Please see my response to Question 6.a.

7. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.⁸ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁹ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹¹

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

I am generally aware of evidence indicating that there is implicit racial bias in our criminal justice system, but I have not studied this evidence.

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

I am generally aware of evidence indicating that people of color are disproportionately represented in our nation's jails and prisons, but I have not studied this evidence.

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

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

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹² Why do you think that is the case?

I am not familiar with this report and have not studied this issue enough to provide a more specific response. As I testified during my recent hearing, racism will have no place in my courtroom if I am fortunate enough to be confirmed. Equality is a fundamental principle in our justice system. Further, Congress has directed district courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" in

⁸ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

⁹ *Id.*

¹⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹¹ *Id.*

¹² U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

imposing a sentence. 18 U.S.C. § 3553(a)(6). I will faithfully apply sentencing statutes and applicable Supreme Court and Fifth Circuit precedent in imposing “a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing. *Id.* at § 3553(a).

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹³ Why do you think that is the case?

I have not studied this issue in depth, but I believe that it is important that our criminal justice system be free from all forms of racial bias.

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

Federal judges should be aware of the potential for racial bias and must make sure that every criminal defendant is treated fairly and impartially.

- 8. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁴ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁵

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

I have not studied this issue closely enough to form an opinion on this question.

- b. Do you believe there is a direct link between decreases in a state’s incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this issue closely enough to form an opinion on this question.

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

Yes.

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

¹³ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹⁴ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁵ *Id.*

Yes.

11. Do you believe that *Brown v. Board of Education*¹⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

It is my unequivocal belief that *Brown v. Board of Education* was correctly decided. *Brown v. Board of Education* occupies a unique status in American history that warrants an exception from the ordinary rule that federal judicial nominees will not comment on the correctness of particular Supreme Court precedents.

12. Do you believe that *Plessy v. Ferguson*¹⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Please see my response to Question 11. *Plessy* was wrong.

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

No.

14. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”¹⁸ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

As a federal district court judge nominee, it would be improper for me to comment on the political statements of any elected official, including President Trump. *See* Canon 5(C) of the Code of Conduct for United States Judges.

15. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”¹⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Please see my response to Question 14. Additionally, the Supreme Court has held that the Due Process Clause applies to all persons in the United States. *See Zadvydas v. Davis*, 633 U.S. 678, 693 (2001). I would faithfully follow that precedent and all other precedents of the Supreme Court and Fifth Circuit.

¹⁶ 347 U.S. 483 (1954).

¹⁷ 163 U.S. 537 (1896).

¹⁸ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Responses to Questions for the Record from Senator Kamala D. Harris
Submitted September 23, 2020
For the Nomination of:**

**Taylor B. McNeel, to be United States District Judge for the Southern District of
Mississippi**

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

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

I would review the presentence report and any sentencing memorandums and arguments submitted by the parties. I would consult applicable precedents of the Supreme Court and the Fifth Circuit as well as applicable federal statutes. I would consult the sentencing guidelines and perform the required guideline calculation. I would consider the factual record in its entirety. I would consider the sentencing factors identified in 18 U.S.C. § 3553(a), and I would be mindful of the statutory mandate to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in” the federal sentencing statute.

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

Please see my response to Question 1.a. Additionally, I would consult sentencing statistics available from the Administrative Office of the Courts and sentencing decisions of my colleagues.

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

The Supreme Court has held that the Sentencing Guidelines are advisory instead of mandatory. *United States v. Booker*, 543 U.S. 220 (2005). The Sentencing Guidelines also contemplate circumstances under which district courts may conclude that it is appropriate to depart from the Guidelines (see Part K of Section 5 of the Guidelines). Additionally, binding precedents of the Fifth Circuit set forth factors that may support a sentence that departs from the Guidelines.

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

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

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

I am not familiar with Judge Reeves' comments or the basis for those comments. Congress has established mandatory minimum sentences for certain federal crimes. If confirmed, I will faithfully follow all applicable statutes and precedent. The issue of mandatory minimum sentences is a policy issue to be addressed by Congress.

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

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

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

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

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.¹ **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

If confirmed, I would state the reasoning for any sentence, including those for which the court lacks discretion. I would faithfully apply the sentencing statutes and Supreme Court and Fifth Circuit precedent.

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

Charging policies are determined by the Executive Branch. Judges must not encroach on that authority. If I concluded that the law compelled imposition of an unjust and disproportionate sentence because of the charging policy, then, consistent with the Judicial Canons of Ethics, I would consider raising the issue or commenting on it as part of the sentencing process or in a written decision. Additionally, I would consider raising the issue with the U.S. Attorney only if doing so would be consistent with the applicable ethical rules, procedural rules, and applicable law.

¹ See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>.

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

The clemency power is reserved for the President of the United States and the Executive Branch. If confirmed as a District Court Judge, I would be bound to respect the separation of powers under our Constitution. However, it may be appropriate for a judge to state on the record that he or she would not have imposed a certain sentence but for the statute or other law requiring that judge to do so.

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

Yes. I would consider such alternatives to the extent consistent with applicable law and justified by the relevant facts.

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

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

Yes.

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

Racial bias continues to impact our country in many ways. Racial bias should play no role in our criminal justice system. I am aware that there are statistical reports showing racial disparities in our criminal justice system, such as incarceration rates.

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

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

Yes.

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

Yes.

Senator Josh Hawley
Responses to Questions for the Record

Taylor B. McNeel
Nominee, U.S. District Court for the Southern District of Mississippi

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

“[A] prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

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

Yes. Please see my response to Question 1.

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

No.

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

No.

5.

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

Strict scrutiny applies to state laws that burden religious exercise if the law at issue “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). “Official

action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality” *Id.* at 534. In that instance, the state action is not neutral and is subject to strict scrutiny. *Id.* at 531-34, 546. Also, the Supreme Court “has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Further, the government cannot demonstrate unlawful hostility to religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731-32 (2018). And the “First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

If the state action is in fact facially neutral and generally applicable, then the state action must be rationally related to a legitimate governmental interest. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). There are instances where a compelling governmental interest is required for facially neutral actions. *See e.g.*, 42 U.S.C. § 2000cc.

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

Please see my response to Question 5.a.

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

A court’s “narrow function in this context is to determine” whether a person’s asserted religious belief reflects “an honest conviction.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014).

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

The Supreme Court held that the Second Amendment guarantees the “individual right to possess and carry weapons in case of confrontation” which allows “law-abiding, responsible citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 554 U.S. 570, 592, 635 (2008).

- 7. Please state whether you agree or disagree with the following statement and explain why: “Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English**

would have understood the words to mean, in their context, at the time they were enacted.”

I agree. This statement describes my understanding of discerning the original public meaning of a statute. *See, e.g., New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).