

**Nomination of Michael Newman to the United States District Court for the
Southern District of Ohio
Questions for the Record
Submitted August 5, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2007, in *CBOCS West, Inc. v. Humphries*, you represented CBOCS West, a corporate entity that owned a Cracker Barrel restaurant, before the U.S. Supreme Court. The case arose out of a claim by an employee named Humphries, a former assistant manager at Cracker Barrel, that CBOCS West dismissed him because of racial bias (he is a Black man) and because he had complained to managers that a fellow assistant manager had dismissed another Black employee for race-based reasons. In CBOCS's Petition for Writ of Certiorari, you argued that race is not a cognizable issue under 42 U.S.C. § 1981(a), a longstanding civil rights law that provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." In particular, your brief argued that "[r]etaliatory terminations are, of course, not racially motivated. The motivation behind the retaliatory termination, by definition, is the protected activity, which in most situations is some form of complaint. The complaining party's race has nothing to do with the termination." (Petition for Writ of Certiorari, *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (Apr. 25, 2007) (citations omitted)). The Supreme Court ruled against your argument in a 7-2 decision and held that § 1981 encompasses race-based retaliation claims. (*CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008)).

Please identify the legal and factual bases for your argument that race is a not a cognizable issue under 42 U.S.C. § 1981(a).

This was a legal argument presented to the Supreme Court of the United States on behalf of a client represented by my former law firm in my role as one of its legal advocates. The legal authority upon which such argument was based is set forth in the Petition for Writ of Certiorari. The Supreme Court disagreed with this argument in a 7-2 decision and, as a United States magistrate judge or, if confirmed, a district judge, I am bound to follow this decision and will do so.

2. In 2008, in *Messer v. Starbucks Corp.*, you represented Starbucks in an employment discrimination lawsuit. Starbucks terminated the plaintiff, a 59-year-old woman, on the grounds that she violated Starbucks' cash management policy. The plaintiff alleged that terminating her over the cash management policy violation was pretext, and the real reason for her termination was her age and/or gender. The plaintiff offered evidence of Starbucks giving a 40-year-old male a verbal warning for conduct similar to that which led to the plaintiff's termination. In Starbucks' brief in support of its motion for summary judgment, you sought to exclude plaintiff's evidence on the grounds that "Starbucks does not consider [the 40-year-old male's conduct] as constituting conduct of comparable seriousness" even though the court had already found that it constituted

comparable conduct. The court denied Starbucks' motion for summary judgment and noted twice that the motion was not "well-taken."

Please explain why you included this argument even though it contradicted findings by the court.

The argument was presented in good faith and in my role as one of the attorneys for my client. The argument was submitted for the court's consideration before it made any ruling on the merits of such argument. Importantly, the court's decision was made on summary judgment and, therefore, under Rule 56, the court did not make a factual finding as to whether plaintiff and her co-worker were, in fact, similarly situated. Instead, the court concluded that there were issues of fact in dispute on that issue and, thus, a jury would have to make the ultimate determination of such factual issue at trial *Messer v. Starbucks Corp.*, No. 1:06-CV-573, 2008 WL 2074037, at *4 (S.D. Ohio May 14, 2008).

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

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

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

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

I do not believe it is proper to question Supreme Court precedent in a concurring opinion or dissent.

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

District court opinions are not binding precedent.

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

As a United States magistrate judge or district judge nominee, it is not proper for me to determine when or if it is appropriate for the Supreme Court to overturn its own precedent.

4. 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”?

I am unfamiliar with the terms “super-stare decisis” and “superprecedent.” I agree that *Roe v. Wade* is established law, and that I am bound to follow it as a United States magistrate judge and, if confirmed, as a district judge.

b. Is it settled law?

Please see answer to Question 4(a).

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

Yes. *Obergefell* is controlling precedent that I am bound to follow as a United States magistrate judge and, if confirmed, as a district judge.

6. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

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

As a United States magistrate judge and a district judge nominee, it is not appropriate for me to comment on the merits of an opinion authored by a Supreme Court Justice.

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

Heller does leave room for “some measures” of gun regulation and specifically stated that “the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626, 636 (2008).

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

As a United States magistrate judge and district judge nominee, it would be inappropriate to express an opinion as to whether the holding of the Supreme Court of the United States in *Heller* comports with its prior opinions. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court precedent and commit to doing so.

7. 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?

As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court and Sixth Circuit precedent and commit to doing so.

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

As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court and Sixth Circuit precedent and commit to doing so.

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

As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court and Sixth Circuit precedent and commit to doing so.

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

As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court precedent and commit to doing so.

9. 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?

In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. As a United States magistrate judge and, if confirmed, as a district court judge, I will fully and faithfully apply all Supreme Court precedent.

10. 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 answer the Question 9.

11. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2008. 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 did not have any involvement in writing content for the webpage referenced in this question and I cannot elaborate on what the author of this statement means.

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

I did not have any involvement in writing content for the webpage referenced in this question and I cannot elaborate on what the author of this statement means.

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

I did not have any involvement in writing content for the webpage referenced in this question and I cannot elaborate on what the author of this statement means.

- 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.**

Yes. I spoke with Lisa Ezell and briefly with Leonard Leo in November 2019 to discuss my candidacy for a district judgeship in the Southern District of Ohio. Prior to that time, I met with another member of the Federalist Society whom I do not recall to discuss my candidacy for a district judgeship. I have also had general conversations with others in the legal community about my interest in a district judgeship and the nomination process, including some who may be members of the Federalist Society.

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

Friends and acquaintances have suggested to me that membership in the Federalist Society might make a judicial nomination more likely. I do not recall the specific individuals who suggested this or the specific context of the suggestion. No one employed by the Federalist Society communicated this to me, and to the best of my knowledge membership in the Federalist Society played no role in my nomination.

- f. When you joined the Federalist Society in 2008—19 years after you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary? Please answer either “yes” or “no.”**

I do not recall my specific motivations for joining the Federalist Society in 2008.

- i If your answer is “no,” then why did you decide to join the Federalist Society in 2008, 19 years after you began practicing law?**

Please see my answer to Question 11(f).

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

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

Yes, I was aware of the draft ethics opinion and would have relinquished my membership if the draft ethics opinion was ultimately adopted by the Judicial Conference Committee on Codes of Conduct. I was advised by memorandum from the Administrative Office of the United States Court dated July 30, 2020

that the Judicial Conference Committee on Codes of Conduct has decided not to publish the draft ethics opinion at this time.

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

I commit to complying with Canon 4 of the Code of Judicial Conduct.

12. 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?**

I do not recall any specific question in this regard.

- 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?**

Not to my recollection.

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

As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court Sixth Circuit precedent and commit to doing so.

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

This question concerns political or policy issues that I cannot answer in light of Canon 5 of the Code of Judicial Conduct.

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

As a United States magistrate judge and, if confirmed, as a district judge, I would consider legislative history only in those circumstances in which the United States Supreme Court or United States Court of Appeals for the Sixth Circuit holds it is appropriate to do so.

15. 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.

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

These questions, as well as the written questions from other Senators, were given to me by the Office of Legal Policy. I drafted answers to these questions and then consulted with the Office of Legal Policy. Thereafter, I finalized my responses and authorized the Department of Justice to file these answers on my behalf.

**Questions for the Record for Michael Jay Newman
From Senator Mazie Hirono**

1. From 2016 to 2017, you served as the National President for the Federal Bar Association. During that time, the Federal Bar Association supported transferring responsibilities for the adjudication of immigration claims from the Executive Office of Immigration Review within the Department of Justice to a specialized Article I court.

- a. **Why did the Federal Bar Association consider it important to transfer immigration cases out of the Justice Department and into an independent Article I court?**

The Federal Bar Association is a legal association that speaks through its members. I am no longer President of the Federal Bar Association and am not authorized to speak on its behalf.

- b. **Last year—along with Senators Harris, Klobuchar, Booker, and others—I introduced the Immigration Court Improvement Act, a bill designed to insulate immigration judges from improper political interference or manipulation. Do you agree that protecting immigration judges from political influence is an important reform to our immigration system? Why or why not?**

As a United States magistrate judge and district judge nominee, it is not appropriate for me to speak about political issues, policy matters or pending legislation.

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

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

Yes.

- b. **Have you ever taken such training?**

I took implicit bias training offered by the Federal Judicial Center in August 2020.

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

Yes.

Nomination of Michael Jay Newman
United States District Court for the Southern District of
Ohio Questions for the Record
Submitted August 5, 2020

QUESTIONS FROM SENATOR BOOKER

1. As a magistrate judge, you heard the case of *Maston v. Montgomery Cty. Jail Med. Staff Pers.*, which involved a pro se plaintiff who filed a § 1983 action against an emergency medical technician and nurse who the plaintiff alleged were indifferent to his serious medical needs while he was in jail.¹ After the plaintiff was arrested and processed he informed jail personnel that he had epilepsy and needed to take his medication. The next day, the plaintiff had a seizure and sustained injuries requiring hospitalization. You held that the plaintiff had “not provided any medical or other evidence showing that he suffered from a serious medical need and that he sustained injuries as a result of Defendants’ alleged actions” and dismissed the case even though he submitted medical records with his complaint. Why did you believe he not provide any medical evidence showing that he suffered from a serious medical condition and he sustained injuries as a result of the defendant’s alleged actions?

I concluded that Plaintiff did not provide “any medical or other evidence showing that he suffered from a serious medical need and that he sustained injuries as a result of Defendants’ alleged actions” because the records Plaintiff submitted were not properly authenticated as required by Fed. R. Evid. 901. I also noted that information contained in the unauthenticated records “create serious doubt that the medication would have made a difference in light of the diagnosis that Plaintiff’s seizures were resistant to medication.” *Maston v. Montgomery Cnty. Jail Med. Staff Pers.*, 832 F. Supp. 2d 846, 852 n.2 (S.D. Ohio 2011).

2. When in private practice, you represented CBOCS West—which owned a Cracker Barrel restaurant—in *CBOCS West, Inc. v. Humphries*.² The case dealt with a claim by a Black former assistant manager at Cracker Barrel who was fired allegedly because of racial bias and because he had complained to his supervisors that a fellow assistant manager fired another Black employee because of his race. In that case, you argued that race is not a cognizable issue under 42 U.S.C. § 1981(a), which provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”³ You wrote:

Retaliatory terminations are, of course, not racially motivated. The motivation behind the retaliatory termination, by definition, is the protected activity, which in most situations is some form of complaint. The complaining party’s race has nothing to do with the termination. In fact, under a retaliation theory, but for the employee’s complaint, the employee, whether white or black,

¹ 832 F. Supp. 2d 846 (S.D. Ohio 2011).

² 128 S. Ct. 1951 (2008).

³ *Id.* at 1954.

would not have been terminated. Under a discriminatory termination theory, on the other hand, but for the employee's race, the employee would not have been terminated.⁴

The Supreme Court rejected your argument in 7-2 decision and held that 42 U.S.C. § 1981 includes race-based retaliation claims.

Do you believe that race can be a factor in the termination of someone who is fired for retaliatory reasons?

As a United States magistrate judge and, if confirmed, a district judge, I am bound to follow the precedent set forth in *CBOCS W., Inc. v. Humphries* and will do so.

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

The use of terms such as “originalist” and “originalism” is problematic because such terms can mean different things to different people. I understand originalism to mean interpreting the law in a manner consistent with the meaning of the text at the time of enactment. I believe this is an appropriate method of interpretation. As a United States magistrate judge and, if confirmed, a district judge, I must interpret the law in accordance with the precedent of the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit and commit to doing so.

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

The use of terms such as “textualist” and “textualism” is problematic because such terms can mean different things to different people. I understand textualism to mean interpreting the law consistent with the plain meaning of the text without considering non-textual resources. I believe this is an appropriate method of interpretation. As a United States magistrate judge and, if confirmed, a district judge, I must interpret the law in accordance with the precedent of the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit and commit to doing so.

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

The Supreme Court has held that when a statute is ambiguous, federal courts can consider legislative history. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545

⁴ Petition for Writ of Certiorari, *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (Apr. 25, 2007) (citations omitted).

U.S. 546, 568 (2005). I am bound to follow this precedent as a United States magistrate judge and, if confirmed as a district judge, would faithfully do so.

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

Please see my answer to Question 5(a).

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

Yes, I believe that judicial restraint is an important value for all judges. I understand judicial restraint to mean the fair and impartial determination of a case based upon applying applicable law to the facts of that particular case.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁵ Was that decision guided by the principle of judicial restraint?

As a United States magistrate judge and a district judge nominee, it is not appropriate for me to comment on the merits of Supreme Court precedent.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁶ Was that decision guided by the principle of judicial restraint?

Please see my answer to Question 6(a).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁷ Was that decision guided by the principle of judicial restraint?

Please see my answer to Question 6(a).

- 7. 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.⁸ In fact, in-

⁵ 554 U.S. 570 (2008).

⁶ 558 U.S. 310 (2010).

⁷ 570 U.S. 529 (2013).

⁸ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org>

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.⁹

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

I am aware that this issue is one of much political debate. As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court and Sixth Circuit precedent and commit to doing so.

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

I am aware that this issue is one of much political debate. As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court and Sixth Circuit precedent and commit to doing so.

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

I am aware that this issue is one of much political debate. As a United States magistrate judge and a district judge nominee, is it not appropriate for me to express a view on this issue. As a United States magistrate judge and, if confirmed, as a district court judge, I must fully and faithfully apply all Supreme Court and Sixth Circuit precedent and commit to doing so.

8. 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.¹⁰ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹¹ 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.¹² In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹³

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

/analysis/debunking-voter-fraud-myth.

⁹ *Id.*

¹⁰ 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>.

¹¹ *Id.*

¹² 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>.

¹³ *Id.*

While I am not familiar with the particular study referenced, I presume there is implicit racial bias in our criminal justice system.

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

Yes.

- 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.

Although I cannot identify specific books, articles or reports, I have read materials regarding implicit bias in our criminal justice system and it is an important issue regularly discussed amongst my colleagues. I took implicit bias training offered by the Federal Judicial Center in August 2020.

- 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.¹⁴ Why do you think that is the case?

I have not studied this issue in depth and, therefore, cannot provide an informed opinion on the matter. As a United States magistrate judge, I strive to treat everyone equally under the law regardless of race and commit to continuing to do so if confirmed as a district judge.

- 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.¹⁵ Why do you think that is the case?

Please see my answer to Question 8(d).

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

Judges play an important role in addressing implicit racial bias in our criminal justice system by fairly applying the law regardless of race. Judges also have a duty to be cognizant of implicit racial bias at all times and to ensure that court staff -- including pretrial and probation officers -- are properly trained on this topic.

¹⁴ 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.

¹⁵ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

9. 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.¹⁶ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁷

- 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 am unfamiliar with this study and am not sufficiently informed to offer an opinion on this issue.

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

I am unfamiliar with this study and am not sufficiently informed to offer an opinion on this issue.

10. 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.

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

Yes.

12. Do you believe that *Brown v. Board of Education*¹⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Although it is inappropriate for a judge to comment on the correctness of a decision of the Supreme Court of the United States, commentary on the Supreme Court's decision in *Brown v. Board of Education* is the one exception to that rule. Yes, I believe *Brown v. Board of Education* was correctly decided.

13. Do you believe that *Plessy v. Ferguson*¹⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

¹⁶ 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>.

¹⁷ *Id.*

¹⁸ 347 U.S. 483 (1954).

¹⁹ 163 U.S. 537 (1896).

No, the Supreme Court of the United States has held that *Plessy v. Ferguson* was wrongly decided. See *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

14. 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.

15. 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.”²⁰ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Race or ethnicity is not a basis for removal under 28 U.S.C. § 455.

16. 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.”²¹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

As a United States magistrate judge and, if confirmed, a district judge, I must follow the precedent set by the Supreme Court of the United States, including *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”), and the United States Court of Appeals for the Sixth Circuit and commit to doing so.

²⁰ 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>.

²¹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

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

Michael Jay Newman, to be United States District Judge for the Southern District of Ohio

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 follow the sentencing procedure set forth in 18 U.S.C. § 3553 and the provisions of the Federal Rules of Criminal Procedure, including Fed. R. Crim. 32. In addition to considering the factors and other provisions set forth in § 3553, I would carefully review the sentencing memoranda submitted by the parties; the Presentence Investigation Report prepared by U.S. Probation; the provisions of the Sentencing Guidelines, including the advisory sentencing range; any plea agreement between the parties, including any agreement between the parties as to the sentence under Fed. R. Crim. P. 11(c)(1)(C); all statements made by the defendant, including any statement made during allocution; statements of any victim; and statements made by family and friends of the defendant and the victim. I would keep an open mind throughout the process and would carefully state my sentencing decision in open court and ensure that the defendant understands the sentence imposed.

- 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).

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

The Sentencing Guidelines are advisory and not mandatory. *Booker v. United States*, 543 U.S. 220 (2005). I commit to carefully consider the Sentencing Guidelines and depart from its advisory terms only when appropriate to do so under the facts and circumstances of a particular case and as permitted by precedent set forth by the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit.

- 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

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

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

Mandatory minimum sentences and the policies set forth by the United States Sentencing Guidelines are part of the political legislative process. Therefore, as United States magistrate judge and district judge nominee, I do not believe it is appropriate for me to comment on this issue. *See* Code of Conduct for United States Judges, Canon 2(A); Canon 5(C).

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

Please see my answer 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 answer 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?**

As a United States magistrate judge and, if confirmed, a district judge, I am bound to follow the law and I commit to doing so. I am mindful of the separation of powers and as a United States magistrate judge and district judge nominee, I commit to act only as permitted under the law and applicable ethical codes. If required by law to impose a sentence I personally find to be inappropriate, I may choose to elaborate on my thoughts in an opinion only after careful deliberation and if permitted under the law and my ethical obligations as a judge to do so.

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

Please see my answer to Question 1(d)(iv)(1). Charging policies are within the powers accorded to the Executive branch. Being mindful of the separation of powers, I would consider speaking

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>.

with the United States Attorney or other federal prosecutors to discuss charging policies only after careful deliberation and if permitted under the law and my ethical obligations as a judge to do so.

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

Please see my answer to Question 1(d)(iv)(1) and (2).

- 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?**

I commit to taking into account alternatives to incarceration in all instances where appropriate to do so under the law.

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.**

Yes. I am aware of statistics published by the United States Sentencing Commission evidencing such racial disparities. As a United States magistrate judge, I strive to treat everyone equally under the law regardless of race and commit to doing so if confirmed as a district judge.

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
Questions for the Record

Michael Jay Newman
Nominee, U.S. District Court for the Southern District of Ohio

- 1. Under Supreme Court and U.S. Court of Appeals for the Sixth 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?**

“[P]risoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers.” *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008); *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)) (emphasis and internal quotations omitted); see also *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir. 2017).

- 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. “[P]risoners must identify an alternative that is ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’” *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52).

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

Not to my knowledge. See *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72-75 (2009).

- 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 Sixth 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.**

As set forth by the Supreme Court of the United States, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)). However, certain state action under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) must survive a compelling interest analysis even if facially neutral. *See* 42 U.S.C. § 2000cc; 42 U.S.C. § 2000cc-1. Otherwise, state laws burdening the free exercise of religion that are neither neutral nor generally applicable “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest[,]” *i.e.*, strict scrutiny. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32.

- b. Under Supreme Court and U.S. Court of Appeals for the Sixth 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.**

A state law that discriminates on the basis of religion must serve a compelling state interest, *i.e.*, it must survive strict scrutiny. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017); *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2260 (2020); *see also Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (“[A] law that discriminates against religious practices usually will be invalidated because it is the rare law that can be ‘justified by a compelling interest and is narrowly tailored to advance that interest’”) (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 533); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020).

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

“Courts are ‘to determine whether the line drawn’ by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs ‘reflects

an honest conviction.” *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 586 (6th Cir. 2018) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)); *see also Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020).

- d. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.**

Yes. *Devore v. Mohr*, No. 2:18-CV-559, 2019 WL 3413647 (S.D. Ohio July 29, 2019), *report and recommendation adopted*, No. 2:18-CV-559, 2019 WL 4452884 (S.D. Ohio Sept. 17, 2019).

6.

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

In *Heller*, the Supreme Court of the United States held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

- b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.**

Yes. *United States v. McCauley*, No. 3:06-CR-154, 2011 WL 4063075 (S.D. Ohio Aug. 11, 2011), *report and recommendation adopted*, No. 3:06-CR-154, (S.D. Ohio Sept. 13, 2011), *order vacated on reconsideration*, No. 3:06-CR-154, 2011 WL 5356794 (S.D. Ohio Feb. 14, 2012).

- 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. Statutory interpretation involves reading the words as written and ultimately passed by the legislative branch.