

**Nomination of Drew B. Tipton to the United States District Court for the
Southern District of Texas
Questions for the Record
Submitted February 19, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. In a 2007 *Houston Chronicle* article, you defended the nomination of Judge Leslie Southwick to the Fifth Circuit Court of Appeals. While serving on the Mississippi Court of Appeals, Southwick had joined a majority opinion that reinstated a social worker who was fired for calling an African American colleague “a good ole nigger.” Judge Southwick reasoned that the social worker’s use of the slur was “not motivated out of racial hatred or animosity directed toward her co-worker or toward blacks in general,” and he rejected “an arbitrary, across-the-board rule” that the use of the n-word—or of any other racial epithet—is always “so inflammatory or disruptive that it warrants the ultimate sanction of loss of employment.” (*Richmond v. Mississippi Dep’t of Human Servs.*, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. 1998)) *The Houston Chronicle* quoted you as saying, “[e]xcept for this case, I haven’t heard any other opposition about him,” and “[it] certainly does not evidence a pattern of hostility against anyone or any people who are of a particular race.” (Cindy George, *Local Groups Oppose Bush Nominee Over Racial Slur: Leslie Southwick of Mississippi Is Accused of Condoning the Use of the Word In A Decade-old Opinion*, HOUSTON CHRONICLE (June 1, 2007))

- a. **Do you believe that calling a colleague at work the n-word is not a fireable offense?**

No. Having practiced labor and employment and civil rights law from both the plaintiff’s and defendant’s perspective over the course of my career, I am of the firm belief that use of the term that was used in that case is abhorrent and cruel.

- b. **What, in your view, constitutes sufficient evidence of hostility against people of a particular race?**

I am aware that there is a debate in the courts as to whether the single use of the term used in that case is sufficiently severe, by itself, to create a hostile work environment within the meaning of Title VII. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues.

2. *The Houston Chronicle* article mentioned above referred to you as the “Houston chapter president of the Republican National Lawyers Association.” (Cindy George, *Local Groups Oppose Bush Nominee Over Racial Slur: Leslie Southwick of Mississippi Is Accused of Condoning the Use of the Word In A Decade-old Opinion*, HOUSTON CHRONICLE (June 1, 2007)) On your Questionnaire for the Senate Judiciary Committee, you wrote that you were only the Houston chapter president of the Republican National Lawyers Association (“RNLA”) in 2003. You indicated that you were a member of the RNLA from 2002 to 2008.

- a. Were you the President of the RNLA’s Houston chapter in any year aside from 2003?**

To the best of my memory, I believe that I was President of the Houston chapter for only the year 2003. A partner from my law firm’s Washington DC office was active in the RNLA at the national level and was interested in starting a chapter in Houston. She asked if I would be willing to serve as the President of the Houston chapter. Other than the initial meeting forming the Houston chapter, I do not believe that we ever had any other meetings at the Houston chapter level. I never attended any other RNLA meetings at any level. That is why I have listed 2003 as the only year I was President.

- b. Whether you were in fact President of the RNLA’s Houston chapter in any year aside from 2003, did you hold yourself out to the public as such in any year besides 2003?**

To the best of my memory, I do not believe that I held myself out as the President for any year other than 2003. Please see my Response to Question 2(a).

- c. Apart from the 2007 *Houston Chronicle* article referenced above, did you speak on behalf of—or otherwise represent—the RNLA’s Houston Chapter in any year besides 2003?**

- i. If yes, please provide the details of all such occasions.**

To the best of my memory, I do not believe that I held myself out as the President or otherwise represented the RNLA’s Houston Chapter in any year besides 2003. My understanding of why I was contacted by the media was that they had contacted the national RNLA for comment and were directed to me. Please see my Response to Question 2(a).

3. The RNLA’s “About Us” webpage states that “[e]ach member . . . must ascribe to the accomplishment” of the organizations missions, which include: “Advancing Republican Ideals. The RNLA further builds the Republican Party goals and ideals through a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates.”

- a. Please detail the activities that your membership in this organization entailed.**

Please see my Response to Questions 2(a) and 2(c)(i). Other than the initial meeting forming the Houston chapter, and to the best of my memory, I do not believe that we ever had any other meetings at the Houston chapter level, or that I ever attended any other RNLA meetings at any level. I believe the only activities that my membership in this organization entailed was responding to media inquiries.

b. In what ways do you believe that you “directly support[ed] Republican policy, agendas and candidates”?

Please see my Response to Question 3(a).

4. You have worked on numerous cases involving non-compete and non-solicitation clauses.

Do you believe that non-compete and non-solicitation clauses are a restraint on trade?

Yes. Texas courts and federal courts within the Fifth Circuit have recognized that restrictive covenants are a restraint of trade. Covenants not to compete in Texas are governed by Texas Business and Commerce Code § 15.50, which provides that “[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.”

5. You served as lead counsel for a company that had an employee with an intellectual disability who was sexually assaulted while working at the Houston Livestock Show and Rodeo. The employee alleged that before the assault he had notified his supervisors that a co-worker was harassing him and making unwanted sexual advances. You argued that the company bore no responsibility for the sexual assault. The case ultimately settled. (*Muhammad, individually and as next friend of Moore, an incapacitated adult, Moore and Moore v. Green, Aramark Corporation, and SMG*, No. 2007-13731 (129th Judicial District Court, Harris County, Texas))

How did you come to the conclusion that this company bore no responsibility for failing to keep its employee safe from assault?

The facts alleged in the Moore case were heartbreaking. The legal questions presented to the court focused on whether an employer can be held liable for the intentional torts committed by an employee, and whether the employer was negligent in hiring, training, supervising and retaining the accused employee. This involved questions as to whether the claims as alleged were barred by the Texas Workers’ Compensation Act because recovery of workers’ compensation benefits is the “exclusive remedy” of an employee for intentional torts and negligence claims brought under these circumstances. Additionally, the court was presented with the question of whether intentional tort claims can be imputed to an employer when they were not within the course and scope of the authority given by the employer to the accused employee.

6. You represented an oil and gas company that had an employee who alleged he had endured a hostile work environment because he is half-Hispanic. This employee had several confrontations with his co-workers, and then one evening two of them followed him in his truck after work and shot at it with a shotgun. The employee was then removed from his

position in part because the company didn't believe it could keep him safe. (*Olmeda v. Cameron Int'l Corp.*, No. 2:14-cv-01904, 139 F. Supp. 3d 816 (E.D. La. 2015))

Why should an employee who bears no responsibility for the workplace hostility directed at him lose his position because of his employer's inability to keep him safe?

The plaintiff in the *Olmeda* case was not employed by my client. He was employed by a co-defendant. The plaintiff alleged that he had issues with two of my client's employees and that those two employees targeted him away from work after several hours of drinking. Those two employees were immediately fired by my client. The question was whether my client could be held responsible for intentional torts committed by employees that occurred after hours, miles from the worksite, and while the accused employees were inebriated.

7. You served as lead counsel for a company—which does oil and gas drilling—that had an employee who was injured on the job, resulting in two surgeries. The company ultimately fired the injured employee, and a jury later found for the employee on one of his claims before the judge overruled the jury's verdict. (*Chollett v. Patterson-UTI Drilling Servs., LP, LLLP*, No. 6:08-cv-00027, 2011 WL 4592378 (S.D. Tex. 2011))

Do you think it's fair for employees to lose their jobs because they are injured at work?

I think it is important for employees and employers to seek ways to accommodate injuries or health conditions whether they occur at work or not. In *Chollett*, the plaintiff was injured on the job and placed on restrictions by his doctor. My client accommodated those restrictions by creating a light duty position for him for the next 13 months even though the policy provided for a six-month limit. My client also provided an extra hand (or helper) to perform the duties of the job that the plaintiff could not perform. When his doctor extended the plaintiff's restrictions again, my client discontinued the light duty position created for the plaintiff and turned his claim over to the worker's compensation carrier. The plaintiff subsequently received a full duty release, and my client rehired him. Shortly thereafter, the plaintiff started having soreness from the original injury, and his doctor placed restrictions on him yet again. Those restrictions would have required that the plaintiff be placed on light duty because they prohibited him from doing the essential functions of his job. When the plaintiff was discharged because he could not do the job, it had been two years since the date of his original injury. Notwithstanding, the plaintiff was informed that he would be rehired when he received a release.

The Family and Medical Leave Act, the Americans with Disabilities Act, and state workers' compensation statutes provide the requirements for employers and employees alike to navigate these issues. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent.

8. 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?**

No.

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

A district court decision is not binding. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). As such, a district court is not bound by another district court's ruling. In addition, Federal Rules of Civil Procedure 59(e) and 60 provide standards for a district court to set aside its prior rulings in a specific case. A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located.

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

Only the Supreme Court may overturn one of its prior decisions. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). The Supreme Court has articulated factors it may consider in determining whether to overturn its own precedent. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring).

Notwithstanding, it has also made clear that it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3 (1997). It would be inappropriate for me as a lower court nominee to opine on when the Supreme Court should or should not overturn its own precedent. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

9. 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"?**

All Supreme Court decisions are binding on all district courts. If confirmed, I will fully and faithfully apply *Roe v. Wade* and its successor cases.

b. Is it settled law?

Yes.

10. 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.

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

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

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise “grade” a dissenting opinion of the Supreme Court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

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

In *District of Columbia v. Heller*, the Supreme Court stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626–27 (2008). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Heller*.

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

As a judicial nominee, I do not believe it appropriate to comment further on or otherwise “grade” the merits of an opinion of the Supreme Court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

12. 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 First Amendment provides fundamental guarantees to the people of the United States. First Amendment rights should always be of concern to judges considering cases and controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent concerning First Amendment rights and campaign finance law, including *Citizens United v. FEC*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court.

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 12(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I will fully and faithfully follow all Supreme Court and Fifth Circuit precedent, including *Hobby Lobby*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court.

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

The Constitution guarantees both the equal protection of the laws and the right to the free exercise of religion. The relevant provision of the Fourteen Amendment provides "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Constitution requires both that the government not deny a person the equal protection of the laws and that the government not prohibit a person's free exercise of religion. Both of these constitutional amendments enshrine important constitutional values and reflect longstanding liberties that we enjoy in this country. If confirmed, I will fully and faithfully follow all Supreme Court and Fifth Circuit precedent.

14. 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 ruled that state laws prohibiting interracial marriage violate the Equal Protection Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Also, please see my Response to Question 13.

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

The Supreme Court ruled that state laws prohibiting interracial marriage violate the Equal Protection Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Also, please see my Response to Question 13.

16. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2010. 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 cited webpage, and I cannot speak to its meaning as I was not the author and have never heard it discussed.

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

Please see my Response to Question 16(a).

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

Please see my Response to Question 16(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.**

During the course of this nomination process, I did not have any contact with anyone in the national office of the Federalist Society about my possible nomination.

17. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

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

No.

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

No.

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

In my legal practice, I have not focused on matters related to administrative law. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent concerning any subject matter, including administrative law.

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

I have not studied the issue. As a judicial nominee, it would be inappropriate to comment on legal matters that may come before the courts or political issues.

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

In interpreting a statute, the Supreme Court has held that if the text of a statute is unambiguous, that ends the inquiry. When the text of a statute is ambiguous, however, the

Supreme Court has stated that consideration of legislative history may be appropriate. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

20. 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.

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

I received the questions on Wednesday, February 19, 2020 at 4:48 PM. I reviewed my Senate Judiciary Questionnaire, conducted limited research and consulted other materials, and drafted my answers. I then shared my draft responses with the Office of Legal Policy at the Department of Justice, which offered suggestions and comments. In light of those comments, I then revised my responses as I thought appropriate. After finalizing my answers, I authorized the Department of Justice to file these responses.

Written Questions for Drew Barnett Tipton
Submitted by Senator Patrick Leahy
February 19, 2020

1. According to your questionnaire you have served as first chair on only six trials, and your primary specialty is employment and labor law. Nearly all of your experience is in civil law.

(a) How would you describe your readiness to decide issues that arise unexpectedly during trial?

I believe that I have substantial experience in the courtroom in addition to the twelve total trials referenced in my questionnaire. For those matters in which I was not first chair, I made substantial contributions during trial including taking witnesses, arguments and handling evidentiary disputes. In addition, I participated in trials not included in that number that settled after trial had commenced but prior to reaching a verdict. Finally, because my practice has shifted somewhat over the past ten years to trade secret theft and restrictive covenant litigation, I have been first chair in many injunction proceedings all of which included witnesses and complicated evidentiary issues. Trade secret cases by their very nature are expedited and as a result, I deal with a plethora of unexpected issues that arise on an hour by hour basis. I believe I am ready to decide issues that arise unexpectedly during trial or at any other time.

(b) What experience do you have with criminal law issues?

Like many new judges, I would need to get up to speed quickly and that will not be a problem because criminal law was my first passion. The first job I wanted prior to attending law school was to be a federal prosecutor. To help me prepare, I clerked for a high profile white collar criminal defense firm while I was in law school. Upon graduating law school, I served as a law clerk to a federal district judge who had a substantial criminal docket. Because of my interest, I was assigned the entire criminal docket as part of my responsibilities. When there were no openings for an entry level AUSA with my experience, I transitioned to labor and employment law. Even in that practice area, I have been involved with trade secret theft cases and have worked concurrently with law enforcement, including the FBI, on some of the matters.

(c) What process do you employ to become familiar with issues you have not seen before?

This happens fairly frequently in my trade secret theft and covenant not to compete practice. Because of the expedited nature of the litigation, I immerse myself in the industry to become a subject matter expert and

spend time interviewing the witnesses to learn as much as I can about the subject. Likewise, I immerse myself in the documents (both electronic and hard copy).

If presented with an issue or question of first impression as a district judge, if there is no controlling Supreme Court or Fifth Circuit precedent on the issue and the question of first impression arises from a statute or constitutional provision, I would first look to the text of the statute or provision. If the words are plain and unambiguous, the inquiry ends. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The best evidence of what a writing means is the plain meaning of the words. Adhering to the plain meaning of the text, whether it is a clause in a contract, a proscription in a statute, or a provision in a constitution, is the foundational principle necessary to approaching a novel legal question.

If a textual analysis is unclear, I would assess the context of the statute, such as the former version of the law or how Congress used undefined terms in other laws. If a contextual analysis is also unclear, I would utilize the established canons of interpretation. I would also look to Supreme Court or Fifth Circuit precedent addressing similar issues or similarly structured statutes for persuasive guidance. Precedent from other circuit courts of appeal might be considered as persuasive authority.

(d) What assurances can you provide that you are qualified to decide issues with which you are not familiar?

I had the honor of watching how this job should be done when I clerked for Judge John D. Rainey. He dedicated himself to ensuring that he was up to speed on every issue presented to him by the time he made a decision. He had great judgment. Put simply, I can assure you that I will put in the time to learn those areas of the law with which I have had little experience. Every person who becomes a new judge will need to learn issues with which they had not been familiar. I look forward to doing so. One of the great things about being a law clerk was the opportunity to work on such a diverse docket. That prospect is exciting for me.

2. In 2007, you defended a then-nominee to the Fifth Circuit Court of Appeals, Leslie Southwick, in an article in the *Houston Chronicle*. An issue of concern at the time was that now-Judge Southwick joined a majority opinion in a case that reinstated an employee who was fired for using the n-word in reference to an African-American colleague. Judge Southwick reasoned that the use of the racial slur was “not motivated out of racial hatred or animosity” toward either her colleague or African-Americans generally.

(a) In which, if any, situations is the use of a racial slur not revealing of racial animosity?

I am not aware of any. Having practiced labor and employment and civil rights law from both the plaintiff's and defendant's perspective over the course of my career, I am of the firm belief that use of the term in that case is abhorrent and cruel.

(b) Even if the use of a racial slur is not consciously motivated by racial animosity, should the use of such a word in the work place be condoned?

No.

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

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

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

Determining the meaning of a statute requires examination of the text and structure of the statute, with consideration given as to how statutory provisions work together to form a consistent whole. The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent concerning the methods for interpreting statutes.

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

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

The independence of the federal judiciary is a core feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in public debates and commentary. As a

judicial nominee, I do not believe it appropriate to comment further on a subject of political debate.

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

Please see my Response to Question 4(b).

5. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.)

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

The Supreme Court has held that courts review decisions by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

6. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

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

Please see my responses to Questions 5(a), 7(a), and 8. If confirmed, and if such a scenario were to come before me, I will carefully examine the relevant authorities that may bear upon this question and fully and faithfully apply all applicable Supreme Court and Fifth Circuit precedent. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation.

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

- (a) **Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

The Constitution assigns powers over foreign affairs and war to the President and Congress. Questions regarding the appropriate exercise of

these powers continue to arise in litigation. In evaluating conflicts between the two branches in this area, the Supreme Court has looked to Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (citing Justice Jackson's concurrence). If confirmed, I will fully and faithfully apply Supreme Court and Fifth Circuit precedent, as well as any constitutional and statutory authority. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation.

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

- (b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?**

Please see my Response to Question 7(a).

- (c) Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

Please see my Response to Question 7(a).

- 8. How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?**

The Supreme Court made clear long ago that it is ultimately "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). In evaluating any challenge to Executive action, a court must consider the relevant precedents, together with applicable constitutional and statutory provisions, as set forth in my response to Question 7(a).

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

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an "exceedingly

persuasive justification” for gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I will fully and faithfully follow all Supreme Court precedent, including *United States v. Virginia*.

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

The Voting Rights Act is an historic and landmark law. I am not familiar with the comment made by Justice Scalia and, from what I have been able to determine, Justice Scalia’s comment was not part of a holding of the Supreme Court. If confirmed, I will fully and faithfully apply Supreme Court precedent interpreting the Voting Rights Act.

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

The Constitution provides in Article I, section 9 that “no Person holding any Office or Profit or Trust under” the United States “shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation.

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

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

A district court relies on the parties to discover and place before the court the appropriate factual record under the rules of evidence, and an appellate court considers the record that has been developed in the court below. Established standards of review govern an appellate court’s review of factual findings made in the district court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Shelby County v. Holder*. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation.

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

The Thirteenth, Fourteenth, and Fifteenth Amendments reflect a constitutional commitment to counteracting racial discrimination in the aftermath of the Civil War. Each of these Amendments provides that Congress has the power to enforce them “by appropriate legislation.” U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2.

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

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

The Supreme Court has addressed and established a fundamental right to personal autonomy as expressed in *Lawrence v. Texas* and other decisions. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Lawrence v. Texas*.

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

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

The Supreme Court has stated that “the doctrine of stare decisis is of fundamental importance to the rule of law.” *Hilton v. South Carolina Public Ry. Comm’n*, 502 U.S. 197, 202 (1991) (citation omitted). It is never appropriate for lower courts to depart from Supreme Court precedent. *See, e.g., Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

With respect to circuit precedent, the Fifth Circuit imposes a “rule of orderliness” by which “one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.” *Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and the Fifth Circuit, including precedent with respect to application of stare decisis.

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

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

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

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

Courts play a central role in protecting constitutional rights under the rule of law through the impartial application of the law. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent,

including precedent considering and applying footnote 4 of *United States v. Carolene Products*. As a judicial nominee, I do not believe it appropriate to comment further on abstract legal concepts and hypothetical scenarios, which are or may be the subject of pending or impending litigation.

18. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

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

Yes.

19. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

I have not previously researched this issue. If confirmed and this question came before me, I will fully and faithfully apply all applicable Supreme Court and Fifth Circuit precedent regarding the presidential pardon power. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation.

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

The Constitution confers enumerated powers on the federal government, including Article I, Section 8, Clause 3, the Commerce Clause, and Section 5 of the Fourteenth Amendment. The reach of those powers with respect to such provisions has been the subject of litigation and debate, with the Supreme Court deciding a number of cases in these areas. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 of the Fourteenth Amendment). If confirmed, I will fully and faithfully apply Supreme Court and Fifth Circuit precedent concerning the scope of congressional powers, including those addressing the Commerce Clause and Section 5 of the Fourteenth Amendment.

21. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the

Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

- (a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

In *Trump v. Hawaii*, the Supreme Court held, among other things, that the challenged Proclamation was lawfully issued under 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." 138 S.Ct. 2392, 2409. The Court also held that "plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.* The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Trump v. Hawaii*. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation.

- 22. How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The Supreme Court has held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Planned Parenthood v. Casey* and *Whole Woman's Health v. Hellerstedt*. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical legislative examples, which are or may be the subject of pending or impending litigation.

- 23. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.**

(a) Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?

The Supreme Court has held that “[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotations omitted). According to the Supreme Court, “[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Id.* If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent applicable to qualified immunity. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise “grade” the decisions of the Supreme Court.

24. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology,” such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?

The Fourth Amendment provides a fundamental guarantee to the people of the United States. The Supreme Court has recognized that new technological developments can give rise to serious Fourth Amendment concerns. The Supreme Court has explained that new technologies in the digital era can “risk[] Government encroachment of the sort the Framers, ‘after consulting the lessons of history,’ drafted the Fourth Amendment to prevent.” *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (citation omitted); *see also, e.g., Riley v. California*, 573 U.S. 373, 402 (2014) (examining Fourth Amendment concerns involving modern cell phones). If confirmed, I will fully and faithfully apply all Supreme Court

and Fifth Circuit precedent, including precedent applicable to data collection and the Fourth Amendment. As a judicial nominee, I do not believe it appropriate to comment further on abstract or hypothetical scenarios, which are or may be the subject of pending or impending litigation.

25. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

(a) With the understanding that you cannot comment on pending cases, are there situations in which you believe a president can lawfully allocate funds for a purpose previously rejected by Congress?

I have not previously researched this question. If confirmed and were such a matter to come before me, I would fully and faithfully apply all applicable Supreme Court and Fifth Circuit precedent regarding presidential power in this respect. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation.

26. Can you discuss the importance of judges being free from political influence or the appearance thereof?

An independent judiciary is a core feature of our constitutional system and is critical to promotion and protection of the rule of law. An independent judiciary depends upon judges being free from political influence or bias. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. The Code of Conduct for United States Judges reinforces the importance of judges operating independent of politics by affirming that “[a]n independent and honorable judiciary is indispensable to justice in our society.” *See* Code of Conduct for United States Judges, Canon 1. The judicial oath of office provides that I must “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation.

Senator Dick Durbin
Written Questions for Tipton
February 19, 2020

For questions with subparts, please answer each subpart separately.

Questions for Drew Tipton

- 1. When do you believe it is appropriate for the Supreme Court to overrule one of its precedents?**

Only the Supreme Court may overrule one of its prior decisions. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). The Supreme Court has articulated some factors it may consider in determining whether to overturn its own precedent. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). Notwithstanding, it has also made clear that it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3 (1997). It would be inappropriate for me as a lower court nominee to opine on when the Supreme Court should or should not overturn its own precedent. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

- 2. Should district court judges ever write opinions—whether majority opinions, concurrences, or dissents—calling for the Supreme Court to review and consider reversing its own precedents? Or is improper for lower court judges to opine on what the Supreme Court should do?**

I do not believe it is proper for a district court judge to question Supreme Court precedent. A district court judge must fully and faithfully apply all Supreme Court precedent.

- 3. On June 1, 2007, you were quoted in the *Houston Chronicle* commenting on the nomination of Leslie Southwick to the 5th Circuit. The article noted that civil rights leaders had called for the withdrawal of this nomination because of an opinion Southwick joined while a Mississippi state appellate judge in the case *Richmond v. Mississippi Department of Human Services*. In this case, a 5-4 appellate court majority reinstated a white social worker who had called a black colleague the n-word, stating that the social worker's use of the slur was "not motivated out of racial hatred or animosity directed toward her co-worker or toward blacks in general." Two dissenting judges disagreed, saying that: "Search high and low, you will not find any non-offensive definition for this term. There are some words, which by their nature and definition are so inherently offensive, that their use establishes the intent to offend." The *Richmond* case was eventually reversed by the Mississippi Supreme Court.**

You spoke to the *Houston Chronicle* about Judge Southwick in your capacity as the Houston Chapter president of the Republican National Lawyers Association. You said: "except for this case, I haven't heard any other opposition about him...It certainly does not evidence a pattern of hostility against anyone or any people who are of a particular race."

- a. **Do you understand why civil rights organizations and many others were so troubled by the opinion Judge Southwick joined in the *Richmond* case?**

Having practiced labor and employment and civil rights law from both the plaintiff's and defendant's perspective over the course of my career, I am of the firm belief that use of the term in that case is abhorrent and cruel.

- b. **Would you agree with the dissent in that case that there are no non-offensive definitions for the term that was used?**

I am unaware of any non-offensive definitions for the term that was used.

4. In May 2019, *The Washington Post* reported that Federalist Society board co-chair Leonard Leo is at the center of millions of dollars in dark money donations that are being used to influence the selection of judicial nominations. The *Post* reported that Mr. Leo "defended the practice of taking money from donors whose identities are not publicly disclosed." (<https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>)

In January 2020, Mr. Leo told *Axios* that he will be running a new venture that will involve a "minimum of \$10 million issue advocacy campaign focusing on judges in the 2020 cycle." The article noted that Mr. Leo will remain co-chair of the Federalist Society's board. (<https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html>)

- a. **You are a member of the Federalist Society. Does it concern you to hear that Mr. Leo, who is the public face of the Federalist Society, is running a dark money funded political advocacy campaign focused on judges?**

I am unfamiliar with the facts and circumstances reported. I am aware that judicial nominations have generated significant controversy and debate, particularly since the 1980s. I believe that the inclusion of spending limits and disclosure requirements is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration by Congress, or on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation.

Having said that, I believe that an independent judiciary is a cornerstone of our constitutional system and is necessary to promote and protect the rule of law. An independent judiciary depends upon judges being free from political influence or bias. Article III of the Constitution sets forth protections to allow for judicial independence, including provisions regarding life tenure and compensation in office. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independently by affirming that "[a]n independent and honorable judiciary is indispensable to justice in our society." See Code of Conduct for United States Judges, Canon 1. If confirmed, I will model the independence inherent in these statements.

- b. Do you believe that wealthy individuals or special interests that make undisclosed donations to organizations that help choose judicial nominees should make their donations public so that judges can have full information when they make decisions about recusal in cases these donors may have an interest in?**

Please see my Response to 4(a).

5.

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

I am unaware of any such donations or of the Judicial Crisis Network supporting my nomination. As to whether any such donations are problematic, that is a question of ongoing public debate. On this point, please see my Response to 4(a).

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

If confirmed, I would meticulously apply the recusal requirements specified in 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and all pertinent advisory opinions. Beyond that, the disclosure or nondisclosure of any such donations constitutes a matter of ongoing public debate. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration by Congress, or on abstract and hypothetical scenarios, which are or may be the subject pending or impending litigation.

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

Please see my responses to Questions 4(a), 5(a) and 5(b).

6.

- a. Do you believe that judges should be “originalist” and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

As Justice Kagan testified before this Committee, “[s]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. So in that sense, we are all originalists.” The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the

United States: Hearing Before the Senate Committee on the Judiciary, S. Hrg. 111-1044, at 62 (2010). The Supreme Court has recognized the importance of the Constitution's text, structure, and original understanding in interpreting a constitutional provision. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

- b. If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

I have not studied the Foreign Emoluments Clause or any Supreme Court precedent interpreting it. I am aware, however, of pending litigation regarding this Clause. Accordingly, I cannot comment further.

7.

- a. Do you interpret the Constitution to authorize a president to pardon himself?**

I have not studied this question.

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

I have not studied this question.

**Nomination of Drew Barnett Tipton
to the United States District Court for the Southern District of Texas
Questions for the Record
Submitted February 19, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you have been a member of the Houston Lawyers Chapter of the Federalist Society from 2010 until present.

- a. What was your primary motivation for joining the organization? Did you believe that being a member of the Federalist Society would improve your odds of being confirmed as a federal judge in the Trump administration?

I joined the Houston Chapter of the Federalist Society primarily because it has easily accessible monthly luncheons during which I could earn CLE credit while hearing speakers on timely topics. I joined in 2010 during the prior administration and did not consider the possibility that being a member would improve my odds of being confirmed as a federal judge.

- b. If confirmed, do you plan to remain an active participant in the Federalist Society?

I have seen news reports that the Judicial Conference's Committee on Codes of Conduct is reviewing this issue. I will evaluate my memberships and affiliations in any organization in light of their recommendations.

- c. If confirmed, do you plan to donate money to the Federalist Society?

No.

- d. Have you had contacts with representatives of the Federalist Society, in either their official or unofficial capacity, in preparation for your confirmation hearing? Please specify.

No.

2. 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?

I have per your request. I had not previously read or reviewed this material.

- 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 not familiar with the facts and circumstances reported in the Washington Post story. I am aware that judicial nominations have generated significant controversy and debate. I believe that the inclusion of spending limits and disclosure requirements is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration by Congress, or on abstract and hypothetical scenarios, which are or may be the subject pending or impending litigation.

Having said that, I believe that an independent judiciary is a cornerstone of our constitutional system and is necessary to promote and protect the rule of law. An independent judiciary depends upon judges being free from political influence or bias. Article III of the Constitution sets forth protections to allow for judicial independence, including provisions regarding life tenure and compensation in office. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independently by affirming that "[a]n independent and honorable judiciary is indispensable to justice in our society." See Code of Conduct for United States Judges, Canon 1. If confirmed, I will model the independence inherent in these statements.

- 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?

I am unfamiliar with the facts and circumstances related to that statement. As such, I cannot comment on what he meant to convey. Please also see my Response to Question 2(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?

I am unfamiliar with the facts and circumstances related to that statement. As such, I cannot comment on what he meant to convey. Please also see my Response to Question 2(b).

3. 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?

As a general proposition, I agree with the metaphor to the extent it captures the idea that the role of a judge is to fairly and impartially adjudicate cases within the constitutional boundaries of the judicial branch. A judge's role is to interpret the law, not to make it.

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

A judge's duty is to follow and apply the law in a fair and neutral manner. It is the duty of the political branches to consider and address the practical consequences. To the extent that Supreme Court and Fifth Circuit precedent and applicable rules and statutes permit a judge to consider the practical consequences in rendering a decision on a particular issue, a judge may do so.

4. 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?

Whether a genuine dispute as to any material fact exists requires the court to consider the parties' factual assertions based on the evidentiary record, construed in a light most favorable to the non-movant. Such a decision requires judgment and reason, and in that sense is objective. Regardless, it should not be subjective in the sense that judges should refrain from injecting their personal views or feelings into the determination.

5. 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?

A judge must be fair, careful, and thorough. Empathy is an essential human attribute, and it should motivate a judge to conform his or her conduct to meet these characteristics. Ultimately, a judge's decisions must be based on applicable law and relevant facts, and not on personal feelings.

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

Every judge brings his or her varied personal life experiences to the bench with them. A judge's personal views should not affect their duty to administer justice impartially and fairly to all. Ultimately, a judge's decisions must be based on applicable law and relevant facts, and not on personal experiences.

6. 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.

7. 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 Seventh Amendment right to a jury trial in “suits at common law” is a critically important component of the American justice system that protects the rights of civil litigants to have facts decided by a jury of one’s peers. As such, the jury plays a fundamental and critical role in our constitutional system.

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

The Seventh Amendment articulates a fundamental guarantee to the people of the United States. As with the guarantees of each of the Bill of Rights, the right to a jury trial in “suits at common law” should always be of concern to judges considering cases or controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent with respect to the Seventh Amendment and arbitration clauses. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation.

- 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 7(b).

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

The Supreme Court has issued several opinions analyzing the level of deference that should be given to fact-findings by Congress in situations where they support expanding or limiting individual rights. If confirmed, I will fully and faithfully follow Supreme Court and Fifth Circuit precedent with respect to this issue.

9. 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?

Per your request, 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.
- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
- 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.

Advisory Opinion #116 appears to summarize and emphasize particular aspects of the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees with respect to educational seminars. I will abide by and consider both Codes in the execution of my judicial duties, including with respect to participation in educational seminars

- 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 9(b). In addition, I will be alert for the potential that sponsoring organizations of educational programs might attempt to gain influence with participating judges, and if I am aware of that fact, to take appropriate action.

**Nomination of Drew B. Tipton, to be United States District Court Judge
for the Southern District of Texas
Questions for the Record
Submitted February 19, 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?

If confirmed, I will fully and faithfully apply the framework set forth in the many Supreme Court decisions assessing these questions, including but not limited to *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

Yes, as directed by Supreme Court and Fifth Circuit 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, as directed by Supreme Court and Fifth Circuit precedent. The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), set forth the analysis for whether a right is deeply rooted in the nation's history and tradition, stating that it involves "examining our Nation's history, legal traditions, and practices." 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?

Yes. If confirmed, I will be bound by Supreme Court and Fifth Circuit precedent previously recognizing any such right. Absent binding precedent, I will look to decisions from other circuit courts as persuasive authority.

- 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. If confirmed, and absent binding precedent, I will consider whether Supreme Court and circuit precedent previously recognizing any similar right constitutes persuasive authority.

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

Both *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Casey* and *Lawrence*.

- f. What other factors would you consider?

If confirmed, I will consider any other factors deemed relevant under Supreme Court and Fifth Circuit precedent.

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

The Supreme Court has long held that the Equal Protection Clause of the Fourteenth Amendment applies to both race-based classifications and gender-based classifications. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

- 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 that there is a debate about the intent of the individuals who passed the Fourteenth Amendment on this issue; however, this does not affect the binding nature of Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including the precedent cited above.

- 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 did not reach the Supreme Court prior to 1996.

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry “on the same terms as accorded to couples of the opposite sex.” If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Obergefell*.

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

Equality under the law is paramount in our legal system and to the rule of law. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent addressing this topic. However, as a judicial nominee, I do not believe it appropriate to comment further on a question that is or may soon be the subject of pending or impending litigation.

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 addressed and established a constitutional right to privacy protecting a woman's right to use contraceptives in a series of cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including these decisions.

- 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 addressed and established a constitutional right to privacy protecting a woman's right to obtain an abortion in a series of cases, including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including these decisions.

- 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 addressed and established a constitutional right to privacy protecting intimate relations between two consenting adults, regardless of their sexes or genders, in a series of cases, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including these decisions.

- 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?

The Supreme Court has held that societal changes can be relevant to a court’s analysis in numerous contexts. When the Supreme Court has directed lower courts “to consider evidence that sheds light on our changing understanding of society,” the lower courts should do so. If confirmed, I will follow the Supreme Court’s holdings on this issue, including *Virginia* and *Obergefell*.

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

The role of sociology, scientific evidence, and data depends on the nature of the particular issue within a particular case. If confirmed, I will fully and faithfully apply Supreme Court and Fifth Circuit precedent establishing what role these sources should play in a given case, including precedent with respect to judicial notice and admissibility of expert opinion.

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?

Obergefell is binding Supreme Court precedent. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court stated, “Our 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.” 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Obergefell* and *Masterpiece Cakeshop*.

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

Please see my responses to Questions 1 and 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?

I am aware that there are legal scholars who have maintained that *Brown v. Board of Education* is not consistent with originalism. I am also aware that there are legal scholars who have maintained that it is, including Judges Robert Bork and Michael McConnell. Beyond any academic debate, however, the Supreme Court has made clear in numerous decisions that racial discrimination has no place under our Constitution. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Brown* and progeny.

- 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 Feb. 19, 2020).

I am not familiar with this article or these authors’ argument. I understand that determining the original public meaning of a constitutional provision can be difficult. I also understand that the Supreme Court has not abandoned its judicial role of interpreting constitutional phrases merely because of this difficulty. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent regardless of the breadth of a term such precedents interpret.

- 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?

For a district judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court or, in my case, the Fifth Circuit has decided that it is dispositive. If the Supreme Court or Fifth Circuit has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision controls. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, regardless of their methodology.

- 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 confirmed, I will fully and faithfully apply all relevant Supreme Court and Fifth Circuit precedent that identifies the appropriate sources to use in discerning the contours of a constitutional provision.

7. What are the legal standards that you would apply and types of facts that you would consider in analyzing hostile work environment claims?

Under Title VII, an employer's liability for workplace harassment depends on the status of the alleged harasser. If the harassing employee is the victim's co-worker, the employer is liable if it was negligent in controlling working conditions. *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 452 (5th Cir. 2013) (*en banc*). That is, the plaintiff must show that the employer knew or should have known about the harassment and failed to take prompt remedial action.

In cases in which the harasser is a "supervisor," however, different rules apply. Where a harassment claim arises out of a supervisor's conduct, there are four elements of a hostile working environment claim: (1) the employee belongs to a protected class; (2) the employee was subject to unwelcome harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment. *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999). The Supreme Court has emphasized that a hostile work environment claim "is not limited to 'economic' or 'tangible' discrimination." *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). Rather, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris v. Forklift Sys.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

In *Burlington Ind. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court held that if the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may avoid liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

Generally speaking, the foregoing articulates the legal standards for hostile work environment claims and the facts that a court should consider in analyzing same. If

confirmed, I will fully and faithfully apply all relevant Supreme Court and Fifth Circuit precedent on these issues.

**Questions for the Record for Drew Barnett Tipton
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. 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. I believe there is value in judges taking such training.

b. Have you ever taken such training?

No.

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

I am not familiar with the training opportunities afforded district court judges. However, I do commit to exploring any training offered that will enhance my ability to serve.

3. In 1997, early on in your legal career, you represented a plaintiff who sued her employer for sexual harassment and retaliation she experienced by her direct supervisor. In seeking Supreme Court review after the lower courts dismissed your client's claims, you asserted that "[s]ummary judgment is ordinarily inappropriate in the context of a work place discrimination case because the allegations usually require an explanation into an employer's true motivation and intent for making a particular employment decision."

Is that still your view? Do you believe discrimination claims brought by workers against their employees should ordinarily not be dismissed before trial?

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and provides that the court should grant summary judgment only "if the movant shows that there is no genuine dispute as to any material fact" and "is entitled to judgment as a matter of law."

Employment cases sometimes involve questions of motivation and intent, which may not be suited for summary disposition because they are within the province of the jury. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues.

4. In 2007, you represented Aramark in a sexual harassment case involving an employee who alleged he had been sexually harassed and eventually sexually assaulted by another employee. The plaintiff alleged he repeatedly informed his supervisors of this harassment but Aramark failed to take any action. You settled the case in what you described as “terms that were favorable to Aramark.”

a. Why did you list the Aramark case as one of the top 10 most significant cases you were personally involved in?

The facts alleged in the Aramark case were heartbreaking. The reason I listed it as one of the top 10 most significant cases I was personally involved in was because of the complexity of the legal arguments involved, not the factual allegations.

The legal questions presented to the court focused on whether an employer can be held liable for the “intentional torts” committed by an employee, and whether the employer was negligent in hiring, training, supervising and retaining the accused employee. This involved questions as to whether the claims as alleged were barred by the Texas Workers’ Compensation Act because recovery of workers’ compensation benefits is the “exclusive remedy” of an employee for intentional torts and negligence claims brought under these circumstances. Additionally, the court was presented with the question of whether intentional tort claims can be imputed to an employer when they were not within the course and scope of the authority given to the accused employee.

b. What responsibility do you think companies should take in ensuring that their employees are safe from sexual assault and sexual harassment by other employees?

I am aware that there are certain steps employers should take and duties imposed by law that are set forth by Congress and other policy making officials accountable to the people. As a judicial nominee, it would be inappropriate to comment on legal matters that may come before the courts or political issues. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues

5. In 2007, you defended the nomination of Leslie Southwick to the Fifth Circuit who was described at the time as having “a disturbing history of insensitivity to blacks and other minority groups.” Judge Southwick was criticized for upholding the reinstatement of a white state social worker who had been fired for calling an African-American co-worker “a good ole” N-word. At the time, you were the President of the Houston chapter of the Republican National Lawyers Association, which had endorsed Southwick’s nomination.

a. Do you agree with Judge Southwick that calling a co-worker the N-word is insufficient grounds for firing an employee for racial animus?

No. Having practiced labor and employment and civil rights law from both the plaintiff's and defendant's perspective over the course of my career, I am of the firm belief that use of the term that was used in that case is abhorrent and cruel.

I am aware that there is a debate in the courts as to whether the single use of the term used in that case is sufficiently severe, by itself, to create a hostile work environment within the meaning of Title VII. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues.

b. As President of the Houston chapter of the Republican National Lawyers Association, what issues and policies did you prioritize during your tenure?

I believe that I was President of the Houston chapter for only the year 2003. A partner from my law firm's Washington DC office was active in the RNLA at the national level and was interested in starting a chapter in Houston. She asked if I would be willing to serve as the President of the Houston chapter. Other than the initial meeting forming the Houston chapter, I do not believe that we ever had any other meetings at the Houston chapter level and, to the best of my memory, I never attended any other RNLA meetings at any level. Accordingly, I did not prioritize any issues or policies. My understanding of why I was contacted by the media regarding Judge Southwick was that they had contacted the national RNLA for comment and were directed to me.

Nomination of Drew B. Tipton
United States District Court for the Southern District of Texas
Questions for the Record
Submitted February 19, 2020

QUESTIONS FROM SENATOR BOOKER

1. You were quoted in a 2007 news article defending the nomination of Leslie Southwick to the United States Court of Appeals for the Fifth Circuit. While he was on the Mississippi Court of Appeals, Judge Southwick had joined a decision upholding the reinstatement of a white social worker who had been fired for calling an African-American colleague a racial slur. The opinion concluded that in context the social worker’s use of the slur “was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or toward blacks in general.”¹ It further stated that “whether such improper language is so inflammatory or disruptive that it warrants the ultimate sanction of loss of employment is not a question that is can [sic] be answered by an arbitrary, across-the-board rule.”² This ruling became a controversial issue during Judge Southwick’s confirmation process.

The *Houston Chronicle* quoted you as saying about this issue, “Except for this case, I haven’t heard any other opposition about him,” and, “It certainly does not evidence a pattern of hostility against anyone or any people who are of a particular race.”³

- a. Do you stand by your statement in this article?

Having practiced labor and employment and civil rights law from both the plaintiff’s and defendant’s perspective over the course of my career, I am of the firm belief that use of the term in that case is abhorrent and cruel.

- b. Do you agree with the decision reached by Judge Southwick and his colleagues in this case?

As a nominee for the district court, it would be inappropriate for me to comment on the merits of the case. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues.

- c. Are you aware of any significant developments in the law relating to this issue, either since the case was decided in 1998 or since Judge Southwick’s confirmation in 2007?

I am aware that there is a debate in the courts as to whether the single use of the term used in that case is sufficiently severe, by itself, to create a hostile work environment within the meaning of Title VII. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues.

- d. If you are confirmed, how would your experiences litigating labor and employment cases inform how you would approach a case like this one involving the use of a racial slur in the employment context?

In my career, I have had the privilege of working on cases like this as a law clerk to a federal district judge, as a plaintiff's attorney, and as a defense attorney. And I have seen the impact that the term used in this case has had in the lives of those it targeted. If confirmed as a district court judge, I would faithfully follow Supreme Court and Fifth Circuit precedent on these issues.

2. You have been a member of the Federalist Society since 2010.⁴ Why did you join the Federalist Society at that time?

I joined the Houston Chapter of the Federalist Society primarily because it has easily accessible monthly luncheons in which I could earn CLE credit while hearing speakers on timely topics.

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

I prefer not to label myself as an originalist or textualist, as these terms mean different things to different people. I think the most common usage refers to interpreting a text based on its original public meaning. I believe that the original public meaning of constitutional and statutory texts must be considered when interpreting and applying any such text. The Supreme Court has recognized the importance of the Constitution's text, structure, and original understanding in interpreting a constitutional provision. The Supreme Court has also repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

¹ *Richmond v. Miss. Dep't of Human Servs.*, No. 96-CC-00667 COA, 1998 Miss. App. LEXIS 637, at *13 (Miss. Ct. App. 1998).

² *Id.* at *16.

³ Cindy George, *Local Groups Oppose Bush Nominee over Racial Slur: Leslie Southwick of Mississippi Is Accused of Condoning the Use of the Word in a Decade-Old Opinion*, HOUS. CHRON. (Jun. 1, 2007), <https://www.chron.com/news/houston-texas/article/Local-groups-oppose-Bush-nominee-over-racial-slur-1819117.php>.

⁴ SJQ at 5.

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

Please see my response to Question 3.

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?

In interpreting a statute, the Supreme Court has held that if the text of a statute is unambiguous, that ends the inquiry. When the text of a statute is ambiguous, however, the Supreme Court has stated that consideration of legislative history may be appropriate. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

- 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 5(a).

6. 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. Federal judges have a limited role in our representative democracy, and the principle of judicial restraint recognizes that those more accountable to the people, such as Congress, the President, and state officers, should be making policy decisions and enacting laws. I understand judicial restraint to mean that the role of the judge is to apply the law to the facts of the specific case before the court and to do so in a fair and impartial manner without regard to the judge's personal policy or outcome preferences.

- 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 judicial nominee, it is inappropriate for me to state my personal views on whether any particular Supreme Court case was rightly decided or what principle guided the Supreme Court's decision. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *District of*

Columbia v. Heller.

- 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?

As a judicial nominee, it is inappropriate for me to state my personal views on whether any particular Supreme Court case was rightly decided or what principle guided the Supreme Court's decision. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent including, *Citizens United v. FEC*.

- 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?

As a judicial nominee, it is inappropriate for me to state my personal views on whether any particular Supreme Court case was rightly decided or what principle guided the Supreme Court's decision. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent including, *Shelby County v. Holder*.

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-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

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/analysis/debunking-voter-fraud-myth>.

⁹ *Id.*

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

I have not studied whether there is widespread voter fraud, however, I am generally aware of reports on that subject. I would faithfully apply any applicable Fifth Circuit or Supreme Court precedent on this issue.

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

Voting is a fundamental constitutional right that must be protected. As a judicial nominee, it would be inappropriate to comment on policy or legal matters that may come before the courts.

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

Please see my response to Question 7(b).

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?

I am not familiar with this Brookings Institution study, however, based on the statistics it reports and similar news reports of which I am aware, I believe that racial bias continues to affect our country in many ways, including implicit racial bias in our criminal justice system. Any bias, implicit or explicit, has no place in the criminal justice system.

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

Yes, based on my understanding of statistics like those mentioned above.

- 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.

I have not studied the issue of implicit racial bias in our criminal system, beyond articles and opinion pieces I have seen or heard in daily media.

- 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 closely enough to form an opinion on this question. Ours is a nation committed to the equality of all people without regard to race, and as such, racial bias should play no role in our criminal justice system. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

- 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 response to Question 8(d).

- 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?

Judges have the responsibility of ensuring that bias will not be found in their courtrooms and that every defendant is treated fairly, respectfully, and with dignity. I will honor the judicial oath of office: I will “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of our nation.

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.*

¹⁴ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.usc.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 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.

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.

Yes.

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.

No.

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?

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. The Code of Conduct for United States Judges sets recusal standards, along with statutory guidance such as 28 U.S.C. § 455 and other applicable rules. The independence of the federal judiciary is likewise a core feature of our constitutional design. Article III of the Constitution sets forth certain protections designed to enable judges to make decisions that are grounded in law, without respect to criticisms in public debates and commentary. As a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, which is or may be the subject of pending or impending litigation.

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,

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).

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>.

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?

The Supreme Court has held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Zadvydas*.

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 February 19, 2020
For the Nomination of:

Drew B. Tipton, to be United States District Judge for the Southern District of Texas

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 fully appreciate the magnitude and seriousness of the sentencing process, along with the care and attention it requires. I witnessed it firsthand when I clerked for a federal district court judge. I would fully and faithfully follow the law and my judicial oath in carrying out this responsibility.

If confirmed, I would devote careful thought to every sentencing proceeding, working to ensure that the sentence imposed is “sufficient, but not greater than necessary, to comply with the purposes” of federal sentencing set forth by Congress. *See* 18 U.S.C. § 3553(a). To meet that goal, I anticipate that I would consult the indictment, the governing statutes, and applicable precedent. I would also carefully review the presentence report of the probation officer pursuant to 18 U.S.C. § 3552, along with the advisory Sentencing Guidelines and other factors set forth in § 3553(a). I anticipate that I would also consider the arguments and objections of the parties, as well as any statements from the defendant, victims, and witnesses.

- 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?**

Please see my Response to Question 1(a).

- 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' statements. I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration and debate by Congress. If confirmed, I would fully and faithfully apply federal sentencing laws as determined by Congress and as required by Supreme Court and Fifth Circuit precedent.

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?**

I am not familiar with Judge Gleeson's opinions on this subject. I am aware that mandatory minimum sentences have generated significant controversy and debate. If I am confirmed, I would evaluate each case individually and would carefully consider the law and my ethical obligations if confronted with the circumstances in this question, consistent with my duty to apply federal sentencing laws as determined by Congress and as required by Supreme Court and Fifth Circuit precedent.

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

The separation of powers among the branches of the federal government places charging policies and decisions exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional

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>.

framework. However, if I am aware of ethical violations by prosecutors, I would not hesitate to consider and take appropriate action consistent with my oath of office.

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

The separation of powers among the branches of the federal government places the clemency power exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework.

- 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.

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

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

Yes.

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

I believe that racial bias continues to affect our country in many ways. Ours is a nation committed to the equality of all people without regard to race, and as such, racial bias should play no role in our criminal justice system. I have not otherwise studied this issue closely enough to form an opinion on this question. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

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?**

I learned the value of diversity in the Marine Corps when an eclectic group of individuals from across the country of every race, religion, and socio-economic class were thrust together and taught the value of working together and learning from each other. I have been fortunate in the past twenty-one years of private practice to work at a respected law firm that takes seriously the commitment to diversity and equal opportunity in hiring and promotion. At times, I have served on my firm's recruiting committee and have been the Equal Employment Opportunity Officer in the Houston office for several years. I have observed that the firm's diversity and equal opportunity policies were actually implemented in practice and not just articulated. If confirmed, I would do the same in my chambers. I will encourage qualified candidates from all backgrounds, including qualified minorities and women, to apply for a position in my chambers. I will give serious and equal consideration to every individual who applies.

Senator Josh Hawley
Questions for the Record

Drew B. Tipton
Nominee, U.S. District Court for the Southern District of Texas

1. What role should the original public meaning of the Constitution’s text play in federal courts’ interpretations of its provisions?

The original public meaning is how the text in question was reasonably understood by a well-informed reader at the time of the provision’s enactment. It does not rely on the subjective intent of the people who wrote the text. The Supreme Court has looked to the original public meaning of words at the time they were adopted when interpreting constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

2. As a judge, how would you approach a case involving an issue of first impression?

If there is no controlling Supreme Court or Fifth Circuit precedent on the issue, and the question of first impression arises from a statute or constitutional provision, I would first look to the text of the statute or provision. If the words are plain and unambiguous, the inquiry ends. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The best evidence of what a writing means is the plain meaning of the words. Adhering to the plain meaning of the text, whether it is a clause in a contract, a proscription in a statute, or a provision in a constitution, is the foundational principle necessary to approaching a novel legal question. There is no room to insert personal policy preferences or take a results-oriented approach.

If a textual analysis is unclear, I would assess the context of the statute, such as the former version of the law or how Congress used undefined terms in other laws. If a contextual analysis is unclear, I would utilize the established canons of interpretation. I would also look to Supreme Court or Fifth Circuit precedent addressing similar issues or similarly structured statutes for persuasive guidance. Precedent from other circuit courts of appeal might be considered as persuasive authority. Notwithstanding, as a district judge I would always be mindful that it is the function of the Supreme Court or the legislative branch, not the lower courts, to recognize or create new rights, *see Washington v. Glucksberg*, 521 U.S. 702 (1997), and that for me to do so would “place the matter outside the arena of public debate and legislative action.” *Id.* at 720.

3. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

So much can be said about this case. In *Lochner*, the Court struck down a New York law setting maximum hours for bakery employees, because there was “in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law.” *Id.*, at

58. The constitutional jurisprudence during the ensuing “*Lochner* era” was marked by the use of substantive due process to invalidate legislation held to infringe on economic liberties, particularly the freedom of contract. The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least “room for debate and for an honest difference of opinion.” *Id.*, at 72 (opinion of Harlan, J.). Subsequently, the Supreme Court required that implied fundamental rights be “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).

I am aware that there is a vigorous ongoing debate about the foregoing issues in our federal courts. As a judge, I am bound to and will follow Supreme Court precedent regardless of my personal beliefs. A district judge must apply the law as written and avoid turning his or her personal preferences into constitutional mandates. District courts should not substitute their own beliefs for the judgment of the elected legislative bodies, who are elected to address social and economic issues. To do so, substitutes the court’s will for that of the legislature and violates the separation of powers.