Nomination of T. Kent Wetherell, II to the
U.S. District Court for the Northern District of Florida
Questions for the Record
Submitted October 24, 2018

QUESTIONS FROM SENATOR FEINSTEIN

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

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

   Never.

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

   It is inappropriate for district court judges to criticize or question Supreme Court precedent. In limited circumstances, it may be proper for a district court judge to note conflicts in the law or areas that may require clarification by the Supreme Court.

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

   The Supreme Court has the sole prerogative to overrule its precedents, *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016), and the Court recently explained in *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018), that it will not overrule precedent "unless there are strong grounds for doing so." Some of the factors the Court takes into account when deciding whether to overrule precedent are "the quality of [the prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79. As a nominee for a lower court, it is not for me to say whether these factors are appropriate or not.

2. 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 textbook 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 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"? "superprecedent"?

From my perspective as a sitting state court judge and a nominee to the district court, all Supreme Court decisions are "superprecedent" and equally binding.

b. Is it settled law?

Yes.

3. 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.

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

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

As a sitting state court judge and a nominee to the district court, it would be inappropriate for me to express my agreement or disagreement with Justice Stevens' dissent in *Heller*. *See* Code of Conduct for United States Judges, Cannons 2(A), 3(A)(6). And, even if I agreed with the dissent in *Heller* (or any other case), I would be bound to follow the majority opinion.

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

In *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). The Court also recognized "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627.

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

I have not studied the decisions that predated *Heller*, so I cannot say whether or not *Heller* departed from decades of Supreme Court precedent. But, even if it did, the decision would be no less binding on me as a district court judge.

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

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

The Supreme Court has held that "First Amendment protection extends to corporations," *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 342 (2010) (citing cases dating back to 1967), but the parameters of that protection is the subject of ongoing litigation in the state and federal courts. Accordingly, as a sitting state court judge and a nominee for the district court, it would be inappropriate for me to comment on the issue. *See* Code of Judicial Conduct for United States Judges, Cannon 3(A)(6).

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

See response to Question 5.a.

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

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), that corporations are entitled to protection under the Religious Freedom Restoration Act when exercising religion. The parameters of that right is the subject of ongoing litigation in the state and federal court**s**, so it would be inappropriate for me, as a sitting state court judge and a nominee for the district court, to comment on the issue. *See* Code of Judicial Conduct for United States Judges, Cannon 3**(**A**)**(6).

6. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what

you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

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

I was asked during my pre-nomination interview with attorneys from the White House and the Department of Justice about my experience as a state administrative law judge. I explained that my role as an administrative law judge was to preside over formal evidentiary hearings in which agency action was being challenged and that my responsibility was to afford the challenger (frequently a *pro se* party) his or her "day in court" by providing an impartial review of the challenged agency action based on my determination of the facts and my *de novo* interpretation of the applicable statutes and rules.

I was also asked in the interview about my views on "*Chevron* deference." I explained that Florida law is generally in accord with *Chevron* insofar as state courts are required to defer to the agency's interpretation of a statute within the agency's specific area of expertise unless the agency's interpretation is contrary to the plain language of the statute or clearly erroneous. But I also explained that agencies in Florida have considerably less regulatory authority than federal agencies because Florida law prohibits unbridled delegation of rulemaking authority to state agencies, precludes agencies from implementing statutes that only set forth general legislative intent or policy, and only allows agencies to adopt rules that implement or interpret the specific powers and duties delegated by the enabling statute.

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"?

I believe that administrative law is an extremely important area of law because more and more cases having significant impacts on society are being determined in the administrative arena, but I have no "views on administrative law" that will prevent me from faithfully following all binding administrative law precedent from the Supreme Court and the Eleventh Circuit

7. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 2016. 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?

These statements are not mine, so I cannot speak to them. That said, my experience with the Federalist Society is that it provides an open forum for robust debate and discussion on a broad range of legal topics, and several of the programs that I have attended included speakers with competing ideological viewpoints.

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

See response to Question 7.a.

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

See response to Question 7.a.

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

The Supreme Court has made clear in numerous cases that courts may consult legislative history when statutory language is unclear and ambiguous.

9. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received these questions, and questions from four other Senators, by email from the

Office of Legal Policy (OLP). I reviewed the questions, conducted necessary research, and drafted my responses. I provided a draft of the responses to members of OLP and solicited their feedback. I revised the answers and made edits that I deemed appropriate based on that feedback and then authorized OLP to submit the responses to the Committee on my behalf. All of the responses are my own.

Nomination of T. Kent Wetherell II to be
United States District Judge for the Northern District of
Florida Questions for the Record
October 24, 2018

QUESTIONS FROM SENATOR BLUMENTHAL

I am concerned about public faith in the judiciary's impartiality and integrity. Please address the following question in light of our nation's constitution, laws, and code of conduct for the judiciary.

1. **Do you believe that a sitting judge or justice who is shown to have committed perjury or substantially misled the Senate Judiciary Committee about the truth of a matter should continue to serve on the bench?**

   As I understand this question, it is asking whether a sitting judge or justice should be impeached for committing certain actions. If that is the question, it would be inappropriate for me to answer because the determination as to whether a judge or justice committed an impeachable offense is a political question within exclusive purview of Congress. That said, I share your concern about the importance of judges maintaining high standards of conduct, respecting the law, and acting at all times in a manner that promotes public confidence in the integrity and impartiality of the judicial system. *See* Code of Conduct for United States Judges, Cannons 1 and 2(A). If confirmed as a district court judge, I will take these ethical responsibilities seriously, as I have done for the past 16 years as a state court judge.

There have been recent reports that the Heritage Foundation was planning to run a secret clerkship training program.[11] I am generally concerned about growing attempts by outside groups to buy influence in the judiciary.

1. **Do you believe it is appropriate for sitting judges to participate in trainings designed to help law clerks with a particular ideological perspective advance their beliefs within the judiciary?**

   I am not familiar with the specific training program referenced in the article so I cannot comment on whether it is appropriate for judges or law clerks to participate in that program. However, as a general proposition, I think it is important for law clerks to obtain general "nuts-and-bolts" training (such as that offered by the Federal Judicial Center) rather than training that promotes any particular ideological agenda.

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[1] Adam Liptak, *A Conservative Group's Closed-Door 'Training' of Judicial Clerks Draws Concern* N.Y. Times (Oct. 18 2018) https://www.nytimes.com/2018/10/18/us/politics/heritage-foundation-clerks-judges-training.html.

2. Please list all meetings, conferences or events affiliated with the Federalist Society in which you have participated.

Based on my recollection and a review of available calendars, I attended the following events hosted by the Federalist Society:

June 14, 2018: Reception at the Florida Bar Annual Convention, Orlando, Florida

March 23, 2018: Presentation by Professor Michael Rappaport on "Original Methods: An Originalism with Coherence AND Constraint," Tallahassee, Florida

February 2-3, 2018: 2018 Annual Florida Chapters Conference, Lake Buena Vista, Florida

January 18, 2018: Presentation by Ed Whalen on his book, *Scalia Speaks*, Tallahassee, Florida

October 3, 2017: Presentation by Professor Shon Hopwood on "A Call for Clarity in the Criminal Law," Tallahassee, Florida

June 22, 2017: Reception at the Florida Bar Annual Convention, Boca Raton, Florida

March 8, 2017: Presentation by Professor John Stinneford on "The Supreme Court and the Death Penalty: Doing the Right Thing for All the Wrong Reasons," Tallahassee, Florida

February 3-4, 2017: 2017 Annual Florida Chapters Conference, Lake Buena Vista, Florida

December 5, 2016: Presentation by Alan Gura on "Dead or Alive: The Second Amendment in Today's Courts," Tallahassee, Florida

June 16, 2016: Reception at the Florida Bar Annual Convention, Orlando, Florida

October 23, 2013: Reception for law clerks and young lawyers, Tallahassee, Florida

Questions for the Record for Kent Wetherell, II
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. In 2012, a group of plaintiffs challenged Florida's congressional map as violating the state constitution's "Fair District Amendment." In relevant part, that amendment stated:

   > "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice . . . ."

   The trial court ordered that state legislators provide certain discovery, including depositions of legislators and legislative staff members and production of draft reapportionment maps and supporting documents for an in camera review.

   On appeal, you authored a majority opinion granting the Republican-led legislature's petition to quash the trial court's order. You held that the ordered discovery was protected by "legislative privilege" and that "after-the-fact statements of individual legislators as to what they thought or intended when proposing or voting on the legislation" was irrelevant to the constitutionality of the congressional map drawn and approved by the legislators.

   a. Please explain how a litigant can prove that congressional districts were draw with partisan intent without discovery of information relating to individual legislator's subjective intent.

      As explained in the opinion, the challengers "will be able to make their case that the Plan was drawn with improper intent—if, indeed, that was what happened—with the evidence in the legislative record and their experts' analysis of the Plan and its underlying demographic data." *Fla. House of Representatives v. Romo*, 113 So. 3d

117, 125 (Fla. 1st DCA 2013); *see also id.* at 126 (noting that the challengers had been provided "tens of thousands of files from which legislative intent can be gleaned, including the extensive legislative record of the reapportionment process and the materials submitted by the State to the U.S. Department of Justice under the Voting Rights Act.").

b. Only one year prior to the issuance of your opinion, the Florida Supreme Court construed identical language in a parallel provision of the state constitution relating to the drawing of state legislative districts and explained that "the focus of the analysis must be on both direct and circumstantial evidence of intent." You acknowledged the Florida Supreme Court's clear statement in your opinion, but you ignored it to reach your desired result. Why should the members of this Committee believe that you will respect precedent and not take a similar outcome-driven approach to cases should you be confirmed as a federal district court judge?

I have written hundreds of published opinions as a state court judge and, collectively, those opinions demonstrate my respect for precedent and the Rule of Law and refute any suggestion that I have an "outcome-driven approach" to deciding cases. In fact, in a 2013 dissent, I wrote extensively about the importance of adhering to precedent. *See Westphal v. City of St. Petersburg*, 122 So. 3d 440, 466-68 (Fla. 1st DCA 2013) (Wetherell, J., dissenting). In that opinion, I criticized the majority for overruling settled precedent and I explained that adhering to precedent "contributes to the legitimacy of the courts and the integrity of our constitutional system of governance, both in appearance and in fact, by requiring decisions to be grounded in the rule of law rather than in the proclivities of individuals." *Id.* at 467.

3. In 2001, a two-year-old girl died from heat stroke when she was left in a locked van during a field trip with the Abundant Life Academy of Learning, a church-run childcare center. After this tragedy, in a Daytona News article, you defended a Florida law that exempted church-affiliated childcare centers from certain regulations—including that childcare centers perform a headcount and complete a roster of children entering and exiting a vehicle. You stated, "The argument is if you start telling us how to run the day care, you'll start telling us how to run our religion."

a. Is it your position that church-affiliated businesses should be exempt from valid, neutral, and generally applicable laws? Please explain.

See response to Question 2.a from Senator Harris.

b. There are times when one person's constitutional right to freely exercise her religion conflicts with another person's constitutional right to equal protection under the law. If confirmed as a federal district court judge, how would you approach such a case?

I would approach such a case in the same way that I have approached every case that has come before me over the past 16 years as a state court judge. I would carefully review the

evidence and the the parties' arguments and then faithfully apply any applicable statutes and precedent from the Supreme Court and the Eleventh Circuit.

Nomination of T. Kent Wetherell II
United States District Court for the Northern District of Florida
Questions for the Record
Submitted October 24, 2018

QUESTIONS FROM SENATOR BOOKER

1. As you no doubt noticed, one side of the dais at your October 17 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.

    a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, *and* without the minority's consent—which the Committee has never done before?

    This is a political question within the exclusive purview of the Senate, and it would not be appropriate for me to comment on the internal operations of the Senate or its committees.

    b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

    See response to Question 1.a.

    c. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the timing of your confirmation hearing?

    No.

2. According to a Brookings Institute 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.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] 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.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison system is greater than

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on- drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of- justice-racial-and-ethnic-disparity-in-state-prisons/.

10 to 1.[4]

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

I have not studied the issue, but I have no reason to believe that the criminal justice system is immune from the implicit racial biases that unfortunately still exist in all parts of society.

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

I have not studied the issue, but I have no reason to question the statistics in the studies showing that that people of color are disproportionately represented in jails and prisons.

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, but I have attended judicial education programs at which it was discussed. For example, in May 2012, I attended a day-long program on fairness and diversity that focused on ways to identify and eliminate implicit biases of all types, including racial, from the judicial decision-making process. Since then, I have attended a number of additional Florida Supreme Court-approved judicial education programs at which issues of fairness, diversity, and implicit bias were discussed. I do not recall which, if any, books, articles, or reports were discussed at these programs.

3. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

a. Do you believe there is a direct link between increases of 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 the relationship between crime rates and incarceration, but I

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[4] *Id.* at 8.

[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016),*available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.p df.

[6] *Id.*

would expect that there are many factors influencing the crime rate in any given area and that incarceration rates may be one such factor.

b. Do you believe there is a direct link between decreases of 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.

See response to Question 3.a.

4. 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.

5. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.[7]

a. Do those statistics alarm you?

Any statistic that shows a racial disparity between similarly-situated defendants is troubling.

b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color? Why not?

As a sitting judge and a judicial nominee, it would not be appropriate for me to comment on this issue as it may come before me. *See* Code of Conduct for United States Judges, Cannon 3(A)(6).

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

Judges should strive to eliminate all forms of bias from their courtrooms to ensure that that the justice system is not only fair, but that it is perceived to be fair by all participants in the system. To do so, judges must fairly and impartially apply the law and treat everyone who comes before the court with dignity and respect irrespective of their race or their situation in life. That is what I have done as a state court judge for the past 16 years and it is what I will continue to do if I am confirmed as a district court judge.

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[7] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited June 13, 2018).

6. In *Thompson v. State*, you voted to uphold a trial court ruling that revoked the probation of a single mother of three for her failure to pay certain fees.[8] The case involved a 22-year-old mother who pleaded guilty to child neglect for leaving two of her children unattended.[9] Instead of being incarcerated, she was placed on probation for 24 months and she was required to pay an assortment of fees.[10] When the end of her probation was approaching, the Florida Department of Corrections found that the mother had failed to pay $917 in court costs, $960 in supervision costs, and $30 for a drug test.[11] Throughout the duration of her probation, she was indigent.[12] Oddly, the trial court never looked into whether the defendant was able to pay the fees.[13]

    a. Do you believe the trial court erred when it failed to make an inquiry or finding regarding the mother's ability to pay?

       The trial court did make such an inquiry. *See Thompson v. State*, 250 So. 3d 132, 137 (Fla. 1st DCA 2018) ("The trial court is required to inquire into ability to pay. The trial court did so. Appellant testified that her basic living expenses were government-subsidized (food stamps plus HUD-paid housing and utilities). She received at least some child support from the fathers of her three children and had taken steps to enforce the child support obligations. She had the ability to work but chose not to work, except for a short-term under-the-table job from which she paid nothing toward her probation obligations, and chose to quit. Once the Notice to Appear was issued, however, she very quickly found a job, strongly suggesting that she could have done so earlier if she had felt sufficiently motivated. She was able to come up with the money to post bond of over $500 when she was arrested for felony child neglect, and to pay the $50 application fee for criminal indigent status, on which application she indicated she had zero debts or liabilities. . . . . The trial court's inquiry was sufficient, and the record reflects competent, substantial evidence that Appellant had the ability to work and had the ability to pay something toward her obligations, even if not in full. This is not a situation of a probationer trying to pay her obligations, yet through no fault of her own, being unable to do so.").

    b. Judge Scott Makar dissented in the case and wrote, "no findings were made that a financially destitute probationer had the ability to pay costs, no inquiry was made as to the reasons for her failure to do so, no alternatives other than incarceration were considered, and revocation was based on an improper and uncharged group."[14] What is your response to his dissenting opinion?

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[8] *Thompson v. State*, 250 So. 3d 132, 137 (Fla. Dist. Ct. App. 2018).
[9] *Id.* at 134.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 139.
[14] *Id.* at 143.

See response to Question 6.a. Additionally, as noted in the majority opinion, the arguments in the dissent went far beyond the issues that were preserved by the defendant in the trial court or raised by her on appeal. *See Thompson v. State*, 250 So. 3d 132, 137 (Fla. 1st DCA 2018).

c. Pursuant to Florida law, the burden was on the State to establish that the mother "engaged in a substantial and willful violation of these conditions of probation?"[15] What led you to the conclusion that the State met this burden?

The majority opinion summarized the evidence that supported the trial court's determination that the defendant willfully violated her probation. *See Thompson v. State*, 250 So. 3d 132, 136-37 (Fla. 1st DCA 2018) ("She submitted only two job-search logs in two years, and both of those were blank. She admitted she did not want to work while her dependency case was going on. She was not pregnant during the majority of her probationary period, and gave no legitimate medical reason why she could not work while on probation. She had an under-the-table job, but chose to leave it. She did not get another job until after a Notice to Appear was issued on her violation of probation, and then was able to get a job very quickly. She did not use or offer to use any money gained from those jobs to pay anything at all toward her probation obligations.").

d. "'Ability-to-pay' and 'willful refusal' are standards that must be met under 'both state and federal constitutional requirements' of equal protection and due process.'"[16] Can you explain how the trial court fulfilled those standards despite not making a finding on whether the mother was able to pay the requisite fees?

As explained in the majority opinion, the trial court did make the requisite finding on the defendant's ability to pay. *See Thompson v. State*, 250 So. 3d 132, 137 (Fla. 1st DCA 2018) ("Although the dissent . . . attacks the lack of an express written finding of willfulness, Appellant concedes that the finding was necessarily made—as it was, because it was expressed orally twice and was clearly the foundation of the ruling . . . .").

e. As a judge, does it matter to you whether an indigent criminal defendant is able to pay fees associated with his or her sentence consistent with requirements under the Constitution and Florida Constitution?

Yes, it is well-established that a criminal defendant cannot be imprisoned for failure to pay fees associated with his or her sentence unless he or she has the ability to pay. I have faithfully applied this rule when supported by the evidence. For example, in *Giambrone v. State*, 109 So. 3d 1279, 1281 (Fla. 1st DCA 2013), I authored the opinion reversing the defendant's prison sentence and remanding

[15] *Id.* at 138.
[16] *Id.* at 139.

for reinstatement of probation "because the evidence was insufficient to support the trial court's finding that Appellant had the ability to pay the cost of his supervision and because the trial court did not make an express finding that his failure to pay was willful."

f. Was your vote in this case consistent with federal and state constitutional requirements?

Yes, because as explained in the majority opinion, and contrary to the position taken by the dissent, there was evidence supporting the trial judge's determination that the defendant willfully failed to pay the costs at issue despite having the ability to do so.

Questions for the Record from Senator Kamala D. Harris
Submitted October 24, 2018
For the Nomination of

Thomas Kent Wetherell, II, to the U.S. District Court for the Northern District of Florida

1. In a 2018 case called *Thompson v. State*, you voted to affirm a trial court ruling that revoked the probation of, and subsequently imprisoned, a single mother of three for failure to pay certain court- and probation-associated fees—even though the trial court had made no inquiry or finding regarding the defendant's ability to pay. This decision was sharply criticized in Judge Scott Makar's dissent, which argued that the trial court abused its discretion because "no findings were made that a financially destitute probationer had the ability to pay costs, no inquiry was made as to the reasons for her failure to do so, no alternatives other than incarceration were considered, and revocation was based on an improper and uncharged ground."

    a. **Do you stand by that decision today?**

    Although I might not have revoked the defendant's probation had I been the trial judge, the appeal was correctly decided based on the controlling standard of review and the fact that, contrary to the position advocated by the dissent, there was record evidence supporting the trial judge's finding that the defendant willfully failed to pay the costs at issue despite having the ability to do so.

    b. **In making the decision, did you have any concerns about imprisoning a mother of three for her failure to pay fees?**

    As an appellate judge, my role was to review the record to determine whether, under the circumstances, the trial judge abused his discretion by revoking the defendant's probation and imposing a prison sentence. Florida law affords trial judges broad discretion in determining whether to revoke or reinstate a defendant's probation after a violation, and as explained in the majority opinion, the controlling standard of review did not allow me to substitute my judgment for that of the trial judge so long as his decision was not "arbitrary or fanciful." *See Thompson v. State*, 250 So. 3d 132, 137-38 (Fla. 1st DCA 2018). Thus, even if I might have ruled differently had I been the trial judge, that would not have been a legitimate basis to reverse. *Id.* at 138.

    c. **In making the decision, did you have any concerns that the lower court's decision meant a person of means could pay her way out of prison, but others would suffer imprisonment simply because of their inability to pay?**

    See response to Question 1.b and response to Question 6.e from Senator Booker.

d. **Why did you think it unnecessary for the lower court to consider the woman's ability to pay before imprisoning her?**

As explained in the majority opinion, the trial judge did consider the defendant's ability to pay. *See Thompson v. State*, 250 So. 3d 132, 137 (Fla. 1st DCA 2018) ("The trial court is required to inquire into ability to pay. The trial court did so. Appellant testified that her basic living expenses were government-subsidized (food stamps plus HUD-paid housing and utilities). She received at least some child support from the fathers of her three children and had taken steps to enforce the child support obligations. She had the ability to work but chose not to work, except for a short-term under-the-table job from which she paid nothing toward her probation obligations, and chose to quit. Once the Notice to Appear was issued, however, she very quickly found a job, strongly suggesting that she could have done so earlier if she had felt sufficiently motivated. She was able to come up with the money to post bond of over $500 when she was arrested for felony child neglect, and to pay the $50 application fee for criminal indigent, on which application she indicated she had zero debts or liabilities. . . . . The trial court's inquiry was sufficient, and the record reflects that Appellant had the ability to work and had the ability to pay something toward her obligations, even if not in full. This is not a situation of a probationer trying to pay her obligations, yet through no fault of her own, being unable to do so.").

2. Two-year-old Zaniyah Hinson died from a heat stroke when she was left in a locked van during a field trip with the Abundant Life Academy of Learning, a church-run childcare center. Although Florida law typically requires that childcare centers perform a headcount and complete a roster of children entering and exiting a vehicle, the childcare center's religious affiliation exempted it from complying with state safety regulations. In defending the religious exemption as Deputy Solicitor General, you argued the exemption was grounded in the principle of the separation of church and state, and "if you start telling us how to run the day care, you'll start telling us how to run our religion."

   a. **Do you believe that the U.S. Constitution's religion clauses *require* a state to exempt a church-run daycare from neutrally applicable safety regulations, including but not limited to the safety regulations at issue in this case?**

   This was a tragic situation and I was not "defending" the statutory exemption in court or otherwise. I was simply providing background and identifying what I understood to be a possible argument in support of the exemption. I did not express any view on the strength of that argument, and I am not aware of any precedent from the Supreme Court or the Eleventh Circuit interpreting the First Amendment to require states to exempt church-run day cares from safety regulations.

3. District court judges have great discretion when it comes to sentencing defendants. In considering your nomination, it is important that we understand your views on

sentencing, while appreciating that each case must be evaluated on its specific facts and circumstances.

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

I will approach each sentencing decision with considerable thought and preparation. Prior to imposing a sentence, I will carefully review the case file and consider the nature and circumstances of the offense, all applicable statutes, the advisory sentencing guidelines, any other pertinent legal authorities, any presentence report, any arguments from the parties, and any statements from defendant, victims, and other witnesses. I will impose each sentence based on the specific facts and circumstances of the case, mindful that the sentence should be "sufficient, but no greater than necessary" to achieve the purposes set forth in 18 U.S.C. § 3553(a).

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

See response to Question 3.a.

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

The Sentencing Guidelines list various grounds that may justify a departure sentence. *See* Guidelines, Chapter 5, Part K. Additionally, a departure sentence may be appropriate when there are aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and a departure is necessary ensure that the sentence is "sufficient, but not greater than necessary." *See* 18 U.S.C. § 3553(a)(2), (b)(1); Guidelines, §5K2.0(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?**

I have not studied the deterrent effect of mandatory minimum sentences, so I am not in a position to agree or disagree with Judge Reeves. Additionally, because the wisdom of mandatory minimum sentences is a policy matter within the purview of Congress, it would not be appropriate for me, as a judicial nominee, to comment on the issue.

[1] Judge Danny C. Reeves, Responses to Senators' Questions for the Record, https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf.

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

See response to Question 3.d.i.

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

See response to Question 3.d.i.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and he has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **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?**

   In an extreme case, it may be appropriate for a judge to highlight the perceived inequity of a statutorily-mandated sentence in a written opinion. However, when doing so, the judge must be mindful that the establishment of mandatory minimum sentences is a policy matter within the purview of Congress and that the judge's role is to follow the law, not to say what the law should be.

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

   I do not think is appropriate for a judge to interfere with or seek to influence the charging decisions of the U.S. Attorney because those decisions fall within the purview of the Executive Branch.

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

   I do not think it is appropriate for a judge to seek to influence the clemency process because the judge should not be an advocate for a party and clemency decisions fall within the purview of the Executive Branch.

e. 28 U.S.C. § 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious

[2] *See, e.g.*, Stephanie Clifford, *Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose*, N.Y. 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.

offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes, as permitted by law and as warranted by the facts of the case.

4. 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 that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

    I have not studied the issue, but I am aware of studies showing racial disparities in prison populations.

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

    a. **Do you believe that 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 will give all qualified applicants serious consideration regardless of race or gender.

6. You reported having been a member of the Capital City Country Club from 1995-2004. The Capital City Country Club had a history of racial segregation up until the 1950s. **Did you have any concerns about joining an institution with a history of being racially segregated?**

    The Club had been fully integrated for over 40 years by the time my wife and I became members, and I never saw any vestiges of the Club's discriminatory history during our time as members.