Senator Chuck Grassley
Questions for the Record

Responses of Carolyn B. McHugh
Nominee, United States Circuit Judge for the Tenth Circuit

1. **In one public meeting you attended, you noted there was a decline in public confidence in the courts as shown in national public opinion surveys. In what ways have you worked or will you work to increase public confidence in the courts?**

   Response: I serve as the Chairperson of the Utah State Courts Standing Committee on Judicial Outreach. In that capacity, I have organized and participated in educational efforts designed to improve the public image of the courts. These activities include hosting public forums where members of the community can address specific questions to the judiciary and court representatives, speaking in Utah's public schools on topics related to the structure of the United States Constitution and the role of the Judicial Branch, and creating written and visual information about the court system. I have also planned and implemented programs to celebrate the federal Constitution and this country's adherence to a system of laws. As a member of Utah's Constitutional Commission on Civic and Character Education, I have worked to encourage Utah's teachers to incorporate lesson plans designed to prepare Utah's citizens for informed and civil participation in government. If confirmed, I would continue my efforts to educate the public about our constitutional republic and the unique role of the courts in it.

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

   Response: My judicial philosophy in applying the Constitution to modern statutes and regulations is to exercise my judgment fairly and impartially, and to avoid imposing my will on the outcome. If confirmed, I will apply Constitutional provisions according to the text and any controlling precedent. In the event that the issue cannot be resolved by a careful reading of the text and controlling precedent, I will consider the original meaning of the Constitutional provision at issue. *See United States v. Jones*, 132 S.Ct. 945, 949-50 (2012) (examining original public meaning and determining that the Fourth Amendment to the United States Constitution protects against physical trespass by public officials); *District of Columbia v. Heller*, 554 U.S. 570, 581-92 (2008) (examining original public meaning and determining that the Second Amendment to the United States Constitution confers an individual right to bear arms); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (examining original public meaning and determining that the Sixth Amendment to the United

States Constitution affords a criminal defendant the right to cross examine all of the government's testimonial witnesses).

3. **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: A judge should not base a legal decision on her personal opinions. As an appellate judge for the State of Utah, I have not based a legal decision on my personal opinions and I would not do so if confirmed to the Tenth Circuit. However, I am bound and would continue to be bound if confirmed, by controlling precedent of the United States Supreme Court. In interpreting the prohibition against "cruel and unusual" punishment in the Eighth Amendment, the Supreme Court has stated that it holds "repugnant . . . punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *See Miller v. Alabama,* 132 S.Ct. 2455, 2463 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). To determine those "evolving standards," the Supreme Court has sometimes considered the number of states that have authorized the death penalty as punishment for the particular crime. *See Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (noting that Georgia was the only state that authorized the death penalty for rape of an adult woman and holding that the imposition of the death penalty under those circumstances is unconstitutional). I am not aware of any other circumstances in which the Supreme Court has looked to evolving standards of decency to interpret provisions of the Constitution. If confirmed, I will follow this precedent.

4. **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: The United States Supreme Court has explained that while the Establishment Clause and Free Exercise Clause "express complementary values, they often exert conflicting pressures." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Despite that tension, "there is room for play in the joints" between the Clauses which leaves "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* For example, in *Cutter* the Supreme Court held that the increased protection of prisoners' religious rights in the Religious Land Use and Institutionalized Persons Act "fit[] within the corridor between the Religion Clauses . . . as permissible accommodation of religion that is not barred by the Establishment Clause." *Id.*, at 720.

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

Response: The United States Supreme Court has held that capital punishment is constitutional in certain circumstances. *See generally Gregg v. Georgia*, 428 U.S. 153 (1976). If confirmed, I will follow this precedent.

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

Response: The United States Supreme Court has recognized constitutional privacy interests in various contexts. *See*, *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) (internal quotation marks omitted) (holding that search involving "a compelled physical intrusion beneath [suspect's] skin and into his veins to obtain a sample of his blood for use as evidence" constitutes "an invasion of bodily integrity [which] implicates an individual's most personal and deep-rooted expectations of privacy"); *Kyllo v. United States*, 533 U.S. 27, 34-40 (2001) (holding that thermal imagining of the interior of a home violates the prototypical privacy interest protected by the Fourth Amendment); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (identifying the liberty interests in the Due Process Clause, including the right to privacy); *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) ("The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion."); *Id.*, at 361 (Harlan, J., concurring) (reasoning that a Fourth Amendment search occurs when the government violates a subjective expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a right of marital privacy); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

a. Where is it located?

Response: The Supreme Court has held that the First, Third, Fourth, and Fifth Amendments to the United States Constitution protect privacy interests. *See* Answer to Question 6.

b. From what does it derive?

Response: The United States Supreme Court has held that privacy rights derive from the First, Third, Fourth, and Fifth Amendments. *Id.*

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

Response: The First Amendment protects privacy in communications and associations. The Third and Fourth Amendments implicate a reasonable expectation of privacy in the home, and the Fourth Amendment further protects a privacy interest in one's person and things. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that the Due Process Clause found in the Fifth Amendment protects substantive rights and liberties which are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither

liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks omitted). The privacy rights protected by the Due Process Clause of the Fifth Amendment include the "right[] to marry," the right "to have children," the right "to direct the education and upbringing of one's children," the right "to marital privacy," the right "to use contraception," the right "to bodily integrity," and the right "to abortion." *Id.*, at 720. However, the Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* (internal quotation marks omitted). If confirmed, I will follow this precedent.

7. 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: If confirmed, I will decide cases based on the text of the Constitutional provision at issue and controlling precedent from the Supreme Court and the Tenth Circuit. I will also be bound by the holding of *Griswold v. Connecticut*, 381 U.S. 479 (1965), as refined by later decisions of the Supreme Court.

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

Response: A judge should begin any analysis of a constitutional provision by examining the text and controlling precedent. If further inquiry is required, she should consider the history, tradition, and purpose of the provision with due regard to the context of the document as a whole. *See generally District of Columbia v. Heller*, 554 U.S. 570 (2008) (considering original meaning of the Second Amendment).

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

Response: The United States Supreme Court has not settled the question of the appropriate scrutiny to be applied in reviewing Second Amendment challenges to a State or Federal gun law. *See District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (holding that a ban of handguns in the home would fail constitutional muster under any standard of scrutiny). After

Heller was issued, the Tenth Circuit applied intermediate scrutiny to a Second Amendment challenge to federal legislation. *See United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). If confirmed, I would be bound by the prior decisions of the Tenth Circuit in the absence of contrary precedent from the Supreme Court.

9. 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: A judge must reach a decision in a case based on the evidence in the record. However, it is the responsibility of the judge to research the controlling law whether or not the parties have called it to the attention of the court.

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

Response: A judge should base her decision on psychological and sociological studies when those studies are part of the record and relevant to an issue in the case. For example, such information may be relevant to evaluating the admissibility of expert testimony. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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

Response: I would define an "activist judge" as one who imposes his will on the outcome of the decision based on personal opinions or preferences or one who decides issues that are not properly before the court.

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

Response: I believe the most important attribute of a judge is humility. A humble judge will naturally accept the limitations of her role in our system of government, apply what the law is rather than what she wants it to be, be respectful of other persons and ideas, and work diligently to understand the arguments of the parties and the controlling law. Every day I serve as an appellate judge for the State of Utah, I am humbled by the trust placed in me by the Governor and the Utah Senate.

12. 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: Yes, I believe that collegiality is an important element of the work of a Circuit Court. If confirmed, I will continue the practices I have employed working on panels of the Utah Court of Appeals. I will: (1) welcome the insights and contrary views offered by a colleague during discussions about a case; (2) review my own positions in light of my colleague's perspective; (3) make modifications that are consistent with my judgment to address my colleague's concerns; and (4) if still at odds with my colleague, write a decision that respectfully disagrees with my colleague's position.

13. 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 impartial, diligent, and respectful. I have tried to exhibit these attributes in my interactions with the parties, counsel, court staff, and my colleagues during my eight years as a member of the Utah Court of Appeals.

14. In general, Supreme Court precedents are binding on all lower federal courts, and Circuit Court precedents are binding on the district courts within the particular circuit. 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.

15. 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: During my service as an appellate judge for Utah, I have had many opportunities to address issues of first impression. In most instances those issues have involved the interpretation of a written document, including the state or federal constitutions, a statutory provision, a term of a contract, or a rule. My practice in resolving these issues is to read carefully the language used in the document, giving those words their ordinary and common meanings. I also consider the provision at issue in the context of the document as a whole and avoid any interpretation that will render other provisions of the document superfluous. In most instances, this approach is effective in resolving the issue. When it is not, I have looked to related provisions of the statutory code and decisions interpreting those provisions to determine whether the reasoning can be applied analogously to the issue of first impression before the court. I have also looked to decisions on the issue from jurisdictions that are not binding, and considered whether the rationale for any conclusion reached by those courts on the issue is persuasive.

16. 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: If confirmed, I will be bound to follow controlling precedent of the United States Supreme Court and the Tenth Circuit irrespective of whether I agree with it.

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

Response: The federal courts must uphold properly adopted legislation unless Congress acts beyond the scope of its enumerated powers or improperly encroaches upon powers reserved to the States or the rights retained by the People.

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

Response: A judge should determine the meaning of a statute based on its actual language and any controlling precedent interpreting it. Only when the text is subject to two or more plausible interpretations and there is no precedent on point should the judge attempt to discern the legislative intent.

19. 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: I do not believe that a legal decision reached by a judge should be influenced by her gender, ethnicity, or other demographic factors. I also believe that a judge should guard against such factors influencing her decision.

20. 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: With the exception of English common law, no.

21. 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: The best assurance I can give the Committee and future litigants that I will put aside my personal views and be fair to all who appear before me is the body of written decisions I have authored during my eight-year tenure as a member of the Utah Court of Appeals. I believe those decisions reflect my fidelity to the law and my impartiality.

22. 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: If confirmed, I will be bound by the prior decisions of the United States Supreme Court and of the Tenth Circuit. Decisions of a prior panel of the Tenth Circuit may be overruled only by the court sitting *en banc* or if the prior decision has been superseded by a decision of the United States Supreme Court. Rule 35 of the Federal Rules of Appellate Procedure provides that a majority of the active members of the circuit court may order *en banc* consideration of a matter "to secure or maintain uniformity of the court's decisions" or "to address a question of exceptional importance." Tenth Circuit rule 35.1 specifies that *en banc* consideration of matters is disfavored and should be permitted only in extraordinary circumstances. If confirmed, I will follow these standards.

23. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: As an appellate judge for the state of Utah, I first read the briefs filed by the parties, any appendices to those briefs, and the trial court decision that is the subject of the appeal. If the issue arises out of a written document, I carefully examine the language used in the document and the operation of the relevant provision in the context of the document as a whole. In addition, I familiarize myself with the relevant legal authorities and the record. Next, I listen to the arguments of counsel and in particular, to their responses to the questions from the panel. In conference, I am open to the insights of the other panel members and express my own opinions and concerns. During the drafting process, I refine my analysis and reexamine issues when warranted. Ultimately, I decide the case based on the application of the law to the facts.

24. 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 subject matter 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.

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

Response: I received the questions from the Office of Legal Policy in the Department of Justice on Wednesday, October 2, 2013. I reviewed the questions and drafted responses. I submitted those answers to an attorney in the Office of Legal Policy for review. I then made some revisions and finalized my answers for submission to the Committee.

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

Response: Yes.

Questions for Judicial Nominees
Senator Ted Cruz

Responses of Carolyn B. McHugh
Nominee, United States Circuit Court for the Tenth Circuit

Judicial Philosophy

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

Response: My judicial philosophy is to exercise my judgment fairly and impartially in applying the law to the facts of the case or controversy before me, and to avoid imposing my will on the outcome by applying not what the law is, but what I want it to be. I believe that Justice John Marshall Harlan II implemented this philosophy during his tenure on the United States Supreme Court.

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: When the text itself is not sufficient to resolve an issue of constitutional interpretation, the United States Supreme Court has examined the original public meaning of the provision. *See United States v. Jones*, 132 S.Ct. 945, 949-50 (2012) (examining original public meaning and determining that the Fourth Amendment to the United States Constitution protects against physical trespass by public officials); *District of Columbia v. Heller*, 554 U.S. 570, 581-92 (2008) (examining original public meaning and determining that the Second Amendment to the United States Constitution confers an individual right to bear arms); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (examining original public meaning and determining that the Sixth Amendment to the United States Constitution affords a criminal defendant the right to cross examine the government's testimonial witnesses). If confirmed, I will follow this precedent.

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: If confirmed, I will be bound by the decisions of the United States Supreme Court and of the Tenth Circuit. Decisions of a prior panel of the Tenth Circuit may be overruled only by the court sitting *en banc* or if the prior decision has been superseded by a decision of the United States Supreme Court. *En banc* consideration of matters is disfavored and should be permitted only in situations of exceptional importance in order "to secure or maintain uniformity of the court's decisions" or "to address a question of exceptional importance." *See* Fed. R. App. P. 35; U.S.Ct. of App. 10th Cir. R. 35.1. I will follow these rules if confirmed.

Congressional Power

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: If confirmed, I will be bound by the Supreme Court's decision in *Garcia* and any subsequent decisions clarifying or modifying its holding. The Tenth Amendment to the United States Constitution reserves to the states all rights that are not expressly granted to the federal government. The Constitution also provides a secondary safeguard by assigning the judicial branch the responsibility to invalidate federal laws if Congress exceeds the limits of its delegated powers and improperly encroaches on states' rights. *See Printz v. United States*, 521 U.S. 898 (1997) (invalidating Brady Handgun Violence Prevention Act's requirement that the "chief law enforcement officer" of each local jurisdiction conduct background checks on prospective handgun purchasers as infringing upon state sovereignty in violation of the Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992) (invalidating Low-Level Radioactive Waste Policy Act's "take title" provision, requiring states to accept ownership of interstate waste or regulate according to instructions of Congress, as infringing upon state sovereignty in violation of the Tenth Amendment).

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

Response: The United State Supreme Court has held that the Commerce Clause and Necessary and Proper Clause allow Congress to regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities having a substantial relation to" or that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (holding that Congress exceeded its Commerce Clause power by criminalizing the possession of firearms in a school zone because such conduct was not an economic activity substantially affecting interstate commerce). In *United States v. Morrison*, 529 U.S. 598 (2005), the Supreme Court emphasized the non-economic nature of the activity in holding that the Commerce Clause did not provide Congress with authority to enact the civil remedy provisions of the Violence Against Women Act. *See id.* at 609-19. If confirmed, I will follow these precedents.

Presidential Power

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

Response: In *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585-87 (1952), the United States Supreme Court explained that "The President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself." Justice Jackson's concurring opinion in *Youngstown* sets forth a three-part analytical framework which remains the

touchstone for determining the constitutionality of executive action or executive orders. *See id.* at 635 (Jackson, J., concurring). *See also Medellin v. Texas*, 552 U.S. 491, 523-29 (2008) (applying "Justice Jackson's familiar tripartite scheme" from *Youngstown* and holding that President did not have authority to transform terms of non-self-executing treaty into domestic law); *Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 678 (1981) (applying Justice Jackson's tripartite scheme from *Youngstown* and upholding executive action nullifying attachments, transferring Iranian assets, and suspending claims in American courts). If confirmed, I will follow these precedents.

Individual Rights

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court held that the Due Process Clause protects substantive rights and liberties which are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks omitted). The fundamental substantive rights protected by the Due Process Clause include the "right[] to marry," the right "to have children," the right "to direct the education and upbringing of one's children," the right "to marital privacy," the right "to use contraception," the right "to bodily integrity," and the right "to abortion." *Id.* at 720. The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* (internal quotation marks omitted). If confirmed, I will follow this precedent.

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

Response: The United States Supreme Court has identified three levels of scrutiny for assessing the constitutionality of legislation challenged under the Equal Protection Clause: strict scrutiny; intermediate scrutiny; and the rational basis standard. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439-41 (1985). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. However, classifications based on race or ethnic background must meet strict scrutiny. *See Fisher v. University of Texas*, 133 S.Ct. 2411, 2417 (2013) (remanding for reconsideration of constitutionality of university's consideration of race in admission decisions under strict scrutiny standard). Strict scrutiny is also appropriate when the legislation "impinge[s] on personal rights protected by the Constitution." *Cleburne*, 473 U.S. at 440. An intermediate level of heightened scrutiny is imposed for classifications based on gender or illegitimacy. *Id.* at 441. If confirmed, I will follow this precedent.

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: I do not have a personal opinion on this issue. If confirmed, I will follow the Supreme Court's precedent in *Grutter*, including its application of strict scrutiny analysis to all racial classifications imposed by government. *See Gutter v. Bollinger*, 539 U.S. 306, 326 (2003). *See also Fisher v. University of Texas*, 133 S.Ct. 2411, 2417 (2013) (remanding for reconsideration of challenge to university's use of racial classifications in admission decisions under strict scrutiny and instructing that, "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.").