Senator Chuck Grassley
Questions for the Record

Robert Leon Wilkins
Nominee, United States Circuit Judge for the D.C. Circuit

1. **At your hearing, I asked for your response to certain assertions regarding Constitutional Law. I realize that these are not your assertions, but I want to know if you agree or disagree with each statement and then explain to me why or why not.**

    a. **"Reproductive rights should be doubly constitutionally protected by the overlapping liberty and equality guarantees."**

    Response: My understanding is that this statement comes from a law review article authored by Professor Cornelia Pillard. *See* Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work–Family Policy*, 56 Emory L.J. 941, 976 (2007). The entire sentence encompassing the quoted passage reads: "Paradoxically, while reproductive rights should be doubly constitutionally protected by the overlapping liberty and equality guarantees, that dual pedigree can instead leave reproductive rights more vulnerable." *Id*. at 942. During her Senate confirmation hearing testimony and in her "Questions for the Record," Professor Pillard cites to the joint opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) as legal authority for the proposition that abortion rights are protected under the due process clause. Further, she indicated that she was unaware of any cases where the Supreme Court relied on the equal protection clause as a basis for recognizing abortion rights, which comports with my understanding of the law in this area. In any event, if I were faced with a case regarding reproductive rights, I would follow *Casey* and any other relevant precedents from the Supreme Court and the D.C. Circuit.

    b. **"Reproductive rights really are fundamentally about sex equality."**

    Response: My understanding is that this statement also comes from the article discussed above. The entire sentence encompassing the quoted passage reads: "The turn to equality, properly understood, has the potential to do more than provide an alternative defense of reproductive rights; it brings into the open a truth that millions have experienced, which is that reproductive rights really are fundamentally about sex equality." 56 Emory L.J. at 946. Professor Pillard did not explain this further in her testimony, but earlier passages in this paragraph from the article indicate that this passage is more of an academic argument than a

declaration of the current state of the law. As stated above, I would follow *Casey* and any other relevant precedents from the Supreme Court and the D.C. Circuit if I were faced with a case involving reproductive rights.

c. "Promulgation of stereotypes in sex education should be treated as unconstitutional."

Response: My understanding is that this statement also comes from the article discussed above. The entire sentence encompassing the quoted passage reads: "Promulgation of stereotypes in sex education should be treated as unconstitutional for the same reasons that equal protection rejects denial of opportunity based on stereotypes." 56 Emory L.J. at 988. Professor Pillard did not explain this further in her testimony, but the context of the article indicates that this passage is more of an academic argument than a declaration of the current state of the law. As stated above, I would follow *Casey* and any other relevant precedents from the Supreme Court and the D.C. Circuit if I were faced with a case involving reproductive rights.

2. What is your understanding of the constitutionality of states to provide "conscience rights" to pharmacists and health care providers who refuse to facilitate abortions or fill prescriptions for contraceptives if they are personally opposed to such practices?

Response: As far as I am aware, neither the Supreme Court nor the D.C. Circuit has decided this precise issue. Furthermore, there has been recent litigation in the D.C. Circuit and district courts relating to this issue, see *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (per curiam) and *Roman Catholic Archbishop of Wash. v. Sebelius*, 920 F.Supp.2d 8 (D.D.C. 2013). Thus, this issue may come before me as a judge on the District Court or as a judge on the Court of Appeals, if I am confirmed, and it would be inappropriate for me to comment further. *See* Code of Conduct for United States Judges, Canon 3(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

3. There was a recent decision by the New Mexico Supreme Court[1] where the Court held that a photographer improperly discriminated against a gay couple when she refused to take photos for their commitment ceremony for religious reasons and, as the Court stated in its opinion, the Respondents are, "now are compelled by law to compromise the very religious beliefs that inspire their lives."[2]

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[1] *Elane Photography, LLC v. Willock*, 2013 WL 4478229 (N.M. Aug. 22, 2013).

[2] *Id.*, Para. 90.

a. How would you respond if a party in a similar case claimed this was a Freedom of Speech violation? Particularly with respect to a creative and expressive art form such as photography?

Response: The case you have asked me about deals with a challenge by a photography company to a determination by the New Mexico Human Rights Commission that the company violated New Mexico law. In particular, as is relevant to your questions about Elane Photography, the New Mexico Supreme Court analyzed the New Mexico Human Rights Act, NMSA 1978 §§ 28-1-1 to 13 (1969, as amended through 2007). That statute contains a similar prohibition to the D.C. Human Rights Act, which also makes it unlawful to discriminate on the basis of sexual orientation. *See* D.C. Code §§ 2-1401.11, 2-1402.21, 2-1402.31. Vendors across the country have refused to serve same-sex couples in various ways related to weddings and commitments ceremonies, and these actions have begun to result in lawsuits. *See, e.g.*, Annette Cary, *Arlene's Flowers in Richmond [Washington] sued by gay couple*, Tri-City Herald (Apr. 18, 2013), http://www.tri-cityherald.com/2013/04/18/2361691/arlenes-flowers-in-richland-sued.html. Thus, this issue may come before me as a judge on the District Court or as a judge on the Court of Appeals, if I am confirmed, and it would be inappropriate for me to comment further. *See* Code of Conduct for United States Judges, Canon 3(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

b. Do you think the New Mexico state legislature, by requiring companies that advertise publicly to act in this way, compels the company to speak the government's message?

Response: Please see above.

c. How would you respond if an individual or company in this circumstance raised a Free Exercise claim?

Response: Please see above.

4. What is your judicial philosophy or approach in applying the Constitution to modern statutes and regulations?

Response: Sometimes a 21st century law may implicate factual scenarios that are not explicitly addressed by the text of the Constitution or its original public meaning. For example, the Constitution provides that "Congress shall make no law . . . abridging the

freedom of speech," and there may be some difficulty in determining how the original public meaning of text drafted in the 18th century should apply to a constitutional challenge made today to a law regulating Twitter, Facebook or Wikileaks. The Supreme Court and the D.C. Circuit have used several tools, such as examining the intent of the framers, historical context, and the principles sought to be advanced by the text, to resolve modern controversies using text drafted primarily in the 18th and 19th centuries. I would follow that precedent.

5. **What role do you think a judge's opinions of the evolving norms and traditions of our society have in interpreting the written Constitution?**

   Response: The Supreme Court has held that the plain language of the text of the Constitution, as well as the original intent of the framers and the original public meaning of the text, is the starting point for constitutional interpretation. In addition, the Court has at times recognized that the Constitution can protect rights in a context not explicitly envisioned by the framers, such as by holding that the 14th Amendment prohibits gender discrimination and racial segregation, even though both of those practices were embraced by the framers of that amendment. I would follow those precedents.

6. **What is your understanding of the current state of the law with regard to the interplay between the establishment clause and free exercise clause of the First Amendment?**

   Response: It is my understanding is that the Supreme Court has addressed this interplay in *Locke v. Davey*, 540 U.S. 712 (2004) and *Cutter v. Wilkinson*, 544 U.S. 709 (2005), among other cases. The Court has observed that while the prohibitions of the Free Exercise Clause and Establishment Clause may be "frequently in tension," there is nevertheless "room for play in the joints between them," and therefore "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718-719 (citations and internal quotation marks omitted). I would follow this and any other relevant precedent from the Supreme Court and the D. C. Circuit if faced with a case involving these issues.

7. **Do you believe that the death penalty is an acceptable form of punishment?**

   Response: The Supreme Court has held that the death penalty is constitutional in certain circumstances. I would abide by that precedent.

8. **Do you believe there is a right to privacy in the U.S. Constitution?**

Response: The Supreme Court has held that the Constitution protects individual rights to autonomy and privacy in certain contexts, and as with all Supreme Court precedent, I would follow it.

a. Where is it located?

Response: The Supreme Court has held that several provisions of the Constitution confer different types of privacy rights to the individual, including the First, Third and Fourth Amendments, as well as the Due Process Clause of the Fifth Amendment.

b. From what does it derive?

Response: Please see above.

c. What is your understanding, in general terms, of the contours of that right?

Response: The contours of each of the different types of privacy rights vary, and the precedent of the Supreme Court and the D.C. Circuit have explained that the analysis depends upon the specific constitutional provision at issue and the facts and circumstances of the case.

9. In *Griswold,* Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the "penumbras" and "emanations" of the Constitution.

a. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by "reading between the lines"?

Response: I follow the precedent of the Supreme Court and the D.C. Circuit when interpreting the Constitution. Those precedent hold that courts should begin the exercise of interpreting the Constitution by reviewing the meaning of the actual text of the document.

b. Is it appropriate for a judge to search for "penumbras" and "emanations" in the Constitution?

Response: Please see above.

10. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court left open the question of the specific standard of scrutiny for assessing a Second Amendment challenge to a Federal or State gun law. However, the Court in *Heller* indicated that rational-basis review would not be an appropriate standard. 554 U.S. at 628 n.27. The D.C. Circuit has stated that "the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged conduct burdens the right," such that "a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (citations and internal quotation marks omitted). Following those principles, the D.C. Circuit held that intermediate scrutiny applied to gun registration laws and to the prohibitions on certain semi-automatic rifles at issue in the case. *Id*. at 1257, 1261-1262. I would apply this and any other relevant precedent of the Supreme Court and the D.C. Circuit in a Second Amendment challenge against a Federal or State gun law.

11. In *Brown v. Entertainment Merchants Association*., Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

a. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: The composition of the record on appeal, and under what circumstances the record can be supplemented, is governed by Fed. R. App. P. 10. I would follow that rule and any applicable precedent of the Supreme Court and the D.C. Circuit to determine when, if ever, sources outside of the record and the briefs can be relied upon in reaching a decision in a case.

b. When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?

Response: The answer would seem to depend upon the context. It seems that if any such studies were relied upon by the Congress to draft a statute, or by the President to draft an Executive Order, by an agency to draft a rule, or by the parties to the dispute to support their contentions in the lower court, then it may be necessary or appropriate for the appellate court to review the studies relied

upon when deciding the case. If none of those circumstances were present, I would follow the precedent of the Supreme Court and the D.C. Circuit to determine when, if ever, reliance on any such studies is appropriate.

12. What would be your definition of an "activist judge"?

Response: I would define judicial activism as occurring when a judge fails to heed the limitations on the judicial role prescribed by the Constitution, statutes, and precedent, and instead bases his or her decision on his or her personal views to reach a desired outcome.

13. In September 2012 you handed down a decision in the case ISDA v. CFTC. As with many decisions of judges, there was criticism of your decision. One of the criticisms was that your decision was "logically incoherent." The basis for that allegation was that in one part of the decision you wrote that "Section 6a is *ambiguous* as to the precise question at issue: whether the CFTC is required to find that position limits are necessary and appropriate prior to imposing them." Later in the opinion you stated, "The precise question, therefore, is whether the language of Section 6a(a)(1) clearly and *unambiguously* requires the Commission to make a finding of necessity prior to imposition position limits."

a. Please explain your approach to statutory construction.

Response**:** When called upon to review an agency's interpretation of a statute, as in the *International Swaps* case, I apply the test announced by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under this test, a judge must first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. In making this initial determination, I employ "traditional tools of statutory construction" by looking to the statute's text, structure, purpose, and history, as well as the statute's relationship to other federal statutes, where appropriate. *See id.* at 843 n.9; *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999). If these sources indicate that Congress's intent is clear, then this ends the matter because both agencies and courts "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If the statute is ambiguous on the precise question at issue, though, then courts should defer to the agency's interpretation, so long as it "is based on a permissible construction of the statute." *Id.* at 843.

b. Do you believe your decision in this case was internally inconsistent as alleged by the commentary described above? Please explain.

Response**:** I disagree with the assertion that the *International Swaps* decision was "logically inconsistent." The two passages cited above pertain to different aspects of the statute at issue, and thus different steps of the statutory analysis. The overall question in the case, summarized in the first quoted passage, was whether the statute required the Commodity Futures Trading Commission "to find that position limits are necessary and appropriate prior to imposing them" on futures contracts, options contracts, and swap transactions. *ISDA v. U.S. CFTC*, 887 F. Supp. 2d 259, 267 (D.D.C. 2012). I concluded that the statute was ambiguous as to this overall question. In reaching that determination, though, one step of my analysis required that I look to the statute as a whole, including subparagraph (a)(1), 7 U.S.C. § 6a(a)(1). In so doing, I determined that subparagraph (a)(1) "unambiguously require[d] the Commission to make a finding of necessity prior to imposing position limits," *see ISDA*, 887 F. Supp. 2d at 269, as referenced in the second passage quoted above. Importantly, while I found the language of subparagraph (a)(1) to be clear and unambiguous, I nevertheless concluded, at a later step in my statutory analysis, that the extent to which Congress intended to incorporate the requirements of subparagraph (a)(1) into other portions of the statute—in particular, the new "position limits" provisions added by the Dodd-Frank Act—remained ambiguous and unclear. These two conclusions are not inconsistent.

14. What is the most important attribute of a judge, and do you possess it?

Response: I think that a commitment to impartially uphold the Constitution is the most important attribute of a judge, and I believe that I possess and have demonstrated that attribute during my tenure as a judge.

15. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?

Response: Collegiality is certainly an important element of being a judge on Circuit Court of Appeals. Because the judges work primarily in panels of three (unless the matter is being heard en banc), no individual judge can reach an outcome in a case without reaching agreement with one or more of the other judges on the panel. Thus, it is extremely important to approach the work of a Circuit judge with an open mind to the views of the other members of the court and to treat the other judges with civility and respect with a view toward reaching consensus if possible, and I would strive to do just that.

16. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should be respectful, impartial and fair. I believe that my record as a judge shows that I meet that standard.

17. In general, Supreme Court precedents are binding on all lower federal courts. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

18. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If confronted with a case of first impression, I would first review the specific language of the statute, regulation or other text at issue, and then turn to related precedent from the Supreme Court and the D.C. Circuit to identify any legal principles or rules that might be relevant or analogous to the circumstances of this case. I would also consult treatises or other learned secondary sources for guidance. In general, I would seek to identify the relevant principles, standards and guidelines that have been developed to analyze the type of legal questions presented by this case and then apply them to these facts.

19. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: As a member of an inferior court, I have a duty to follow all Supreme Court precedent, unless that precedent has been overturned by the Supreme Court. Similarly, I have a duty to follow D.C. Circuit precedent, even if I disagree with it. If I were confirmed to the D.C. Circuit and were to confront a decision that I believed was seriously in error because it conflicted with intervening Supreme Court precedent or had proven itself thoroughly unworkable, I could suggest that it should be overruled by the Court of Appeals sitting en banc.

20. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: While courts do have the power and authority to review the constitutionality of statutes passed by Congress, it is also very well settled that courts must exercise judicial

restraint in doing so. Thus, when reviewing statutes, courts must do so very carefully and must avoid constitutional issues if possible, and endeavor to interpret the statute in a manner that upholds its constitutionality if that can be done in a way that is faithful to the text of the statute and the intent of Congress. If the court cannot avoid the issue, it should only strike down a statute if it is clearly shown that Congress has exceeded its authority under the Constitution or acted contrary to a provision of the Constitution.

21. What weight should a judge give legislative intent in statutory analysis?

Response: Generally speaking, binding precedent requires a court to first attempt to ascertain the intent of the legislature by examining the actual text of the statute, as well as its structure. If the plain meaning of the text is clear, then that settles the issue because the best evidence of what the legislature intended comes from the words that it used in the statute. However, in those circumstances where the plain meaning of the text of the statute is ambiguous, the court can examine the legislative history to aid its construction of the statutory text.

22. Do you believe that a judge's gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.

Response: No. The outcome of a case should depend upon an impartial application of the law to the facts.

23. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: I would be guided by the precedent of the Supreme Court and the D.C. Circuit when ruling on any constitutional issue. My understanding is that those precedents generally have not relied upon foreign law, except in very limited circumstances, such as an occasional reference to English common law in discerning the scope of the Fourth Amendment, or to foreign law to confirm the Court's own interpretation of the Eighth Amendment prohibition against cruel and unusual punishment.

24. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: I believe that my record as a judge for the past two and half years has shown that I am fair and that I make my rulings based solely on the law and the facts and without regard to my personal views, if any.

25. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: D.C. Circuit precedent should only be overruled by the Court of Appeals sitting en banc, and generally only when that precedent is contrary to an intervening decision of the Supreme Court or has proven itself to be thoroughly unworkable in application.

26. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees".

a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the nature of the communications.

Response: No.

b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.

Response: No.

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

Response: After receiving the questions from a representative from the Justice Department's Office of Legal Policy, I reviewed them, performed some research, prepared draft responses and sent those drafts back to the Justice Department. On September 22, 2013, I spoke to a representative from the Office of Legal Policy. I subsequently revised and finalized my responses and sent them to the Justice Department for submission to the Committee.

28. Do these answers reflect your true and personal views?

Response: Yes.

Questions for the Record
Senator Ted Cruz

Responses of the Honorable Robert Leon Wilkins
Nominee, United States Circuit Judge for the D.C. Circuit

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response**:** My judicial philosophy, and what I have tried to do since becoming a District Court Judge, is to be mindful of judicial restraint. In order to do that, I train my focus on the case in front of me, and keep it there, rather than reaching out and trying to address other issues. As part of this, it is also very important to me not to enter a case with any preconceived notions, nor allow such notions to impact my decision making. Instead, I believe that it is my job to let the facts and the law point to the correct outcome, wherever that path leads. I have not studied the Justices sufficiently to know which of them may share this same philosophy exactly.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: I follow the precedent of the Supreme Court and the D.C. Circuit when interpreting the Constitution. Those precedent have interpreted various provisions of the Constitution using various originalist methods, such as by examining the original intent of the framers of the provision, see *Boumediene v. Bush*, 553 U.S. 723, 739–45 (2008), or by examining what courts and members of the public understood a particular provision to mean at or near the time of drafting, see *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008), or by extrapolating governing principles from the original text, such as the "reasonable expectation of privacy" test used as an aid to interpret the scope of the Fourth amendment, see *United States v. Jones*, 132 S.Ct. 945, 949-50 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring)).

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: As a member of an inferior court, I have no authority to overrule Supreme Court precedent. With respect to D.C. Circuit precedent, it should only be overruled by the Court of Appeals sitting en banc, and generally only when that precedent is contrary to an intervening decision of the Supreme Court or has proven itself to be thoroughly unworkable in application.

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response**:** The Supreme Court in *Garcia* explained, in part by referencing several passages in the Federalist Papers just before the quote you specifically asked about, that the Framers of the Constitution designed a system by which the Federal government would protect the sovereign interests of the States. *Garcia* is binding precedent on all lower courts. For that reason, if I am fortunate enough to be confirmed to the United States Court of Appeals for the District of Columbia Circuit, I would follow *Garcia*, along with all Supreme Court precedent.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response**:** The Supreme Court has struck down legislation passed by Congress and signed by the President because it sought to regulate non-economic conduct, holding that the laws exceeded Congress's Commerce Clause power. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Subsequent to *Morrison* and *Lopez*, Justice Scalia stated in a concurring opinion that "Congress may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring). Therefore, if a party before me ever challenges a statute with respect to Congress's authority under the Commerce Clause to regulate non-economic activity, I would undertake a searching review of the record and then carefully apply the relevant precedents.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: Recently, the Supreme Court reiterated that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). The Court has applied this principle in cases examining both executive orders, *see Youngstown*, 343 U.S. at 582-83, 585, and executive actions, *see Medellin*, 552 U.S. at 498, 524 (involving a presidential memorandum). If I am confirmed, I will adhere to the precedent established in these cases and any relevant cases handed down by the Supreme Court or the District of Columbia Circuit.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response**:** The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are . . . 'implicit in the concept of ordered liberty'" and "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). I would follow that case and other relevant precedent, and, as instructed by the Court, would "exercise the utmost care" when examining this question. *See id*. at 720.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response**:** The U.S. Supreme Court has held that laws and classifications based on race, alienage, and national origin are subject to "strict scrutiny" under the Equal Protection Clause. Strict scrutiny also applies to state laws that impermissibly infringe upon fundamental personal liberties secured by the U.S. Constitution. In addition, though not subject to "strict scrutiny," the Supreme Court has ruled that classifications based on gender and illegitimacy are also subject to a heightened level of scrutiny, commonly described as "intermediate scrutiny." *See, e.g.*, *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985).

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response**:** In 2003, the Supreme Court issued its decision in *Grutter v. Bollinger* and, as noted above, predicted that by 2028 (25 years later), "the use of racial preferences will no longer be necessary to further the interest" of promoting diversity in higher education. 539 U.S. 306, 343 (2003). It remains to be seen whether the Court's predictive judgment will hold true. If confirmed, though, I would faithfully apply the strict scrutiny test the Supreme Court recently reaffirmed in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), which requires that racial classifications be "narrowly tailored to further compelling governmental interests." *Id.* at 2419.