

**Nomination of Don Willett to the
U.S. Court of Appeals for the Fifth Circuit
Questions for the Record
Submitted November 22, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper role of precedent.

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. As my Court recently – and unanimously – noted, “[o]nly the Supreme Court has the ‘prerogative . . . to overrule one of its precedents.’” *See King Street Patriots v. Texas Democratic Party*, No. 15-0320 (Tex. 2017) (quoting *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016)).

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

Fifth Circuit precedent forbids a circuit panel from overruling prior circuit precedent. “It is a well-settled Fifth Circuit rule of orderliness that 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).

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

As a lower-court nominee, it would be unfitting to advise when it is appropriate for the Supreme Court to overturn its own precedent. The Court itself determines when that is appropriate. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (only the Supreme Court has “the prerogative of overruling its own decisions”).

2. Many conservative judges and legal scholars believe that the Constitution should be interpreted consistent with its “original meaning”—in other words, the meaning it had at the time it was enacted.

a. With respect to constitutional interpretation, do you believe judges should rely on the “original meaning” of the constitution?

As Justice Kagan testified at her confirmation hearing, “[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 law begins with language, and all judges should care about the original meaning of language, both constitutional and statutory. The Supreme Court has repeatedly made clear that text and history play an important role in constitutional interpretation. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). If confirmed, my approach to constitutional interpretation will be the same as my approach to judicial review generally – carefully exhaust the entire judicial process and faithfully apply all controlling precedent of the Supreme Court and the Fifth Circuit.

b. How do you decide when the Constitution’s “original meaning” should be controlling?

Lower courts must faithfully follow binding Supreme Court and circuit precedent, no matter the interpretive methodology used in those cases. If precedent applies, precedent controls.

c. Does the “original meaning” of the Constitution justify a constitutional right to same-sex marriage?

Obergefell v. Hodges, which recognized a constitutional right to same-sex marriage, is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. For a lower-court judge, the holding is what matters, not the theory of constitutional interpretation that produced it.

d. Does the “original meaning” of the Constitution explain the right to marry persons of a different race recognized by the Court in *Loving v. Virginia*?

Loving v. Virginia is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. Again, for a lower-court judge, the holding is what matters, not the theory of constitutional interpretation that produced it.

3. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A 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”?

For a lower-court judge, every Supreme Court precedent is super-precedent. The prefix or label matters not. All Supreme Court precedent is equally binding on lower courts. Lower-court judges are duty-bound to follow all controlling precedent, including *Roe*. If confirmed, I will do so fully, fairly, and faithfully with zero hesitation.

b. Is it settled law?

Roe v. Wade is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. I will follow it fully, fairly, and faithfully with zero hesitation.

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

Obergefell v. Hodges is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. I will follow it fully, fairly, and faithfully with zero hesitation.

5. 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 federal judicial nominee, it would be unfitting to comment on Justice Stevens' dissent (or any other Supreme Court opinion). *Heller* is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit.

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

The Supreme Court in *Heller* expressly stated, "the right secured by the Second Amendment is not unlimited," adding, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008).

c. Did *Heller*, in finding an individual right to bear arms, depart from decades

of Supreme Court precedent?

Please see my response to Question 5a above.

6. In campaign ads seeking reelection to the Texas Supreme Court, you have repeatedly described yourself as “the most conservative” Justice on that Court. (Ad Provides Opportunity to Reflect on Meaning of “Conservative,” Texas Lawyer (June 4, 2012))

a. What did you mean when you said you were the “most conservative” Justice on the Texas Supreme Court?

Texas has partisan judicial elections (something I have vehemently opposed since becoming a lawyer 25 years ago), and I was running in a contested Republican primary. My campaign quoted state and national conservative leaders who described me that way. My twelve-year record on the Supreme Court of Texas is one of unflinching devotion to the Rule of Law, and I have never hesitated to rule against my staunchest supporters when the law was not on their side. My vote follows the law – every time – regardless of a litigant’s wealth, status, or power.

b. Do you believe you would be the “most conservative” judge on the Fifth Circuit, if confirmed?

If confirmed, I will have a surpassing fidelity to the Rule of Law, including fully, fairly, and faithfully following all controlling Supreme Court and Fifth Circuit precedent.

7. In one ad during your last campaign, you said, “I am the consensus, conservative choice from every corner of the conservative movement: pro-life, pro-faith, pro-family, pro- liberty, pro-Second Amendment, pro-private property rights and pro-limited government.” (Court Has Bias for Business, Some Say, Austin American-Statesman (May 14, 2012))

a. Is this still how you would describe yourself today?

Please see my response to Question 6a above.

b. The Supreme Court has repeatedly held that the Constitution protects a woman’s right to choose, including in *Roe v. Wade* and *Planned Parenthood v. Casey*. How should I understand your 2012 campaign promise to be a “pro-life” justice?

As explained in my response to Question 6a, I was describing the state and national conservative leaders and grassroots activists who supported my campaign, not myself. *Roe* and *Casey* are controlling Supreme Court precedent. They bind me as a Justice on the Supreme Court of Texas, and they will bind me if I am

confirmed to the Fifth Circuit. I will follow them fully, fairly, and faithfully with zero hesitation.

- c. It seems like your comments were intended to send a message to voters about how you would rule on cases that might come before you. Is that what those comments were intended to do?**

Please see my responses to Questions 6a and 7b above.

- d. Given these comments, how can you assure us—and litigants that might have cases before you—that you will be able to rule impartially on these and other politically charged issues?**

Please see my responses to Questions 6a and 7a–7c above.

8. Your name appeared on President Trump’s original list of eleven possible nominees to fill Justice Scalia’s seat on the Supreme Court. During the campaign and even after he was elected, President Trump repeatedly stated that he had a litmus test for Supreme Court nominees – that he would only select nominees who would oppose a woman’s right to choose and overturn *Roe v. Wade*.

- a. The people who put together President Trump’s Supreme Court shortlist believed that you would be a reliable vote to overturn *Roe*. Is that true?**

I don’t know what those who assembled the shortlist believed.

- b. If your answer to the prior question is “no,” then why do you think your name appeared on the shortlist, given what President Trump told us about his litmus test?**

Please see my response to Question 8a above.

9. President Trump specifically thanked the Federalist Society and the Heritage Foundation for putting together his Supreme Court shortlist.

- a. Were you ever contacted by anyone from the Federalist Society or the Heritage Foundation about a potential Supreme Court nomination or about your nomination to the Fifth Circuit? If so, when and by whom?**

No.

- b. Why do you think the Federalist Society and Heritage Foundation selected your name to appear on President Trump’s list?**

I do not know.

10. In 2016, the U.S. Supreme Court recognized a constitutional right to same-sex marriage in *Obergefell v. Hodges*. In 2017, you joined a Texas Supreme Court decision called *Pidgeon v. Turner*. In that case, your Court refused to hold that *Obergefell* required the City of Houston to extend benefits to same-sex spouses of city employees on the same terms that the City granted benefits to heterosexual spouses.

- a. Just to clarify, do you believe that despite the U.S. Supreme Court’s decision, a state or city could legally treat LGBT married couples worse than heterosexual married couples?**

As this case remains in active litigation and could reappear before me (either on remand from the U.S. Supreme Court or on appeal from the Texas trial court to which we remanded the case), I must be especially circumspect. I am doubly constrained – first, as a sitting Texas Supreme Court Justice subject to the Texas Code of Judicial Conduct, and second, as a federal judicial nominee guided by the Code of Conduct for United State Judges. Under both state and federal canons, I am ethically prohibited from commenting on the merits of a pending case, but I can note that the characterization of what my Court addressed in *Pidgeon* seems to have been grossly inflated.

My Court in *Pidgeon* did not decide the merits, which had never been fully briefed or litigated. We did not rule for or against anyone on the benefits issue. We had no record on which to do so. We did not enjoin the City’s benefits policy. We left it in effect and remanded, as both parties requested, so they could litigate their constitutional arguments in light of *Obergefell*, which was issued while the case was on appeal.

While we decided an important question of Texas procedural law, we did not decide *any* questions of federal law including whether the U.S. Constitution required Houston to issue benefits to same-sex couples. We did as *both parties* requested and remanded to the trial court so the parties could – for the first time – fully brief and present their arguments on the merits in light of *Obergefell*, which was issued *after* the trial court had issued its preliminary injunction. We stated unequivocally that *Obergefell* was the law of the land and must be applied by the lower courts on remand. And we expressly rejected the taxpayers’ request to instruct the lower courts to read *Obergefell* “narrowly.” We also rejected the taxpayers’ request that we affirm the preliminary injunction, holding instead that “the court of appeals did not err by reversing this temporary injunction in its entirety.” Not one word of *Pidgeon* casts into doubt, challenges, or criticizes *Obergefell*. Indeed, we “agree[d] with the Mayor that any effort to resolve whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples without considering *Obergefell* would simply be erroneous.”

Finally, I am deeply grateful that my nomination is strongly supported by the City’s counsel of record before the U.S. Supreme Court. As former Chief Justice

Wallace Jefferson's letter to the Committee graciously notes, I understand "the judiciary's role in adjudicating disputes without imposing a judge's or court's personal preferences."

- b. In *Obergefell*, the Supreme Court explained that the same-sex couples seeking for the right to marry "ask for equal dignity in the eyes of the law. The Constitution grants them that right." How does the Texas Supreme Court's holding in *Pidgeon* give full effect to the Supreme Court's holding that same-sex couples deserve "equal dignity in the eyes of the law"?

Please see my response to Question 10a above.

- c. In *Loving v. Virginia*, the U.S. Supreme Court held that state laws banning interracial marriage were unconstitutional. In your view, would it be constitutional for the City of Houston to grant more spousal benefits to city employees who were married to people of the same race than to city employees who were married to people of different races?

Loving v. Virginia is controlling Supreme Court precedent, and if confirmed I will follow it fully, fairly, and faithfully with zero hesitation. Please also see my response to Question 10a above.

11. In 2015, you authored a concurrence in *Patel v. Texas Department of Licensing and Regulation* (No. 12-0657), regarding Texas' licensing statutes and regulations.

- a. Your concurrence began by quoting Frederick Douglass after he finally won his freedom from slavery—in your words, "Frederick Douglass's irrepressible joy at exercising his hard-won freedom captures just how fundamental—and transformative—economic liberty is." Please discuss how state licensing schemes, and health and safety regulations, are similar to the practice of human chattel enslavement that existed in the United States, to which Frederick Douglass was subjected.

I was not equating state licensing schemes or health and safety regulations with "human chattel enslavement." I was noting that the constitutionally protected right to pursue a lawful calling is indispensable to dignity and prosperity. I readily accept the State's sweeping police power to regulate in the public interest. I said so unequivocally in my concurrence: "[n]obody seriously disputes a state's omnibus power to safeguard its citizens' health and safety via economic regulation."

- b. You wrote in your *Patel* concurrence that Texans were "doubly blessed, living under two constitutions sharing a single purpose: to secure individual freedom, the essential condition of human flourishing." Later, you also stated that "even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-

paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.” But in 1996, you were deeply critical of the Texas Court of Criminal Appeals, stating that the TCCA had “boldly declared itself free to interpret the Texas Constitution in pro-defendant ways that the U.S. Supreme Court has flatly rejected when construing parallel provisions of the U.S. Constitution.” According to you, the result was that “the Texas Constitution—via judges eager to swell (abandon?) their judicial role and foist their policy views upon the unwashed masses—may now afford criminal defendants greater protection than its federal counterpart.” Why is the fact that state constitutions may afford different protections to individuals a positive development when it relates to economic liberty, but a negative development in the context of criminal justice?

Twenty-plus years ago, when I wrote a policy piece discussing the Texas Court of Criminal Appeals, I stood outside the judicial system as a private lawyer and think-tank commentator. Today, I stand squarely within the judicial system and am duty-bound to faithfully and impartially apply the law as it is. My 1996 article acknowledged that Texas, like every other state, has its own constitution, and is free to recognize rights that are greater or more fulsome than those recognized under the U.S. Constitution, including those implicated in a criminal justice setting. A judge must never disregard a criminal defendant's procedural protections required by law. My 1996 paper was lamenting judges' seeming aversion to harmless-error analysis, thus elevating personal policy preferences over adherence to the Rule of Law.

- c. **Your *Patel* concurrence stated “I oppose judicial activism, inventing rights not rooted in the law. But the opposite extreme, judicial passivism, is corrosive, too—judges who, while not activist, are not active in preserving the liberties, and the limits, our Framers actually enshrined.” Please explain what you meant by this statement.**

The North Star for every judge must always be legal principles, not personal preferences. A black robe should never cloak the imposition of will over judgment. The Texas Constitution confers power, but it also constrains power. It is inclined to limited government, which explains why Texas legislators proposed 156 constitutional amendments in 2017. The Texas Constitution is irrefutably framed in proscription, sharply limiting government power, and Texas judges interpreting it must faithfully enforce its constitutional constraints.

- d. **Why is it appropriate for judges to be “active in preserving liberties, and the limits, our Framers actually enshrined” in the economic context, but not in the criminal justice context?**

Texas judges must “preserve, protect, and defend” the Texas Constitution’s provisions in *every* context, including the criminal justice context. Nothing in *Patel* or in any other writing, judicial or nonjudicial, suggests otherwise.

- e. **In your *Patel* concurrence, you stated “Legal fictions abound in the law, but the federal ‘rational basis test’ is something special; it is a misnomer, wrapped in an anomaly, inside a contradiction. Its measure often seems less objective reason than subjective rationalization.” What standard of review will you apply under federal law to economic regulations?**

In *Patel*, I was interpreting the Texas Constitution on a court of last resort. If confirmed as a federal circuit judge, I will be interpreting the Fourteenth Amendment on an intermediate court and will be 100 percent bound by controlling Supreme Court and Fifth Circuit precedent, which I will follow fully, fairly, and faithfully.

- f. **Your *Patel* concurrence also included a quote which you attributed to Benjamin Franklin: “Democracy is two wolves and a lamb voting on what to have for lunch. Liberty is a well-armed lamb contesting the vote.” Please describe why you included this quote.**

Patel concerned the constitutionally protected right to earn a living and whether the Texas Constitution places an outer-boundary limit on government’s ability to restrict that right. It examined whether the Texas Legislature has carte blanche to restrict occupational freedom, or whether the Texas Constitution imposes judicially enforceable limits, no matter the legislative vote-count.

- g. **Under what modern circumstances do you believe “well-armed lambs” should “contest[] the vote”?**

Please see my response to Question 11f above.

12. In 2010, you joined a dissent in *In the matter of B.W.*, a tragic case where a 13-year-old girl with a history of being sexually and physically abused, solicited an undercover police officer and was arrested and charged with prostitution. The majority held that the 13-year-old girl could not be charged with prostitution under the Texas code, stating “Our Legislature has passed laws recognizing the vulnerability of children to sexual exploitation, including an absolute prohibition on legal consent for children under fourteen. In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, we hold that a child under the age of fourteen may not be charged with that offense.”

- a. **Why did you agree that a child who could not legally consent to sex under Texas’s statutory rape law could nevertheless be charged with prostitution?**

All nine justices saw the underlying facts as heart-rending. The disagreement was simply over how best to read the various statutes to protect children caught up in such horrors. There is zero doubt that prostituted minors are victims in the most tragic sense. Notably, however, anti-trafficking advocates are somewhat divided

on whether prostituted children should be adjudicated delinquent. Those who oppose immunity for exploited children worry that if the judicial system is unable to advocate for treatment and rehabilitation, prostituted children are left at the mercy of pimps and johns, thus inviting even more prostitution of children. Some states have enacted victim-centered protective response laws that offer prostituted children a protective response, rather than a juvenile justice or criminal response. I thought Justice Wainwright's dissent was the better reading of the law – and also more protective of victimized children, who would receive counseling, rehabilitation, and treatment, rather than be released back into a toxic street environment. In this case, B.W., a violent and chronic runaway (her caseworker's description) had fled her third placement in a group home facility and had been missing for more than a year when she was picked up.

What separated the majority and the dissent, at bottom, were three things. First, the view of the role of the juvenile-delinquency system. The majority treated it as a “prosecution” or “quasi-criminal” proceeding from which children should be shielded. In fact, it is a *civil* proceeding designed to identify and correct behavior that, if left unchecked, could provide far worse legal consequences – it is there, ideally, to serve children before it is too late. It merits mention: Upon discovering that B.W. was 13, the State dismissed the adult criminal charge and refiled in the civil juvenile system – a system that focuses on rehabilitation of delinquency rather than prosecution of crimes. Second, the specific role that the “age of consent” played. By having an age of consent, we essentially impose “strict liability” on adults who have sex with children, denying them a defense. But that irrefutable legal presumption doesn't mean that behavior is not evidence of delinquency for some children 14 and under. It just means that the law harshly (and wisely) punishes adults who take advantage of them. Third, the interaction of the Penal Code and the Family Code. The Family Code imports the Penal Code for children ages 10 and over. The majority decided to carve out an exception, based on what the dissent thought was a mistaken premise (the two points above). Under the statute as written, the dissent believed that the courts had the obligation to protect children by adjudicating them delinquent for behavior that would have been criminal by an adult.

Describing the process as a “prosecution” or finding children “guilty” of a crime is a misunderstanding of the statutory regime. It was a *civil* regime designed to *protect* children and put them on a path so they would never need to enter the criminal system when they became adults. The statute safeguards children by intervening when they are on a dangerous course – a course that will lead to certain ruin if not halted. The majority put it this way: “the law recognizes that minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.” But the fact that some actual minors (not the theoretical ones envisioned in the statute) *do* have “actual agreement or capacity” is the thing that should worry us. They are real human beings, not just constructs. Simply *pretending* they are totally unaware of their circumstances (even though no child can be blamed in a criminal sense) is hardly compassionate. Those children whose youth and innocence have been robbed are the ones *most* in

need of the counseling, therapy, and treatment that can flow from a finding of delinquency. The majority stated that children had a “special vulnerability” and the dissent hardly disagreed. Rather, this vulnerability is a key part of why the dissent believed the majority’s approach was incorrect, and disserved vulnerable children by denying them bold corrective action (*not* criminal prosecution) when they were ensnared in risky, dangerous, and illegal behavior.

- b. The majority stated “Children are the victims, not the perpetrators, of child prostitution. Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters.” Do you agree?**

I agree 100 percent. Prostituted children are victims in every sense of the word. When I served as Deputy Assistant Attorney General in the Office of Legal Policy in the Department of Justice, I helped supervise what became the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT Act”), which “comprehensively strengthens law enforcement’s ability to prevent, investigate, prosecute and punish violent crimes committed against children.” *Justice Department Fact Sheet* (April 30, 2003). As part of that initiative, I worked closely with the National Center for Missing and Exploited Children. I have strongly supported the work of anti-trafficking heroes like the International Justice Mission. In the *B.W.* case, there was no daylight between the majority and the dissent at the human level – all shared the heartbreak at the circumstances that led to this case and the anger at the evil and abuse that had befallen this precious girl. Neither the majority nor the dissent saw the girl as a perpetrator – of *course* she was a victim. But part of her victimization was leading her to engage in conduct that violates the criminal law (and is, of course, horribly dangerous for children, or anyone, to engage in). The question was how to deal with these tragic circumstances under the law and in a way that supports her rehabilitation. This was a heartbreaking case, but I believe the dissenting opinion by Justice Wainwright better articulated the law as written.

- c. Do you believe that 14-year-olds possess the mental capacity to consent to sex?**

Sexual consent laws vary from state to state. In Texas, the legal age of consent is 17.

- d. The dissent you joined cited Justice Scalia’s dissent in *Roper v. Simmons*, 543 U.S. 551 (2005). Under what circumstances do you believe Supreme Court dissents should guide lower courts as to the proper application of precedent?**

It is never appropriate for lower courts to depart from controlling Supreme Court precedent. If confirmed, I will follow all applicable Supreme Court precedent fully, fairly, and faithfully with zero hesitation.

13. In 2008, you wrote an article praising the U.S. Supreme Court’s decision in *District of*

Columbia v. Heller. You specifically praised the fact that the Supreme Court’s analysis focused on finding the original meaning of the words in the Second Amendment and said, “[f]or me, this focus on the purported original meaning carries both legal and personal significance,” because, among other things, you are “a licensed-to-carry Texas Supreme Court justice.” (Constitution Day Teaches Us Importance of Freedom, Flower Mound Leader (September 21, 2008)). **Please elaborate on what you meant when you wrote that the *Heller* decision carries “personal significance” to you.**

I was referring to the fact that I am licensed to carry a handgun in Texas.

14. Although you have been on the Texas Supreme Court for several years, it appears that you have very little criminal law experience. My understanding is that the Texas Supreme Court hears only civil cases. You also said on your Questionnaire that 100% of your law practice was in civil cases. (Willett SJQ at 70) This is concerning to me because, according to the Administrative Office of the U.S. Courts, the Fifth Circuit heard nearly 2,500 criminal cases last year alone. (U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2017))

a. What, if any, criminal law experience do you have?

Federal judges come to the bench from a wide variety of legal backgrounds, and a wealth of academic research confirms the value of career diversity and occupational variety on multi-member appellate courts that thrive on vigorous intra-court debate. The Supreme Court of Texas, while the state’s highest civil court, is also the court of last resort for juvenile matters. Moreover, before taking the bench, I served as a Deputy Attorney General of Texas. As chief legal counsel to the state’s chief legal officer, I was involved in the full array of major legal issues confronting Texas, including criminal law matters. Before that, as Deputy Assistant Attorney General in the Office of Legal Policy in the Department of Justice, I helped supervise what became the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT Act”), which “comprehensively strengthens law enforcement’s ability to prevent, investigate, prosecute and punish violent crimes committed against children.” *Justice Department Fact Sheet* (April 30, 2003). And in then-Governor Bush’s office, I often assisted the criminal justice policy director and lawyers in the general counsel’s office on various matters related to criminal law. And of course, as a law clerk on the United States Court of Appeals for the Fifth Circuit, I helped my judge and the court resolve numerous criminal law cases.

b. What, if any, steps are you undertaking to prepare yourself to hear appeals in criminal cases?

My dozen-plus years as a sitting appellate judge have cemented my commitment to the full judicial process: analyzing the arguments presented by counsel; conducting independent legal research; and, conferring with my colleagues and law clerks. That meticulous process applies equally to every case, civil or

criminal. Appellate judging, no matter the underlying subject matter, is about reading well, writing well, and working collaboratively.

15. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

Without disclosing specific advice by any attorneys, it was my understanding that the instructions were to disclose responsive material truthfully and to the best of my ability.

b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did not need to disclose certain material, including material “published only on the Internet,” as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

It was and remains my understanding that I was required to disclose responsive material, including material “published only on the Internet,” and I have done so truthfully and to the best of my ability.

c. Besides your public Twitter account, Justice Willett, have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

It was and remains my understanding that I was required to disclose responsive material, including material “published only on the Internet,” and I have done so truthfully and to the best of my ability.

d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

No.

16. You indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 1992 and on the Board of Advisors for the Austin Lawyers Chapter since 2003. The Federalist Society's "About Us" webpage states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

Until reading your question, I had never seen this statement and am unsure what the Federalist Society means by it.

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

Until reading your question, I had never seen this statement and am unsure what the Federalist Society means by it.

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

Until reading your question, I had never seen this statement and am unsure what the Federalist Society means by it.

17. Please describe with particularity the process by which these questions were answered.

I received these questions on November 22, 2017. I drafted responses and returned them to the Office of Legal Policy. After conferring with OLP lawyers, I revised and finalized my responses and authorized OLP to submit them.

Senator Dick Durbin
Written Questions for Don Willett and James Ho
November 22, 2017

For questions with subparts, please answer each subpart separately.

Questions for Don Willett

1. In your concurrence in the 2015 case *Patel v. Texas Department of Licensing & Regulation*, you said “I oppose judicial activism, inventing rights not rooted in the law. But the opposite extreme, judicial passivism, is corrosive, too—judges who, while not activist, are not active in preserving the liberties and the limits our Framers actually enshrined.” You went on to say “I believe judicial passivity is incompatible with individual liberty and constitutionally limited government.”

Do you believe following *stare decisis* and adhering to judicial precedent can become, in your words, corrosive judicial passivism? Please explain your answer.

No. *Stare decisis* is nonnegotiable for lower courts, which must faithfully follow all binding Supreme Court and circuit precedent.

2. In your concurrence in *Patel v. Texas Department of Licensing & Regulation*, you said “while government has undeniable authority to regulate economic activities to protect the public against fraud and danger, freedom should be the general rule and restraint the exception.” Your concurrence lamented how courts since the *Lochner* era have been restrained in striking down regulations of economic activity, and you wrote in a footnote:

A wealth of contemporary legal scholarship is reexamining *Lochner*, its history and correctness as a matter of constitutional law, and its place within broader originalist thought, specifically judicial protection of unenumerated rights such as economic liberty. Long story short, legal orthodoxy about *Lochner* is evolving among many leading constitutional theorists.

Your concurrence seems to advocate that judges should embrace what you describe as the “evolving” legal orthodoxy when it comes to long-discredited doctrine like *Lochner* and its progeny, which held that it was unconstitutional for the government to provide basic labor protections for working people. If the *Lochner* cases were still good law, for example, the New Deal never would have happened.

- a. **What lesson do you want judges to take away from your concurrence’s discussion of *Lochner*?**

As I underscored in my concurrence, my Court’s decision in *Patel* bears far more analytical resemblance to Justice Harlan’s principal dissent in *Lochner* than to the *Lochner* majority.

b. **Do you believe that courts should consider the cases of the *Lochner* era when deciding whether to strike down federal and state labor laws and business regulations?**

I believe lower courts should faithfully follow all binding Supreme Court and circuit precedent.

3. In 1996 you wrote a briefing paper for the Texas Public Policy Foundation entitled “Juris-Imprudence: Law and Disorder at the Texas Court of Criminal Appeals.” In the paper, you criticize Texas’s highest criminal court, saying that it has a “pro-defendant tilt” and that it is a “stealth Star Chamber that concocts silly ways to reverse [defendants’] convictions.” You wrote that the Court of Criminal Appeals too often overturned convictions on technicalities, and you wrote that “certainly the criminal accused is constitutionally entitled to the full measure of due process and fairness. But once fairly – albeit not always *perfectly* convicted – punishment must be swift and severe and certain.”

If federal or state statutes or the U.S. and state Constitutions provide for procedural protections for criminal defendants, when do you think it is fair and appropriate for a judge to disregard those procedural protections? Where do you draw the line?

A judge must never disregard procedural protections required by law. In my 1996 paper, I was referring to the Court’s seeming aversion to harmless-error analysis.

4. In 2010 you wrote the majority opinion in the Texas Supreme Court case *Waffle House Inc. v. Williams*. This case involved a waitress named Cathie Williams who was sexually harassed and physically abused by a co-worker. She informed her manager, and when the abuse continued she sued the company for negligent supervision of the co-worker and for sexual harassment under the Texas Commission on Human Rights Act. Ms. Williams won at trial, receiving compensatory and punitive damages.

The employer appealed, arguing that the negligent supervision claim should fail because the statutory harassment claim was the exclusive remedy for workplace sexual harassment. You agreed and wrote the opinion for the Supreme Court reducing Ms. Williams’ jury award, holding that she could not recover both for the harassment claim and the negligence claim because in your view the statutory harassment claim preempted the common law negligence claim. In dissent, several justices pointed out that under your ruling a victim of assault would be denied redress for the assault if the perpetrator sexually harassed her as well.

Please explain your reasoning in the *Waffle House Inc. v. Williams* case.

Plaintiff Williams, a waitress, was subjected to a hostile work environment by her co-worker. She brought a common-law negligence claim and a statutory claim for sexual harassment under the Texas Commission on Human Rights Act. The core legal issue was whether a harassment plaintiff may recover negligence damages for sexual harassment that is covered by the TCHRA. We held 7-2 that where the gravamen of plaintiff’s case is workplace harassment covered by the TCHRA, the Act is the exclusive remedy against the employer and forecloses common-law recovery predicated on the same underlying facts. We carefully followed two recent cases from my Court, both of which denied recovery under another

theory when the conduct falls under the TCHRA. Our decision in *Waffle House* tracked the decisions of other state supreme courts as well as several federal district courts sitting in diversity. The TCHRA is the Texas Legislature’s specific and tailored remedy against employers for workplace discrimination, including sexual harassment. Lawmakers enacted a comprehensive remedial scheme to bring Texas in line with Title VII. Plaintiff’s claim was for hostile work environment, a wrong the TCHRA was specifically designed to remedy. The plaintiff repeatedly conceded her harassment claim and her negligence claim arose from the same harassing conduct – that the offensive verbal and physical conduct “were both an assault and sexual harassment.” They weren’t rooted in *similar* facts. They were rooted in the *same* facts. The complained-of negligence was entwined with the complained-of harassment. Under our settled precedent, the TCHRA doesn’t allow a plaintiff to proceed on dual tracks for the same underlying conduct. Lawmakers enacted a meticulous and elaborate statutory regime: unique administrative review procedures; unique statutes of limitation; unique substantive elements; unique affirmative defenses; unique remedies. Where the Legislature provides a comprehensive remedial scheme with a panoply of special rules, allowing alternative remedies renders that regime superfluous.

Waffle House turned on its specific facts and should be viewed alongside my Court’s recent unanimous decision in *B.C. v. Steak N Shake Operations, Inc.*, where we *did* allow a plaintiff’s common-law claim because in that case, the essence of plaintiff’s case was common-law assault rather than statutory harassment. The plaintiff in *Steak N Shake* was assaulted by a supervisor in a bathroom. She did not allege that her employer was liable for fostering or tolerating a hostile work environment. The plaintiff in *Waffle House* did, which brought her claim under the umbrella of the TCHRA. In short, where the gravamen of plaintiff’s claim is assault rather than harassment, the TCHRA does not preempt plaintiff’s common-law assault claim.

5. You have been a prolific tweeter in recent years. In a speech you gave in Austin, TX on December 19, 2016, you said in your speech notes that you are “the tweetingest judge in America” and that you “do it to up people’s civic IQ and to demystify and humanize the judiciary.”

- a. **Have you ever deleted one of your tweets after you posted it? If so, why?**

The only tweets I recall deleting are those that had a spelling or grammatical mistake. Upon discovering the error, I would usually delete the tweet and then tweet a corrected one.

- b. **In 2014, you re-tweeted a story about a transgender student on a girl’s high school softball team and you wrote “Go away, A-Rod.” Do you believe this tweet helped to “up people’s civic IQ”?**

I did not – and would not – tweet about a transgender girl. The tweet was intended as a jestful reference to Alex Rodriguez. Twitter is a topical medium, driven principally by current events, and Rodriguez was among the top trending topics on Twitter at that time. He was dominating the headlines for dropping his litigation against Major League Baseball and accepting a record-setting 162-game suspension for his involvement in MLB’s Biogenesis scandal. The tweet was intended as a lighthearted

joke that Rodriguez, who had fiercely fought his year-long ban, was so desperate to get back onto the diamond that he would spend his 2014 suspension playing on a girls' softball team.

I would also direct the Committee's attention to a support letter from a wonderful former intern of mine, a transgender woman named Jessica Jones, who writes:

Having worked alongside Justice Willett, I can say that he is a man of surpassing decency and kindness. I experienced his magnanimity up close, and it is unthinkable that he intended to disparage the LGBTQ community with his A-Rod or bacon tweet. I know Justice Willett, and speaking as a trans woman, it is inconceivable that he was making light of the LGBTQ community. The suggestion is at odds with Justice Willett's heart, whose kindness and decency are impossible to overstate. I legally changed my name and gender in March of this year, and Justice Willett has been a supportive friend and mentor regardless of my gender.

Justice Willett accepts all individuals for who they are and cherishes his friendships in the LGBTQ community. For me, he has gone the extra step to encourage me to make a difference, not just a living. He is precisely the sort of judge all Americans should want on the federal bench.

- c. **In 2015, you tweeted “I could support recognizing a constitutional right to marry bacon.” Do you believe this tweet helped to “up people’s civic IQ”?**

Please see my response to Question 5b above. The bacon-related tweet was the day after oral argument in *Obergefell v. Hodges*. As I testified, I was earnestly attempting to inject a measure of levity amid a divisive time of national polarization. The tweet at the time was taken in that lighthearted spirit, by those spanning the political spectrum.

- d. **Do you believe tweets can serve as the basis for an appearance of a conflict of interest that may warrant a judge’s recusal?**

Yes. Judges must always be judicious, whether crafting a 280-footnote opinion or a 280-character tweet. Judges are frequent public communicators – speaking at Rotary Clubs, high school career days, Boy Scout troops, etc. No matter the setting, and no matter the medium, judges must always diligently self-censor and aim for carefulness.

I take great care to ensure none of my tweets raise even the possibility of an appearance of a conflict of interest. I never provide personal commentary on legal disputes that might come before the Supreme Court of Texas, or on legislation pending before the Texas Legislature.

I speak and write frequently on the ethical use of social media by lawyers and judges. Texas judicial ethics officials showcase my account not as a cautionary tale but as a positive example of how a judge can navigate the ethical boundaries deftly: “Seana Willing, executive director of the State Commission on Judicial Conduct, said she

uses Willett as an example of how to ethically use social media in her presentations to judges.” Peggy Fikac, San Antonio Express-News, Dec. 28, 2015.

The Director of the Center for Professional Ethics at Case Western Reserve University School of Law, Professor Cassandra Burke Robertson, has submitted a letter to the Committee that reads in part:

In teaching Professional Responsibility, I use Justice Willett’s facility with social media as an example of the ethical integration of new technology. Two years ago, my casebook co-authors and I included Justice Willett’s social media efforts in a “Profile in Attorney Professionalism,” which I have attached to this letter. Through his social media outreach, Justice Willett is able to connect with a much larger community and to de-mystify the judiciary. His posts consistently uphold professional values and comport with the canons of judicial ethics, while offering civics lessons interspersed with gentle humor.

- e. **President Trump’s tweets often express his unequivocal policy intent. Should his tweets be taken into consideration by judges when assessing the constitutionality of President Trump’s Executive Orders?**

This question concerns active litigation. Accordingly, I must refrain from expressing a personal view. Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *see also* Canon 1 Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”)

6.

- a. **Is waterboarding torture?**

I have not had occasion to study this specific legal question. Generally, under 18 U.S.C. § 2340, waterboarding would constitute torture if it were “intended to inflict severe physical or mental pain or suffering” upon a detainee. Waterboarding may also constitute “cruel, inhuman, or degrading treatment” within the meaning of Section 1003 of the Detainee Treatment Act of 2005. Beyond those broad statements, I must refrain from expressing a personal view on a subject of controversy that may result in litigation. Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”)

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

Please see my response to Question 6a above.

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

Please see my response to Question 6a above.

7. You served in the Department of Justice Office of Legal Policy from 2002-03, and in that role you assisted with the selection and vetting of federal judicial nominees. In a 2010 speech, you discussed your work trying to shepherd judicial nominees through the Senate confirmation process. In your speech you said:

Judicial confirmation hearings are not honest debating societies. They are not occasions for elegant and high-minded give and take. It is raw political bloodsport, and the panel's goal is partisan point-scoring, so we told our nominees to bob and weave, be the teeniest tiniest target you can be, and whatever you do, do not commit the cardinal Bork-ian sin of trying to convince the panel that you're right and they're wrong. You want to be as bland, forgettable, and unremarkable as possible.

It is frustrating to me that nearly all of President Trump's judicial nominees seem to be taking your advice. Judicial nominees at their hearings simply pledge that they will robotically adhere to precedent if confirmed and promise that their personal views will never affect their decisions as a judge. Even when nominees have a clear track record of taking strong ideological policy and political positions, they stick to your advice of bobbing and weaving and trying not to say anything at their hearing that would reveal who they really are.

- a. **Do you think the American people are well served when nominees bob and weave to avoid answering substantive questions and try to hide their long-held views from this Committee?**

I deeply respect the Senate's constitutionally enshrined "advice and consent" role, and I have sought to provide substantive answers responsive to all questions asked. As I lamented to Senator Whitehouse at my hearing, however, we regrettably no longer inhabit an age of bipartisan judicial confirmation votes like 99-0 (Justice O'Connor), 98-0 (Justice Scalia), 97-0 (Justice Kennedy), or 96-3 (Justice Ginsburg).

- b. **Do you think the American people are well served when nominees try to be as bland, forgettable, and unremarkable as possible at their nomination hearings?**

Please see my response to Question 7a above.

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

Please see my response to Question 7a above. Moreover, federal judicial nominees must always be mindful of their ethical constraints under the Code of Conduct for United States Judges. *See, e.g.*, Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity"); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

8. **Do you agree, as a factual matter, with President Trump's baseless claim that 3 to 5 million people voted illegally in the 2016 election?**

As a sitting Texas jurist and a federal judicial nominee, I am doubly constrained – by the Texas Code of Judicial Conduct and also the Code of Conduct for United States Judges – from wading into political disputes.

9. In a February 2, 2017 article in *The Austin American-Statesman*, you were quoted saying of President Trump’s Supreme Court nominee Neil Gorsuch “Judge Gorsuch is a Jedi-level wordsmith.”

I want to ask you about a 10th Circuit case involving then-Judge Gorsuch’s wordsmithing. This was the *TransAm Trucking* case, better known as the case of the Frozen Trucker.

Alphonse Maddin, a truck driver from Detroit, was stuck on the side of I-88 in Illinois in sub-zero weather. The brakes on his trailer were frozen, and after waiting for a repair truck for several hours without heat in his cab, his body was going numb. He was told by his trucking company that he had two options: stay in the truck or drag the frozen trailer down the road. Both of these options were risks to health and safety. Instead, Al Maddin unhitched the trailer and drove to a gas station to fuel up and get warm, and then he returned to his disabled trailer. For this, he was fired from his job and blackballed from the trucking industry.

Seven judges heard Al Maddin’s case, and six of them said that his firing was unlawful. The one judge who found for the company was Neil Gorsuch.

In his dissent, Judge Gorsuch cited the Oxford English Dictionary to define the word “operate” in the relevant statute, and on the basis of that definition he ended up deciding that Mr. Maddin could be fired. But the majority looked at a different dictionary, the Oxford Dictionaries Pro, and found that its definition of the word “operate” supported Mr. Maddin’s position and better fit the statute’s purpose. So the same statutory text produced two different plausible interpretations - one that favored Mr. Maddin and one that favored the big company - depending on which dictionary was used.

Ideologically conservative nominees often claim they are using the supposedly neutral philosophies of “originalism” and “textualism” to guide their decisionmaking. But Al Maddin’s case shows how judges can use selective textualism to advance a pro-business agenda and diminish the rights of American workers.

- a. **Isn’t it possible for a textualist judge to try to achieve a particular outcome by choosing a particular dictionary or emphasizing some words in the text over others?**

Without commenting on then-Judge Gorsuch’s dissent (which I have not read), I can state generally that statutory text must be read neither nonliterally nor hyperliterally, but contextually, what I have called “fair-reading textualism.” Judges must have an unremitting focus on reading statutes neither literally nor liberally, but commonsensibly – that is, discerning the words’ accepted contextual meaning. I believe that for judges to play their lexicographic role in the legislative project, we must be attentive not just to words standing alone, but to structure and to historical architecture. When divining what enacted law means, the judge-interpreter’s aim is

not a myopic reading, but a sound one. When a statute is silent, judges often seek guidance in reputable dictionary definitions, particularly legal dictionaries from the enacting era, since semantic usage and nuances can shift over time. Not all dictionaries are created equal, however; some are richer and more explanatory than others.

b. Shouldn't we be wary of such selective textualism?

Please see my response to Question 9a above. Chief Justice John Marshall observed the slipperiness of words nearly two centuries ago: “Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . .” *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 414 (1819). Words are slippery, and interpreting slippery words eludes robot-like precision. Textualist readers invariably read text differently. Judges seize upon different interpretive clues and balance them differently, not to impose a desired outcome but through earnest grappling.

10. In your questionnaire you list yourself as having been a member of the Federalist Society since 1992.

a. Why did you join?

When Justice Kagan was Dean Kagan at Harvard Law School, she was introduced at a Federalist Society event and famously joked, “I *love* the Federalist Society. But, you know, you are not my people.” Like Justice Kagan, I admire the Federalist Society’s contribution to the intellectual lives of American law schools and its commitment to open debate. I love ideas and the freewheeling exchange of ideas. I love rollicking good-faith debate on important issues. I love civil and principled give-and-take where competing points of view get their tires kicked. The Federalist Society is not an echo chamber. Events frequently feature diverse opinions and sharply contrasting views. The Society doesn’t itself take positions on specific legal or policy issues and is open to anyone regardless of political or jurisprudential views. I joined for largely the same reason I recently went back to school for an LL.M. in Judicial Studies – for the sheer intellectual exhilaration that comes from thinking deeply on important legal issues.

b. Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist? For example, in an interview with *Breitbart News*’ Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

As a sitting Texas jurist and a federal judicial nominee, I am constrained by both state and federal canons of judicial conduct from opining on political matters. Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

c. **Please list each year that you attended the Federalist Society’s annual conference.**

My records indicate I attended the National Lawyers Convention the following years: 2007, 2008, 2009, 2010, 2012, 2013, 2014, 2016, and 2017.

11. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting President Trump’s Circuit Court nominees, including then-Justice Joan Larsen.

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

I am grateful for the support my nomination has received from across the political spectrum, but I have no knowledge of anyone making donations in support of, or opposed to, my nomination. I would never solicit such support, nor could I ethically do so under the Code of Conduct for United States Judges. Beyond that, as a federal circuit nominee, I must refrain from commenting on the political aspects of the confirmation process. Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. **Will you condemn any attempt to make undisclosed donations on behalf of your nomination?**

Please see my response to Question 11a above.

- c. **If you learn of any such donations, will you commit to call for any such 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?**

Please see my response to Question 11a above. I have not had occasion to study this specific recusal question but would, if the issue arose, carefully study 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing recusal determinations.

12.

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

I have not had occasion to study this specific legal question. In any event, the contours of the President’s Article II, Section 2 pardon power concern a subject of controversy that

may result in litigation. Accordingly, I must refrain from expressing a personal view. Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”)

b. Can an originalist view of the Constitution provide the answer to this question?

Please see my response to Question 12a above.

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

Please see my response to Question 12a above.

13. In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?

Personal opinions should never dictate judicial opinions. I’ve cast many votes that have defied my personal sense of fairness. Judges are people, too, and thus acquainted with all of life’s tragedies and triumphs. Empathy certainly makes us better friends, better parents, better children, and better people. But if the governing law is clear, I can’t indulge my personal moral convictions or impose my own subjective sense of justice, however strongly felt. Judges must be immune to gusts of popular opinion, and to tugs of personal opinion.

A federal judge’s solemn duty to interpret and apply the law evenhandedly is enshrined in the judicial oath, passed by the Congress of the United States. Specifically, judges swear to “administer justice without respect to persons . . . do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform” all judicial duties.

28 U.S.C. § 453. To be sure, the adjudication of discrete issues (insanity, duress, etc.) may require a judge to understand a defendant’s background. In addition, a judge imposing a noncapital criminal sentence must consider “the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). But honoring the Rule of Law is paramount – always. Personal agendas have no place. Judging is a noble enterprise, and it requires neutral arbiters who never put a finger on the scale or in the wind

14.

a. Was the Supreme Court’s decision in *Obergefell* rightly decided?

Under Article III, judges do not give advisory opinions, and under the canons, they do not give personal opinions. As Justice Kagan testified at her confirmation hearing, “I don’t want to grade or give a thumbs-up or thumbs-down on particular Supreme Court cases.” As a nominee bound by the Code of Conduct for United State Judges, it would be improper for me to express my personal views on whether specific cases were correctly decided. *Obergefell* is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. I will apply it fully, fairly, and faithfully with zero hesitation.

- b. **Do you pledge, if you are confirmed, that you will not take steps to undermine the Court's decision in *Obergefell*?**

Obergefell is controlling Supreme Court precedent. It binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. I will apply it fully, fairly, and faithfully with zero hesitation.

**Nomination of Don Willett to the
United States Court of Appeals
For the Fifth Circuit
Questions for the Record
Submitted November 22, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree in the sense that judges, like umpires, “should perform the duties of the office fairly, impartially and diligently”; “should not be swayed by partisan interests, public clamor, or fear of criticism”; and must “avoid impropriety and the appearance of impropriety” in order to maintain the public’s faith and confidence in the impartiality of the justice system. Canons 2, 3, 3(A)(1), 3(C)(1), Code of Conduct for United States Judges. The federal judicial oath, codified at 28 U.S.C. § 453, underscores the gravity, requiring judges to “administer justice without respect to persons . . . do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me[.]”

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

Substantive law sometimes requires judges to weigh practical consequences – for example, when deciding whether to grant a preliminary injunction. Also, in a statutory-construction case, judges may consider consequences when applying the absurdity doctrine. And in a rare case of pure common law, a judge is certainly free to assess practical, real-world effects. But when it comes to statutory interpretation, lawmakers are better equipped than judges to fine-tune and tailor laws to changed or unintended circumstances.

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

I concede the determination of what constitutes a “genuine dispute as to any material fact” can be difficult, but it must always be objective. Many rules inform the inquiry (like not weighing witness credibility), and hopefully instructive precedents in factually and legally analogous cases will provide judicial guidance.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize

what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old.”

- a. What role, if any, should empathy play in a judge's decision-making process?

A federal judge's solemn duty to interpret and apply the law evenhandedly is enshrined in the judicial oath, passed by the Congress of the United States. Specifically, judges swear to “administer justice without respect to persons . . . do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform” all judicial duties. 28 U.S.C. § 453.

To be sure, the adjudication of discrete issues (insanity, duress, etc.) may require a judge to understand a defendant's background. In addition, a judge imposing a noncapital criminal sentence must consider “the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). Personal opinions, however, should never dictate judicial opinions. I've cast many votes that have defied my personal sense of fairness.

Judges are people, too, and thus acquainted with all of life's tragedies and triumphs. Empathy certainly makes us better friends, better parents, better children, and better people. But if the governing law is clear, I can't indulge my personal moral convictions or impose my own subjective sense of justice, however strongly felt. Judges must be immune to gusts of popular opinion, and to tugs of personal opinion.

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

We're all a product of our individual personal journeys – our unique backgrounds and experiences. Certainly, growing up poor and fatherless in a family where neither parent finished high school helps me understand that many laws work special hardship on those at the bottom rungs of the economic ladder. But my judicial oath forbids me from letting personal opinions dictate judicial opinions. As Justice Kagan aptly put it, “The question is what the law requires.”

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Please see my responses to Questions 2a–b above, as well as the various support letters submitted to the Committee that speak to my personal empathy.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. When discussing the benefits of race-blind admissions policies, you said that these policies “redistribute” rather than exclude minority students. You said this was a good thing because it allows minority students to attend institutions “from which they are better equipped to graduate.”

a. It would seem that in this context redistribution means increasing the number of opportunities for minority students in less selective institutions. Was that your intention?

No, my express purpose in that decades-old article, written in my pre-judge capacity as a legal and policy adviser to then-Governor George W. Bush, was to urge policymakers, in light of *Hopwood*, to think creatively about how to boost minority educational attainment and devise race-neutral ways to attract, admit, and retain minority students. The article encouraged policymakers to, among other things, emphasize early childhood development in educational policies and prioritize early diagnosis of reading-at-risk children.

b. Do you believe that minority students in general are better “equipped to graduate” from less selective institutions? If so, on what evidence did you base that conclusion?

I would never so generalize. Both minorities and non-minorities span the full spectrum of academic readiness and achievement.

5. In 2013, the Center for American Progress reported that you received more than \$250,000 in campaign contributions from energy companies. At your hearing, you discussed having advertised your support from conservative leaders when you said, “I am the consensus, conservative choice from every corner of the conservative movement: pro-life, pro-faith, pro-family, pro-liberty, pro-Second Amendment, pro-private property rights and pro-limited government.”

a. Why would those companies donate so much to your campaign?

My twelve-year record on the Supreme Court of Texas is one of unflinching devotion to the Rule of Law, and I have never hesitated to rule against my staunchest supporters when the law was not on their side. I have ruled for energy companies, and I have ruled against them. My vote follows the law – every time – regardless of a litigant’s wealth, status, or power.

b. Why would those leaders lend support to your campaign?

I hope it was because they believed, as I do, that the judiciary is a legal institution, not a political one. My supreme duty is to be an impartial arbiter, not an ideological combatant seeking to gratify a personal agenda. I’ve worked in and around all three branches of government on both the state and federal levels. I know judging. I know policymaking. And I know the difference.

- c. If these groups did not believe you would cast votes in alignment with their preferred policy outcomes, why would they spend money to support your election?

I cannot speak to their preferences, but I can speak to my principles, which require me to act always judicially by adjudicating, never politically by legislating.

- d. What expectations would they have from such donations or endorsements?

I cannot speak to their expectations. But I can speak to my own, which are to follow the law, not to indulge my personal policy preferences.

- e. At your confirmation hearing, you expressed your distaste for partisan judicial elections. What steps, if any, have you taken to reform Texas's system of partisan judicial elections?

I have aggressively pushed for judicial selection reform my entire legal career. In the 1990s, as a newly licensed lawyer, I was appointed by the Chief Justice of the Supreme Court of Texas to a blue ribbon task force to recommend reforms to Texas' system of partisan judicial elections. Over the years, I have given many interviews and speeches bemoaning our flawed scheme and imploring the Legislature to propose a system worthy of Texas, one that will strengthen public confidence, but unfortunately, reaching successful consensus in the Legislature has proved elusive. The status quo has fierce defenders.

- f. Do you believe it is important that litigants that come before you, and the general public, believe that you will be impartial in all matters on which you sit as a judge? What steps did you take as a judge to ensure the public appearance of your impartiality when a party before you had financially contributed or otherwise publicly supported one of your campaigns? What steps will you take if confirmed if any of these parties come before you in the future?

The Texas Code of Judicial Conduct expressly permits judges to solicit campaign funds. To minimize the appearance of impropriety, the Legislature has imposed contribution limits on individuals, PACs, and law firms, limited the time that contributions can be collected, and mandated timely disclosure of donations and expenditures. I faithfully abide by all ethical guidelines and favor absolute transparency. On my Court, I do not sit on cases where a contributor is a named party. Moreover, in both of my statewide elections, I chose to adhere to the voluntary expenditure limits in our Judicial Campaign Fairness Act.

If confirmed to the Fifth Circuit, I will carefully evaluate my recusal obligations under the legal standards set forth in 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing recusal determinations.

6. You have described the next generation of children as “an army of hardened, stone-cold kids who are rooted in abject moral poverty . . . children who hold absolutely no regard for human life, vacant children who rob and rape and maim and murder (often in gangs) on raw impulse alone.” You also criticized the consideration of mitigation evidence in criminal sentencing, dismissing it as “victimology” and saying this “‘Oprah-ization’ of America has helped make us a nation of buckpassers.”

- a. What did you mean by this?

When I wrote that policy piece twenty-plus years ago as a think-tank commentator, criminologists and politicians from both sides of the aisle were predicting a swelling wave of juvenile crime. The media widely ran the sensational predictions. Thankfully, the demographic research proved to be flawed, and the rate of teenage violence declined – sharply.

- b. How will these views affect how you approach criminal appeals and sentencing?

If confirmed, I will fully, fairly, and faithfully apply the governing legal framework set forth in relevant Supreme Court and Fifth Circuit precedent. I will carefully review the briefs (including any amicus briefs), consider and apply all relevant precedent (including persuasive precedent from other circuits), conduct independent legal research, and confer with my law clerks and colleagues to determine the legally correct answer.

7. At your hearing, you answered questions about some of your nearly 26,000 tweets. If confirmed, will you commit to stop posting commentary on Twitter?

I have not made any final decision. If I am confirmed, I assure you that I will carefully consider the guidance and advice of the Administrative Office of the United States Courts, together with input from my Fifth Circuit colleagues. If I do continue to tweet, the content will focus almost exclusively on improving our nation’s civics knowledge.

Senate Judiciary Committee
“Nominations”
Questions for the Record
November 15 2017
Senator Amy Klobuchar

Questions for Don Willett, Nominee to be United States Circuit Judge for the Fifth Circuit

Working to combat sex trafficking has been one of my highest priorities. Last Congress, I worked with Senator Cornyn to pass anti-trafficking legislation that included a provision based on Minnesota’s “safe harbor” law, which helps to ensure that minors sold for sex are treated as victims, not as criminals. In 2010, you wrote a dissenting opinion in a case involving a 13-year-old who pleaded guilty to prostitution. Although she was convicted by a trial court, that conviction was overturned by the Texas Supreme Court because, as a 13-year-old, she could not legally consent to sex as is required to commit the offense of prostitution. You disagreed with the majority, arguing that 13-year-old minors could be prosecuted under the relevant statute.

- How did you reach your conclusion in this case?
- Is it your view that minors who cannot legally consent to sex can be prosecuted for prostitution?

In the case to which you refer, *In re B.W.*, all nine justices saw the underlying facts as heart-rending. The disagreement was simply over how best to read the various statutes to protect children caught up in such horrors. There is zero doubt that prostituted minors are victims in the most tragic sense. Notably, however, anti-trafficking advocates are somewhat divided on whether prostituted children should be adjudicated delinquent. Those who oppose immunity for exploited children worry that if the judicial system is unable to advocate for treatment and rehabilitation, prostituted children are left at the mercy of pimps and johns, thus inviting even more prostitution of children. Some states have enacted victim-centered protective response laws that offer prostituted children a protective response, rather than a juvenile justice or criminal response. I thought Justice Wainwright’s dissent was the better reading of the law – and also more protective of victimized children, who would receive counseling, rehabilitation, and treatment, rather than be released back into a toxic street environment. In this case, B.W., a violent and chronic runaway (her caseworker’s description) had fled her third placement in a group home facility and had been missing for more than a year when she was picked up.

What separated the majority and the dissent, at bottom, were three things. First, the view of the role of the juvenile-delinquency system. The majority treated it as a “prosecution” or “quasi-criminal” proceeding from which children should be shielded. In fact, it is a civil proceeding designed to identify and correct behavior that, if left unchecked, could provide far worse legal consequences – it is there, ideally, to serve children before it is too late. It merits mention: Upon discovering that B.W. was 13, the State dismissed the adult criminal charge and refiled in the civil juvenile system – a system that focuses on rehabilitation of delinquency rather than prosecution of crimes. Second, the specific role that the “age of consent” played. By having an age of consent, we essentially impose “strict liability” on adults who have sex with children, denying them a defense. But that irrebutable legal presumption doesn’t mean that behavior is not

evidence of delinquency for some children 14 and under. It just means that the law harshly (and wisely) punishes adults who take advantage of them. Third, the interaction of the Texas Penal Code and the Texas Family Code. The Family Code imports the Penal Code for children ages 10 and over. The majority decided to carve out an exception, based on what the dissent thought was a mistaken premise (the two points above). Under the statute as written, the dissent believed that the courts had the obligation to protect children by adjudicating them delinquent for behavior that would have been criminal by an adult.

Describing the process as a “prosecution” or finding children “guilty” of a crime is a misunderstanding of the statutory regime. It was a civil regime designed to protect children and put them on a path so they would never need to enter the criminal system when they became adults. The statute safeguards children by intervening when they are on a dangerous course – a course that will lead to certain ruin if not halted. The majority put it this way: “the law recognizes that minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.” But the fact that some actual minors (not the theoretical ones envisioned in the statute) do have “actual agreement or capacity” is the thing that should worry us. They are real human beings, not just constructs. Simply pretending they are totally unaware of their circumstances (even though no child can be blamed in a criminal sense) is hardly compassionate. Those children whose youth and innocence have been robbed are the ones most in need of the counseling, therapy, and treatment that can flow from a finding of delinquency. The majority stated that children had a “special vulnerability,” and the dissent hardly disagreed. Rather, this vulnerability is a key part of why the dissent believed the majority’s approach was incorrect, and disserved vulnerable children by denying them bold corrective action (not criminal prosecution) when they were ensnared in risky, dangerous, and illegal behavior.

As Deputy Attorney General of Texas, you assisted with trial preparation in challenges to the state’s redistricting legislation. After you left the office, I understand that the Supreme Court found that one of the redrawn district’s lines violated the Voting Rights Act because the district impermissibly diluted the votes of Latinos.

- What do you believe is the proper role of the judiciary in protecting citizens’ right to vote?

The Supreme Court has repeatedly held that the constitutional right to vote is fundamental. *See, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966). The proper role for the judiciary in the voting context is the same as in other contexts – to resolve all cases and controversies properly before it consistent with the Constitution, relevant statutes, and applicable Supreme Court and circuit precedent.

Nomination of Don R. Willett, to be United States Circuit Judge for the Fifth Circuit
Questions for the Record
Submitted November 21, 2017

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, fairly, and faithfully apply the governing legal framework set forth in relevant Supreme Court and Fifth Circuit precedent. I will carefully review the briefs (including any amicus briefs), consider and apply all relevant precedent (including persuasive precedent from other circuits), conduct independent legal research, and confer with my law clerks and colleagues to determine the legally correct answer.

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

Please see my response to Question 1 above.

- 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?

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

- 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*).

Please see my response to Question 1 above.

- f. What other factors would you consider?

Please see my response to Question 1 above.

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 gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court has also extended the equal protection guarantee to other classifications beyond race. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 3584 (2015) (same-sex couples); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). These decisions are binding precedent on all lower-court judges, and I will apply them fully, fairly, and faithfully with zero hesitation. Whether the Fourteenth Amendment’s guarantee of equal protection applies to additional classifications or in other contexts is currently the subject of active litigation. Accordingly, as a federal circuit nominee, I must refrain from “public comment on the merits of a matter pending or impending in any court.” Canon 3(A)(6), Code of Conduct for United States Judges; *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). If confirmed, and if such cases come before me, I will carefully review the briefs (including any amicus briefs), consider and apply all relevant precedent (including persuasive precedent from other circuits), conduct independent legal research, and confer with my law clerks and colleagues to determine the legally correct answer.

- 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?

Please see my response to Question 2 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?

Please see my response to Question 2 above.

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

Please see my response to Question 2 above.

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

Please see my response to Question 2 above.

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

The Supreme Court recognized such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully, fairly,

and faithfully follow these decisions and all other controlling precedent with zero hesitation.

- 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 recognized such a right in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I will fully, fairly, and faithfully follow these decisions and all other controlling precedent with zero hesitation.

- 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 recognized such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will fully, fairly, and faithfully follow *Lawrence* and all other controlling precedent with zero hesitation.

- 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 the subparts above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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?

Several recent Supreme Court decisions illustrate how our Constitution is an adaptive yet enduring charter of freedom. *See, e.g., Riley v. California*, 134 S. Ct. 2473 (2014) (scouring the digital contents of a cell phone does not fall within the search-incident-to-an-arrest exception); *United States v. Jones*, 565 U.S. 400 (2012) (installing a GPS tracking device on a vehicle without a warrant constitutes an unlawful search); *Kyllo v. United States*, 533 U.S. 27 (2001) (using a thermal-imaging device to detect heat emanating from a private home constitutes an unlawful search).

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

I have not had occasion to study this specific legal question. But if it arose, I would carefully consider the arguments of parties and amici, confer with my law clerks and colleagues, and faithfully review and apply applicable Supreme Court and Fifth Circuit precedent.

5. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have never assessed personally whether *Brown* is consistent with originalism, though some scholars have concluded that it is. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429. In any event, the question, while interesting, is purely academic given the Supreme Court’s long-settled holding. What matters is that *Brown* is controlling precedent that binds me today as a Justice on the Supreme Court of Texas and will bind me if I am confirmed to the Fifth Circuit. I am duty-bound to follow all controlling Supreme Court precedent, and that duty is absolute regardless of the interpretive approach used by the Court.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited November 21, 2017).

I have not had occasion to study this specific legal question. Originalism, like other methods of constitutional interpretation, has proponents and opponents, and discerning a provision’s original public meaning can be difficult. But for a federal circuit judge, the debate, while interesting, is somewhat academic. All Supreme Court precedent is binding on lower courts. If confirmed, I will faithfully apply all controlling Supreme Court and Fifth Circuit precedent.

6. During your confirmation hearing, we discussed an article you wrote for the Texas Public Policy Foundation in which you criticized the Texas Court of Criminal Appeals as being “pro-defendant,” and stated that increased rates of “fatherless, Godless, and jobless” children

would become “an army of hardened, stone-cold kids who are rooted in abject moral poverty . . . children who hold absolutely no regard for human life, vacant children who rob and rape and maim and murder (often in gangs) on raw impulse alone.” Though you noted that the Texas Supreme Court does not handle criminal cases, the Fifth Circuit does.

- a. Do you still stand by the assertions made in your article?

When I wrote that policy piece twenty-plus years ago as a think-tank commentator, criminologists and politicians from both sides of the aisle were predicting a swelling wave of juvenile crime. The media widely ran the sensational predictions. Thankfully, the demographic research proved to be flawed, and the rate of teenage violence declined – sharply.

- b. Since that article was published, what steps have you taken to directly assist “fatherless, Godless, and jobless” youth in the criminal justice system in your community?

As a legal and policy adviser for George W. Bush (as Governor of Texas, as a presidential candidate, and as President of the United States), I assisted with various initiatives aimed at helping at-risk youth and juvenile offenders. Moreover, I have devoted much of my nonprofit board service to organizations that serve young people and families in crisis, nonprofits like Big Brothers Big Sisters, SafePlace, Austin Community Nursery Schools, and the National Fatherhood Initiative. Moreover, my family regularly volunteers at organizations that serve vulnerable, at-risk youth in our foster care and juvenile systems.

- c. If confirmed, how would you ensure that all parties with criminal matters before you, especially juveniles, receive a fair proceeding, devoid of any bias or preconceived opinions?

The most indispensable attribute for any judge is a surpassing fidelity to the Rule of Law. My twelve-year record as a Justice on the Supreme Court of Texas is one of unswerving devotion to the law. I behave judicially by adjudicating rather than politically by legislating. I prize legal principles above personal preferences. And I decide disputes with discernment and evenhandedness. If confirmed as a federal circuit judge, the federal judicial oath will impose a similar solemn duty: to “administer justice without respect to persons . . . do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me.” Judging is a sacred trust, and I approach it with reverence and carefulness.

7. During your confirmation hearing, Ranking Member Feinstein asked you about a memo you wrote while working in then-Governor George W. Bush’s office, opposing a proclamation declaring “Business Women’s Week.” In that memo, you wrote, “I resist the proclamation’s talk of ‘glass ceilings,’ pay equity (an allegation that some studies debunk), the need to place kids in the care of rented strangers, sexual discrimination/harassment, and the need generally for better ‘working conditions’ for women (read: more government) The proclamation can perhaps be re-worded to omit these ideological hot buttons while still respecting the contributions of talented women professionals. But I strongly resist anything that shows we

believe the hype.” During your hearing, you stated that you opposed the proclamation because “governor’s proclamations are never intended to take sides on contentious or acrimonious policy proscriptions.”

- a. Did you believe that glass ceilings and pay equity were contentious or acrimonious policy proscriptions? If so, why?
- b. Do you agree with me that women deserve equal opportunities and equal pay for equal work?
- c. Did you believe that the existence of sexual harassment against women in the workplace was a contentious or acrimonious policy proscription? If so, why?
- d. Do you agree with me that no person should be subjected to sexual harassment in the workplace?
- e. Did you believe that the existence of sex discrimination against women in the workplace was a contentious or acrimonious policy proscription? If so, why?
- f. Do you agree with me that no person should face sex discrimination in the workplace?
- g. Did you believe that the need for better working conditions for women in the workplace was a contentious or acrimonious policy proscription? If so, why?
- h. Do you agree with me that employees deserve good working conditions, regardless of gender?
- i. What did you mean by “the need to place kids in the care of rented strangers”?
- j. You wrote, “I strongly resist anything that shows we believe the hype.” Why did you describe the following as “hype”: glass ceilings, pay equity, adequate childcare, sex discrimination, sexual harassment, and the need for better working conditions for women?

Divorcing text from context predictably paints a distorted picture. I refer you to two letters submitted to the Committee authored by the persons with whom I worked on this matter: Shirley Green, then-Governor Bush’s director of correspondence; and, Vance McMahan, then the governor’s policy director (and my direct boss at the time). These letters explain the complete, contextual background and conclusively rebut the assertions that I dispute the presence (and prevalence) of gender barriers in the workplace.

As Ms. Green writes, “words read in isolation can be distorted, both inadvertently and intentionally. I am pleased to set the record straight.” As she notes, the original draft of the proclamation read as a partisan “policy manifesto” that “waded unnecessarily into contentious policy disputes,” side-taking that violated our “longstanding proclamation procedures.” As Ms. Green notes, I suggested revisions that steered clear of “the political and ideological controversies that pervaded the first draft.” The final draft, following my suggested revisions, states, “[m]any working women still face resistance in attaining certain managerial positions, and some still earn less than what men are paid for the same job.” There is no empirical dispute about this, and I do not doubt at all the pervasiveness of gender workplace obstacles.

Ms. Green puts it plainly: “I know the story behind this proclamation, not a snippet – the full story. Don was not attempting to torpedo it, but to revise it consistent with our longstanding content practice, which required neutrality on ideological and political disputes. . . . Painting Justice Willett as someone indifferent to gender equality would be a postposterous caricature of what was, in fact, a proper process.”

The letter from Vance McMahan, my then-boss and the only other person privy to the whole story, is fully consistent: “[a]ny suggestion that Don is unsympathetic to the barriers women confront is simply untrue. In short, Don acted appropriately in determining that a proclamation which took sides on contentious policy issues did not meet the office’s standard for issuing such documents.” As Mr. McMahan notes, “Don was a strong voice within the Governor’s Office urging more support for working moms.”

I’m the son of a widowed truck-stop waitress who never finished high school and who stomachached every workplace indignity imaginable. I saw it firsthand. I am quite familiar – painfully and personally – with what my heroic mom endured. She turned 87 last week and was unfortunately unable to attend my hearing, as she’s suffering from advanced dementia in the memory care unit of a Medicaid skilled nursing facility. As I stated at the hearing, “She could not be here with me . . . and I would not be here without her.” She is the embodiment of grit, tenacity, fortitude, and sacrifice. That’s why I held my formal investiture on her 75th birthday, to pay tribute to all the obstacles she had overcome. When she started waitressing, she made eight cents an hour. When she poured her last cup of coffee 55 years later, she had served about 2.5 million customers and walked roughly 250,000 miles – from the earth to the moon. Every step she took brought a grateful son one step closer to the unfathomable gift I have of serving 28 million Texans on the Supreme Court of Texas.

I practiced employment law long enough to understand the scope of discrimination, harassment, pay inequity, and other barriers afflicting women. They are real, and they are rampant. Witnessing what my mom endured is a key reason why my nonprofit board service has focused on serving vulnerable women: SafePlace (serving victims of domestic violence and sexual assault); Austin Community Nursery Schools (serving low-income moms needing accessible child care). The women executive directors of these life-saving and life-enriching nonprofits have submitted powerful letters to the Committee describing my commitment to their missions. At the time the proclamation was being considered, I was serving on the board of a nonprofit that provides child care for working moms. As Cecilia Blanford, former executive director of Austin Community Nursery Schools wrote in her letter to the Committee, “I have marveled up close at his dedication to vulnerable women and children. It is a dedication born of personal hardship, and it is a dedication proved by deeds, not words.”

Most of my law clerks have been women, many of whom experienced various maternity and other urgent personal and family-related needs during their clerkships. Knowing what my mom endured, I was delighted to advocate for flexible accommodations and additional support far beyond what state policy prescribed. Several of them have written gracious letters to the Committee chronicling their supportive experience in my chambers.

As the numerous letters submitted to the Committee make unmistakably clear, any suggestion or insinuation that I am remotely cavalier or indifferent to the innumerable headwinds afflicting women in the workplace is gravely mistaken.

8. In 2010, you joined a dissent in *In re B.W.*, a case that questioned whether a 13-year-old

could be charged with prostitution under Texas law. The dissent states, “To be clear, children below a certain age probably do not have the mental capacity and the law would deem them unable to consent to certain actions, but that is not the case here.”

- a. Is the age at which a child can consent a purely legislative question?
- b. Can courts evaluate whether a child has the mental capacity to consent? If yes, please list the factors a court should consider.

Sexual consent laws vary from state to state. In Texas, the legal age of consent is 17.

It is important to emphasize that the precise question at issue in *In re B.W.* was not whether a 13-year-old could be “charged” (as the question states) with prostitution under Texas law as a matter of criminal law. Rather, the question was whether a juvenile could be judged delinquent for engaging in prostitution. As the dissent stated, delinquency adjudications are *civil* proceedings designed to identify and correct behavior that, if left unchecked, could provide far worse legal consequences – it is there, ideally, to serve children before it is too late. Describing the process as a “prosecution” or finding children “guilty” of a crime is a misunderstanding of the statutory regime. It was a civil regime designed to protect children and put them on a path so they would never need to enter the criminal system when they became adults. The statute safeguards children by intervening when they are on a dangerous course – a course that will lead to certain ruin if not halted.

Questions for the Record
Don Willett
From Senator Mazie K. Hirono

1. In 1895, in *Lochner v. New York*, a majority of the Supreme Court held that New York could not limit bakery workers to 10 hour days and 60 hour weeks because it would violate their due process rights of freedom to contract. But that decision has long since been abandoned, and legislatures are able to regulate hours and conditions in which Americans work. Chief Justice Roberts, in his dissent in the recent same-sex marriage case of *Obergefell v. Hodges*, reiterated the age-old criticism of *Lochner*, calling it part of “the unprincipled tradition of judicial policymaking.”

In July 2015, conservative columnist George Will wrote a piece in the *Washington Post*, criticizing the Chief Justice, and praising your concurrence in *Patel v. Texas Department of Licensing and Regulation*, where you endorsed a higher level of scrutiny for these kind of economic due process challenges. Will recommended that the President ask all of his nominees whether they agree that *Lochner* was correct.

- a. **Has any member of the administration asked about your view on *Lochner* or any other Supreme Court case of significance?**

No.

- b. **Is the Chief Justice wrong about *Lochner*?**

As a federal judicial nominee, it would be unfitting to comment on Chief Justice Roberts’ dissent in *Obergefell* (or any other Supreme Court opinion).

- c. **Do you recognize the precedent that has been established since the New Deal era that directly overturned *Lochner*’s holding?**

The so-called “*Lochner* era” effectively ended with the Supreme Court’s decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

- d. **What latitude should a Circuit Court judge have in deciding whether or not to follow precedent?**

It is never appropriate for lower courts to depart from Supreme Court precedent. As my Court recently – and unanimously – noted, “[o]nly the Supreme Court has the ‘prerogative . . . to overrule one of its precedents.’” See *King Street Patriots v. Texas Democratic Party*, No. 15-0320 (Tex. 2017) (quoting *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016)).

2. In a concurring opinion that you submitted in *Patel v. Texas Dept. of Licensing*, you joined in overturning an occupational licensing law because “threaders without licenses are. . . less dangerous than government with an unlimited license to decide who gets bureaucratic permission to pursue particular vocations.”

One way of thinking about the concerns that the *Lochner* case presented was that judges were ill-equipped to engage in the fact finding that legislatures are capable of. And as a result, if the state could demonstrate a rational relationship to a legitimate state interest the court would be deferential to whatever that reason was.

How are judges better equipped today than in the past to engage in fact finding that previous courts ducked away from?

Nothing in my *Patel* concurrence (nor in any other opinion I have authored) suggests that judges are better equipped today than in the past to engage in fact finding.

3. Outside of *Lochner*, are there other decisions of the Supreme Court during the second half of the 20th Century that are wrong and should be overturned?

As Justice Kagan testified at her confirmation hearing, “I don’t want to grade or give a thumbs-up or thumbs-down on particular Supreme Court cases.” As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on whether specific cases were correctly decided. If confirmed, I will follow all Supreme Court precedent fully, fairly, and faithfully with zero hesitation.

4. Robert Bork, one of the most controversial nominees that this committee has considered because of his views on the law, labeled *Lochner* as an ‘abomination’ and is “the symbol, indeed the quintessence of judicial usurpation of power.”

a. Was Judge Bork wrong about *Lochner*?

As a nominee bound by the Code of Conduct for United States Judges, it would be improper for me to express my personal views on specific cases. However, as I underscored in my *Patel* concurrence, my Court’s majority opinion in that case bears far more analytical resemblance to Justice Harlan’s principal dissent in *Lochner* than to the *Lochner* majority.

b. If *Lochner*, or an approach similar to the one employed in that case was embraced again, what mechanisms would there be to prevent judges from simply making decisions based on their personal and ideological beliefs?

The principal way to prevent judges from basing decisions on their personal and ideological beliefs is to select judges with a surpassing fidelity to the Rule of Law. My twelve-year record on the Supreme Court of Texas is one of an impartial arbiter acting judicially by adjudicating, never politically by legislating. My vote follows the law – every time – regardless of my personal, political, or ideological preferences.

c. What would a legislature need to show in order to uphold a regulation? What type of test would you apply?

The Supreme Court has not adopted a one-size-fits-all test for reviewing the constitutionality of statutes and regulations. The Court employs a multi-tiered approach that turns on the type of statute or regulation being challenged. For example, when suspect classifications or fundamental rights are involved, Equal Protection analysis applies the “strict scrutiny” standard. *See, e.g., Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016). In cases involving economic rights, the challenged statute or regulation must only withstand “rational basis” review. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992). If confirmed, I will faithfully apply controlling Supreme Court and Fifth Circuit precedent to determine which level of judicial scrutiny is appropriate.

5. In *State v. Naylor*, 466 S.W.3d 783, 795 (Tex. 2015) the Texas Supreme Court denied the State of Texas’s motion to intervene after a trial court issued a final order granting a divorce to a same-sex couple. The Court concluded that the state lacked standing and was not entitled to mandamus relief since the state “had adequate opportunity to intervene and simply failed to intervene.” You filed a dissent in the decision because you were upset that the Court was not weighing in to uphold the marriage ban. You stated: “‘who decides?’ is a fateful question. A generation ago in *Baker v. Nelson*, the U.S. Supreme Court ruled in a succinct, one-sentence order that a state’s preference for opposite-sex marriage raised no “substantial federal question.” Is *Baker* a rule or relic? Is marriage law still “a virtually exclusive province of the states” –resting properly with state voters and their elected representatives rather than with judges—or has *Baker* been swamped by doctrinal developments, overtaken if not overruled?”

- a. **Do you continue to believe that the fundamental right to marriage should be decided on by members of the state legislature or the voters?**
- b. **What other fundamental rights do you believe rest “properly” with the voters?**
- c. **What did you mean by “doctrinal developments?” as applied to marriage equality?**
- d. **Can you please provide a few examples of these “doctrinal developments?”**

Naylor was decided prior to the Supreme Court’s 2015 decision in *Obergefell v. Hodges*. The Supreme Court had previously decided *United States v. Windsor* in 2013 (striking down the federal Defense of Marriage Act), but had not yet constitutionalized a 50-state right to same-sex marriage. *Obergefell* is now the law of the land. It is controlling precedent that binds me as a Justice on the Supreme Court of Texas, and it will bind me if I am confirmed to the Fifth Circuit. I will apply it fully, fairly, and faithfully with zero hesitation.

6. In *In re State*, 489 S.W.3d 454, 456 (Tex. 2016), you wrote a scathing concurrence criticizing a Texas trial court for approving the state’s first same-sex marriage petition to Sarah Goodfriend and her wife, Suzanne Bryant. In the concurrence, you excoriated the Trial Court for failing to notify Attorney General Ken Paxton of the move so that the Mr. Paxton would have the opportunity to defend the marriage ban.

- a. Have you ever issued a concurrence or dissent attacking a trial court in a similar manner?**

Thankfully, I had never before (and have never since) encountered a trial court decision that flouted the unqualified statutory command to notify the Texas Attorney General of state constitutional challenges.

- b. Did your personal views about same-sex marriage impact your decision to write this strongly-worded concurrence?**

No. My personal opinions never dictate my judicial opinions.

- c. In your dissent you referred to marriage equality obliquely in the concurrence as a “cause du jour.” Do you view the work to obtain protections for LGBT people is a “cause du jour?” that is new to this country and that will go away soon?**

The Supreme Court’s same-sex marriage decisions are the law of land. They are controlling precedents that bind me as a Justice on the Supreme Court of Texas, and they will bind me if I am confirmed to the Fifth Circuit. I will follow them fully, fairly, and faithfully with zero hesitation. The point of my dissent was to underscore that by-the-book fastidiousness to governing legal rules is most vital in high-profile cases, to blunt even the appearance of politicized judging.

- d. Can you please give other examples of a causes of the day that are on par with the issue of marriage equality?**

Please see my response to Question 6c.

7. In June, 2017, you joined the majority in *Pidgeon v. Turner*, which held that same-sex spouses of city workers in Houston have no inherent right to public benefits under *Obergefell*. The decision concluded that, “*Obergefell* is not the end either...Pidgeon and the Mayor, like many other litigants throughout the country, must now assist the courts in exploring *Obergefell*’s reach and ramifications, and are entitled to the opportunity to do so.”

- a. Do you continue to believe that the spouses of same-sex partners are not constitutionally entitled to equal benefits pursuant to the holding and reasoning of *Obergefell*?**

As this case remains in active litigation and could reappear before me (either on remand from the U.S. Supreme Court or on appeal from the Texas trial court to which we remanded the case), I must be especially circumspect. I am doubly constrained – first, as a sitting Texas Supreme Court Justice subject to the Texas Code of Judicial Conduct, and second, as a federal judicial nominee guided by the Code of Conduct for United States Judges. Under both state and federal canons, I am ethically prohibited from commenting on the merits of a pending case, but I can note that the characterization of what my Court addressed in *Pidgeon* seems to have been grossly inflated.

My Court in *Pidgeon* did not decide the merits, which had never been fully briefed or litigated. We did not rule for or against anyone on the benefits issue. We had no record on which to do so. We did not enjoin the City's benefits policy. We left it in effect and remanded, as both parties requested, so they could litigate their constitutional arguments in light of *Obergefell*, which was issued while the case was on appeal.

While we decided an important question of Texas procedural law, we did not decide any questions of federal law, including whether the U.S. Constitution required Houston to issue benefits to same-sex couples. Instead, given the unusual procedural posture of the case (an interlocutory appeal from a preliminary injunction and a plea to the jurisdiction), we did as both parties requested and remanded to the trial court so the parties could – for the first time – fully brief and present their arguments on the merits in light of *Obergefell*, which was issued after the trial court had issued its preliminary injunction. We stated unequivocally that *Obergefell* was the law of the land and must be applied by the lower courts on remand. And we expressly rejected the taxpayers' request to instruct the lower courts to read *Obergefell* "narrowly." We also rejected the taxpayers' request that we affirm the preliminary injunction, holding instead that "the court of appeals did not err by reversing this temporary injunction in its entirety." Not one word of *Pidgeon* casts into doubt, challenges, or criticizes *Obergefell*. Indeed, we "agree[d] with the Mayor that any effort to resolve whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples without considering *Obergefell* would simply be erroneous."

Finally, I am deeply grateful that my nomination is strongly supported by the City's counsel of record before the U.S. Supreme Court. As former Chief Justice Wallace Jefferson's letter to the Committee graciously notes, I understand "the judiciary's role in adjudicating disputes without imposing a judge's or court's personal preferences."

b. How is the statement that there has been a "historical view" about marriage relate to the reach of *Obergefell*'s precedent?

The term "historical view" was used descriptively, not normatively, and is unrelated to the legal reach of *Obergefell*.

8. In an article you co-wrote (*Hope from Hopwood: Charting A Positive Civil Rights Discourse for Texas and the Nation*), you asserted that affirmative action has failed and that the vast majority of minorities are not held back by racial bigotry but by fractured families and poor school systems.

a. Do you continue to believe that racial discrimination has not been the most significant factor in holding back the progress of communities of color?

The article I co-wrote twenty years ago as a policy adviser to then-Governor Bush underscored this incontrovertible truth: "[r]acial oppression has . . . stained our nation." The article, written in the wake of the Fifth Circuit's *Hopwood* decision that

barred diversity as a justification for race-conscious admissions, took aim at those who argued that simply abolishing affirmative action would be sufficient to move the nation to Dr. King's ideal. As we wrote, "too many minorities still are not full participants in the American dream."

The article focused on how *Hopwood* was spurring Texas to think creatively about how to boost minority educational attainment without using racial preferences. That is, how could Texas, post-*Hopwood*, devise race-neutral ways to attract, admit, and retain minority students? The article urged policymakers to focus on the arduous work at the front end of the educational pipeline, K-12, "attacking the obstacles that hamstringing minority achievement." At the time, Texas ranked 48th in the nation in college graduation rates. Barely 1/3 of Hispanics were graduating within six years; 27 percent for black students. One point of the article was to urge policymakers to aim higher and commit themselves to helping get minority students *through* college, not just *to* college. The goal must be *graduation*, not merely *matriculation*. I'm the first in my family to finish high school and go to college. I know firsthand what a catapult educational attainment is – how it can radically alter the trajectory not only of your life today, but of your entire family for generations to come.

- b. When you assert that, "equality by definition, must apply to all," how do you square that view with the purpose of affirmative action programs (to redress our long history of racial discrimination).**

As I state in response to Question 8a, the article was written in the wake of the Fifth Circuit's *Hopwood* decision that barred diversity as a justification for race-conscious admissions. I have no doubt that this country's shameful history of racial discrimination has reverberating effects on minority communities to this day. Indeed, the quotation you excerpted actually begins "[r]acial oppression has certainly stained our nation."

My express purpose in that article was to urge policymakers, in light of *Hopwood*, to think creatively about how to boost minority educational attainment and devise race-neutral ways to attract, admit, and retain minority students. The article encouraged policymakers to, among other things, emphasize early childhood development in educational policies and prioritize early diagnosis of reading-at-risk children.

9. At your hearing, I asked you about in your dissent in a 2010 case called *In re B.W.* You did not recall the In that case, an undercover officer was waved over by B.W., a thirteen-year old girl, who then offered to have oral sex with him for 20 dollars. She was arrested and charged with prostitution, but when her age was discovered, the charges were dropped because the criminal code does not generally apply to children under the age of 17. Charges were refiled under the state's Family Code, and she was found to have engaged in "delinquent conduct" by virtue of having admitted to agreeing to engage in sex for money.

The majority of your court sided with B.W., who challenged her adjudication of delinquency because under Texas law it is presumed that no thirteen-year old can consent to sex. You

dissented, and joined an opinion that criticized the majority “because it proclaims that all thirteen-year old teens are legally incapable of consenting to sex.”

Do you believe that thirteen-year olds are ever legally capable of consenting to sex?

Sexual consent laws vary from state to state. In Texas, the legal age of consent is 17.

It is important, however, to address the underlying premise of your question.

In *In re B.W.*, all nine justices saw the underlying facts as heart-rending. The disagreement was simply over how best to read the various statutes to protect children caught up in such horrors. There is zero doubt that prostituted minors are victims in the most tragic sense. Notably, however, anti-trafficking advocates are somewhat divided on whether prostituted children should be adjudicated delinquent. Those who oppose immunity for exploited children worry that if the judicial system is unable to advocate for treatment and rehabilitation, prostituted children are left at the mercy of pimps and johns, thus inviting even more prostitution of children. Some states have enacted victim-centered protective response laws that offer prostituted children a protective response, rather than a juvenile justice or criminal response. I thought Justice Wainwright’s dissent was the better reading of the law – and also more protective of victimized children, who would receive counseling, rehabilitation, and treatment, rather than be released back into a toxic street environment. In this case, B.W., a violent and chronic runaway (her caseworker’s description) had fled her third placement in a group home facility and had been missing for more than a year when she was picked up.

What separated the majority and the dissent, at bottom, were three things. First, the view of the role of the juvenile-delinquency system. The majority treated it as a “prosecution” or “quasi-criminal” proceeding from which children should be shielded. In fact, it is a civil proceeding designed to identify and correct behavior that, if left unchecked, could provide far worse legal consequences – it is there, ideally, to serve children before it is too late. It merits mention: Upon discovering that B.W. was 13, the State dismissed the adult criminal charge and refiled in the civil juvenile system – a system that focuses on rehabilitation of delinquency rather than prosecution of crimes. Second, the specific role that the “age of consent” played. By having an age of consent, we essentially impose “strict liability” on adults who have sex with children, denying them a defense. But that irrefutable legal presumption doesn’t mean that behavior is not evidence of delinquency for some children 14 and under. It just means that the law harshly (and wisely) punishes adults who take advantage of them. Third, the interaction of the Texas Penal Code and the Texas Family Code. The Family Code imports the Penal Code for children ages 10 and over. The majority decided to carve out an exception, based on what the dissent thought was a mistaken premise (the two points above). Under the statute as written, the dissent believed that the courts had the obligation to protect children by adjudicating them delinquent for behavior that would have been criminal by an adult.

Describing the process as a “prosecution” or finding children “guilty” of a crime is a misunderstanding of the statutory regime. It was a civil regime designed to protect children and put them on a path so they would never need to enter the criminal system when they became adults. The statute safeguards children by intervening when they are on a dangerous course – a

course that will lead to certain ruin if not halted. The majority put it this way: “the law recognizes that minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.” But the fact that some actual minors (not the theoretical ones envisioned in the statute) do have “actual agreement or capacity” is the thing that should worry us. They are real human beings, not just constructs. Simply pretending they are totally unaware of their circumstances (even though no child can be blamed in a criminal sense) is hardly compassionate. Those children whose youth and innocence have been robbed are the ones most in need of the counseling, therapy, and treatment that can flow from a finding of delinquency. The majority stated that children had a “special vulnerability,” and the dissent hardly disagreed. Rather, this vulnerability is a key part of why the dissent believed the majority’s approach was incorrect, and disserved vulnerable children by denying them bold corrective action (not criminal prosecution) when they were ensnared in risky, dangerous, and illegal behavior.

10. You’ve been clear and unapologetic that you are a conservative, textualist, originalist. You once described yourself, saying: “I am the consensus, conservative choice from every corner of the conservative movement: pro-life, pro-faith, pro-family, pro-liberty, pro-Second Amendment, pro-private property rights and pro-limited government.”

How can anyone who comes before you, in Texas, or if you’re confirmed to the federal court, believe that you would consider their case fairly and without resort to reliance on your political agenda?

My twelve-year record on the Supreme Court of Texas is one of unflinching devotion to the Rule of Law. My vote follows the law – every time – regardless of my personal, political, or ideological preferences.

11. When you worked at the U.S. Department of Justice, you worked on judicial nominations. You’ve described how you “help[ed] quarterback the subsequent, multi-front confirmation battles, forging and working closely with outside grassroots coalitions to assist the President’s judicial nominees.” You called the political battles over these nominees as “ferocious and almost on an Armageddon scale” and said, “it’s naïve to think you can purge partisanship. Elections are by definition partisan. Confirmation battles are equally nasty if not even more vile and toxic.”

Is it fair to assume, then, that you have been nominated to the Fifth Circuit because the President believes you will side with his partisan views in deciding cases that come before you?

No.

12. In a January 2010 speech, you talked about preparing nominees for their confirmation hearings here in the Judiciary Committee. You said, “Judicial confirmation hearings are not honest debating societies. They are not occasions for elegant and high-minded give and take. It is raw political bloodsport, and the panel’s goal is partisan point-scoring, so we told our nominees to bob and weave, be the teeniest tiniest target you can be, and whatever you do, do

not commit the cardinal Bork-ian sin of trying to convince the panel that you're right and they're wrong. You want to be as bland, forgettable and unremarkable as possible."

a. Which of the answers you gave us at your hearing were the result of your bobbing and weaving?

I deeply respect the Senate's constitutionally enshrined "advice and consent" role, and I have sought to provide substantive answers responsive to all questions asked. As I lamented to Senator Whitehouse at my hearing, however, we regrettably no longer inhabit an age of bipartisan judicial confirmation votes like 99-0 (Justice O'Connor), 98-0 (Justice Scalia), 97-0 (Justice Kennedy), or 96-3 (Justice Ginsburg).

b. Which were part of your effort to make yourself the teeniest tiniest target you can be?

Please see my response above.