

**Nomination of Chad Andrew Readler to the U.S. Court of Appeals for the Sixth
Circuit Questions for the Record
October 17, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

Lower court judges must follow binding Supreme Court precedent. As the Supreme Court has ordered, lower courts must leave to the Supreme Court “the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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

Against the settled backdrop that Supreme Court precedent is binding on all lower courts, there may be occasion for lower courts to question how a precedent of the Supreme Court applies to certain factual contexts, or how a precedent should be applied in a setting unanticipated by the Supreme Court, with an eye toward highlighting issues for possible Supreme Court review. It is not unusual for the Supreme Court to accept cases for review in that context. Nonetheless, questioning precedent should be the rare exception, not the rule.

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

In the Sixth Circuit, decisions from a panel of judges bind all future judges considering the same or similar issues, unless a panel decision is overruled by the en banc court or by the Supreme Court. *United States v. Camp*, 903 F.3d 594, 597 (6th Cir. 2018); *see also* Sixth Circuit Rule 32.1(b). The established rule is that en banc review is reserved for exceptional cases. Fed. R. App. P. 35(a).

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

As articulated in Supreme Court precedent, the Court considers a number of factors in deciding whether to overturn its own precedent, including whether the question before the Court is statutory or constitutional, whether the precedent has given rise to significant reliance interests, whether the precedent was rightly decided and has been consistently applied, and whether the precedent has been eroded by other related decisions. *See, e.g., South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018).

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?

All Supreme Court precedents are binding on the appellate and trial courts. Justice Gorsuch is correct that *Roe v. Wade* has survived many attempts to overturn the decision.

b. Is it settled law?

As an inferior court judge, I would treat *Roe v. Wade* and all other Supreme Court precedent as settled law.

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

Yes, as an inferior court judge, I treat *Obergefell* and all other Supreme Court precedent as settled law.

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* Justice Stevens 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 as a response to the 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?

Justice Stevens’ position was articulated in his opinion dissenting from the majority opinion in *Heller*. As an inferior court judge, I am bound to apply the holding in *Heller*’s majority opinion.

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

Heller held that “the right secured by the Second Amendment is not unlimited,” and further explained that nothing in the 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.” *District of Columbia v. Heller*, 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?

The various opinions in the *Heller* decision disagreed over the scope and applicability of prior decisions addressing whether the Second Amendment confers an individual right to keep and bear arms.

5. During your nominations hearing, you emphasized that the Civil Division’s role is not to design or implement policy, but rather to choose how best to defend the Administration’s policies in courts if those policies are challenged.

a. In your role as Acting Assistant Attorney General for the Civil Division, have you ever conceived of, recommended, or advocated for a particular legal position or a specific legal argument that the Division ultimately adopted? If so, please describe.

As the Acting Assistant Attorney General for the Civil Division, I would routinely consult with lawyers in the Civil Division regarding the particular legal positions to adopt as part of our pending litigation, as we together defended our clients’ interests. For some pending matters, those discussions would also include members of other litigating divisions at the Department or members of Department leadership.

b. In your role as Acting Assistant Attorney General for the Civil Division, have you ever recommended that the Division should not take a particular litigation position or should not make a specific legal argument that the Division nevertheless adopted? If so, please describe.

Given the volume of cases in the Civil Division, many issues are decided without input from the Assistant (or Acting Assistant) Attorney General. For matters where the Assistant Attorney General is consulted, please see the answer above. With respect to matters where the Department’s leadership is also consulted, I would refer the Committee to the August 9, 2018 letter submitted to the Committee on my behalf by Deputy Attorney General Rosenstein: “Our leadership team relies on Mr. Readler for his wise advice and counsel, and we benefit greatly from his intellect and experience. We also appreciate his willingness to accept the direction and decisions of Department leadership about challenging legal matters when the right answer is unclear.”

6. This past June, several states — led by Texas — argued in a case called *Texas v. United States* that the Affordable Care Act (ACA) is unconstitutional. Although led by the states, the Justice Department is also involved in the case, as the Department has refused to

defend the individual mandate of the ACA against Texas's challenge.

In a brief that bears your name, the Justice Department argued that the ACA's coverage requirement for preexisting conditions should be struck down if the individual mandate is found to be unconstitutional. Your brief turned on the question of severability and argued that the requirement that insurers cover individuals with preexisting conditions is not severable from the individual mandate. Therefore, according to your brief, if the individual mandate is found unconstitutional, the requirement that insurers cover those with preexisting conditions must also be struck down. (Federal Defendants' Memorandum in Response to Plaintiffs' Application for Preliminary Injunction, *Texas v. United States* (N.D. Tex. June 7, 2018))

a. What in the enactment of the Tax Cuts and Jobs Act of 2017 signaled that Congress intended to strike down the coverage requirement for those with preexisting conditions?

This matter is currently in litigation. The position of the Department of Justice is articulated in the June 7, 2018 letter from Attorney General Sessions to Speaker Paul Ryan, as well as in the briefs filed by the Department in the *Texas v. United States* case.

b. What is the foundation of your argument that the guaranteed-issue provision is not severable from the individual mandate?

Please see the answer above.

c. Why does the repeal of the financial penalty for failure to comply with the individual mandate necessitate the repeal of the preexisting conditions coverage requirement?

Please see the answer above.

d. Under longstanding policy, the Justice Department will defend the constitutionality of any statute so long as a reasonable argument can be made in its defense. On what basis did you conclude that no reasonable argument could be made in defense of the ACA and, specifically, the ACA's guaranteed-issue provision?

Please see the answer above. With respect to the question regarding any obligation by the Department in addressing severability issues impacting the guaranteed-issue provision, the Attorney General explained in his June 7, 2018 letter to Speaker Ryan that "[t]his question of statutory interpretation does not involve the ACA's constitutionality and therefore does not implicate the Department's general practice of defending the constitutionality of federal law."

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may

be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

7. In January of this year, you submitted a brief asking the Supreme Court to overturn a nationwide injunction issued by a federal district court in California. That injunction maintained the Deferred Action for Childhood Arrivals (DACA) Program. Your brief argued that the Department of Homeland Security had the unilateral authority to rescind DACA so long as the Secretary determined the program was unlawful. Further, you argued that such a decision by the Secretary was not reviewable by a court, claiming that such a decision “falls well within the types of agency decisions that traditionally have been understood as ‘committed to agency discretion.’” (Petition for a Writ of Certiorari before Judgment, *U.S. Department of Homeland Security v. Regents of the University of California* (Jan. 18, 2018))

What makes this decision not reviewable by a court?

This matter is currently in litigation. The Department’s position on these issues is articulated in numerous briefs in cases pending in California, Maryland, New York, and Texas.

8. In November of 2017, your name appeared on a petition for certiorari submitted by the United States in *Hargan v. Garza*. Your brief argued that “J.D. has no constitutional right to an abortion,” and specifically premised this argument on the fact that “J.D. is not a U.S. citizen” and “is not a permanent resident, legal or otherwise.” (Petition for a Writ of Certiorari, *Hargan v. Garza* (Nov. 2017))

a. Does Texas state law differentiate between minor citizens or lawful permanent residents on the one hand and minor non-citizens on the other with respect to the requirements for obtaining consent to have an abortion?

The Solicitor General’s office has primary responsibility for matters in the Supreme Court. As I explained at my hearing, the Department did not take the position in *Garza* that “J.D. has no constitutional right to an abortion.” The language quoted in the question above appears to come from D.C. Circuit Judge Henderson’s dissenting opinion in the litigation. The Supreme Court’s per curiam order in the case correctly notes that “the Government had assumed for purposes of this case that Doe had a constitutional right to an abortion.” *Azar v. Garza*, No. 17-654, Op. at 2 (June 4, 2018).

Otherwise, this matter is currently in litigation, and the Department’s position on these issues is articulated in numerous briefs filed in the litigation.

b. Does *Roe v. Wade* distinguish between a citizen or lawful permanent resident on the one hand and a non-citizen on the other with respect to the right to

obtain an abortion?

Please see above.

c. On what basis did you conclude that J.D.'s citizenship status was determinative as to her right to obtain an abortion?

Please see above.

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

9. In *Stockman v. Trump*, you submitted a brief that argued that “the military’s longstanding accessions policy [prohibiting the recruitment of transgender individuals] rests on the reasonable concern that at least some transgender individuals suffer from medical conditions that could impede the performance of their duties.” You also argued that expenses associated with “transition-related care” for transgender individuals serving in the military would cut into the military’s ability to pay for “other endeavors [that] would more effectively accomplish its ‘primary business’ — *i.e.*, ‘to fight or be ready to fight wars should the occasion arise.’” (Defendants’ Notice of Motion and Motion to Dismiss, *Stockman v. Trump*, No. 5:17-cv-1799 (C.D. Cal. Oct. 23, 2017))

a. What evidence did you have to conclude that “at least some transgender individuals” seeking to join the military “suffer from medical conditions that could impede the performance of their duties”? What was the basis for this statement?

These matters are at issue in pending litigation in numerous courts around the country. The Department has filed numerous briefs in those cases articulating its legal position. Related issues are also addressed in the February 22, 2018 Memorandum from the Secretary of Defense and the Department of Defense Report and Recommendations on Military Service by Transgender persons.

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

- b. Did this argument reflect the conclusions of civilian leadership within the Defense Department? If yes, please provide those conclusions.**

Please see above.

- c. Did this argument reflect the conclusions of military leadership within the Defense Department? If yes, please provide those conclusions.**

Please see above.

- d. On what basis did you conclude that expenses associated with “transition-related care” would negatively impact the military’s ability to “fight or be ready to fight wars should the occasion arise”?**

Please see above.

- e. Did this argument reflect the conclusion of civilian or military leadership within the Defense Department?**

Please see above.

10. While in private practice at Jones Day, you assisted on an amicus brief submitted by the Buckeye Institute and the Judicial Education Project in a voting rights case, *Northeast Ohio Coalition for the Homeless v. Husted*. At issue were changes to Ohio’s voting laws that required the addresses and birthdates on voting records to perfectly match the same information on ballots submitted by absentee or provisional voters. A district court found that this imposed an undue burden on the right to vote and disparately impacted minority voters. In urging the Sixth Circuit to overturn the district court’s decision, you argued that “ordinary race-neutral voting regulations do not ‘deny or abridge’ anyone’s right to vote as long as they impose nothing more than the ‘usual burdens of voting.’” (Brief of the Buckeye Institute and Judicial Education Project as Amici Curiae in Support of Defendants-Appellants and Reversal, *Northeast Ohio Coalition for the Homeless v. Husted* (6th Cir. 2016))

- a. On what basis did you conclude that the Ohio laws “impose[d] nothing more than the ‘usual burdens of voting’”? What evidence supported this argument?**

I participated in the *Northeast Ohio Coalition* litigation as an advocate for clients—the Buckeye Institute and the Judicial Education Project—to express their views to the court as amici participants. The clients had an interest in election integrity issues addressed in the case, as explained in the amicus brief. I faithfully advanced the arguments favored by my clients. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge. *See* Canons 2 and 3 of the Code of Conduct for United States Judges.

b. What consideration should be given to an assessment that a law has a disproportionate impact on minority voters?

As an inferior court judge, I would faithfully apply Supreme Court precedents that govern voting and election issues. Otherwise, please see the answer above.

11. In a 1998 law review article, you argued against anti-discrimination ordinances enacted by local governments. The article specifically referred to protections on the basis of sexual orientation and marital status, and you concluded that “local regulations have little impact on employment discrimination, and any impact they have is not beneficial to employees, employers, or local governments.” You further stated that “local governments should be taken out of the business of regulating private employment. . . . The federal government . . . should be left to decide what regulations are best applied to private employers.” (*Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J. L. REF. 777 (1998))

a. On what basis did you conclude that “local regulations have little impact on employment discrimination, and any impact they have is not beneficial to employees, employers, or local governments”? What evidence did you have to support this claim?

As explained in the Note, I conducted a survey of numerous local officials charged with enforcing local anti-discrimination laws. Those conversations revealed that well-meaning anti-discrimination laws were, as of 1998, largely ineffective due to the lack of complaints filed under the law, lack of enforcement (sometimes due to a lack of resources), lack of awareness by employers and counsel, and the failure of many employers to modify their practices to account for local law.

b. If local governments should be taken out of the business of regulating private employment, does that mean they cannot regulate zoning? Environmental standards?

The Note concluded that “the federal government is the best governmental body to regulate discrimination in private employment.” (Pg. 809). The remaining issues identified in this question were not addressed in the Note, which focused exclusively on anti-discrimination ordinances. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge, *see* Canons 2 and 3 of the Code of Conduct for United States Judges, or on political and policy questions, *see* Canon 5.

12. According to your Questionnaire, between 2014 and 2017, you were a member of two private clubs — the Kit-Kat Club and the Review Club — that limit membership to men.

a. What is the Kit-Kat Club? What is its purpose and why did you join?

The Kit-Kat Club is a century-old essay or “book” club based upon an 18th century English literary club. The Club does not own a facility or charge membership dues.

It meets seven times a year over dinner. For each dinner, a member presents an essay written in anticipation of the dinner. The Club is not a “networking” club; member essays cannot address a member’s business or professional interests. Essays typically address topics like history, culture, literature, education, philosophy or the arts. The Club is limited to 39 members. Members come from a variety of professional communities, including medicine, the arts, teaching, non-profit, law, and community development. Most members are age 55 or over, with some in their 70’s and 80’s. I was the youngest member when I joined, which I did to pursue interests outside of my daily law practice and career at a large law firm.

b. At the time you joined the Kit-Kat Club, were you aware that it limited membership to men?

Yes.

c. What is the Review Club? What is its purpose and why did you join?

Over a century ago, a resident of Columbus gathered over dinner with friends to share highlights of his recent trip to Europe. That meeting inspired the “Review Club,” which today meets over dinner about six times a year, with each dinner hosted by a different member. The Club does not own a facility or charge membership dues. The Club also does not have any membership rules. I do not know who has attended dinners over the last century as there are no attendance records. The handful of dinners I attended were attended by men only except when the dinner speaker was a woman. The speakers addressed a variety of topics, from medicine to community issues to current events. The Club was not a “networking” club. The average age of the attendees was about 70, and I was the youngest attendee at nearly all of the dinners I attended. I was invited to participate in the Club dinners by a 90-year old World War II veteran I respected and whose company I enjoyed.

d. At the time you joined the Review Club, were you aware that it limited membership to men?

The Review Club does not have any membership rules.

e. Why did you end your membership in both of these clubs in 2017?

I was a member of each club for less than three years. I resigned the clubs in early 2017 once I began working in Washington, D.C.

f. During the three years that you were a member of each, did either club have African-American or Latino members?

The Kit-Kat Club had African-American or Latino members. The Review Club did not have membership rules and did not record the names of members from year to year.

13. On your Senate Questionnaire, you indicate that you have been a member of the Federalist

Society since 2001. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

- a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?**

Most of my involvement with the Federalist Society has been with the Columbus Lawyers Chapter. Our Chapter organizes six lunches a year where speakers debate local and national issues of interest. I did not write the language quotes above from the Federalist Society's website, nor have I had a conversation with anyone at the Federalist Society to discuss the language.

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

Please see the answer above.

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

Please see above.

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

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

During my interview in 2017 with officials from the Department of Justice and the White House, we discussed a number of legal topics, although I cannot recall the

precise topics or questions. I do recall a general discussion regarding threshold rules governing administrative law issues as articulated in Supreme Court precedent.

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

No, except as noted above.

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

The Supreme Court has articulated standards governing how courts review issues relating to administrative law and decisions of administrative agencies. Under Canons 2 and 3 of the Code of Judicial Conduct, it would not be appropriate for me to express my personal views on subjects relating to administrative law, but as an inferior court judge I would faithfully apply Supreme Court precedent.

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

Under Supreme Court precedent, “[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil v. Allapattah Servs.*, 545 US 546, 568 (2005).

16. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

My answers are my own. In formulating my answers, I consulted with lawyers at the Justice Department, including with respect to some of the pending litigation matters addressed in these questions. I also solicited feedback from other lawyers at the Department of Justice.

Written Questions for Chad Readler
Nominee for the U.S. Court of Appeals for the Sixth Circuit
Submitted by Senator Patrick Leahy
October 9, 2018

1. During Donald Trump’s presidential campaign he called for a “total and complete shutdown of Muslims entering the United States.” After taking office, President Trump, according to Rudy Giuliani and other top officials, frequently called his executive order the “Muslim ban.” He told the *Brody File* in an exclusive interview that Christian refugees from Muslim-majority countries will be given preference. You worked on the case *Trump v. Hawaii*, the third iteration of Trump’s legal effort to bring his campaign proclamation into reality.
 - a. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These two provisions – the Establishment and Free Exercise Clauses, have been interpreted in numerous decisions from the Supreme Court, and I would faithfully apply those precedents if confirmed to be a judge.

In *Trump v. Hawaii*, the Supreme Court “review[ed] a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.” 138 S.Ct. 2392 (2018). Applying rational basis scrutiny, the Court “up[held] the policy” because “it c[ould] reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.*

This matter is still in litigation. The position of the Department of Justice is articulated in numerous briefs. As a lawyer in the Civil Division, it would be improper for me to comment on issues related to pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

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

The Supreme Court in *Hawaii* held the following:

“[W]e cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which ‘are delicate, complex, and involve large elements of prophecy.’ *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); *see also Regan v. Wald*, 468 U.S. 222, 242–243 (1984) (declining invitation to conduct an “independent foreign policy analysis”). While we of course ‘do not defer to the Government’s reading of the First Amendment,’ the Executive’s evaluation of the underlying facts is entitled to

appropriate weight, particularly in the context of litigation involving ‘sensitive and weighty interests of national security and foreign affairs.’”

Otherwise, please see the answer above.

- c. **When people arrive at our borders, they give up certain rights. For example, under current caselaw, the government may have the right to conduct a warrantless search of their luggage. But do visitors give up all their rights, like the right to equal protection of the laws?**

The Supreme Court has addressed in numerous decisions the rights of those seeking entry into the United States. *See, e.g., Kerry v. Din*, 135 S. Ct. 2128 (2015); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Landon v. Plasencia*, 459 U.S. 21 (1982). As an inferior court judge, I would faithfully apply those decisions. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge. *See* Canons 2 and 3 of the Code of Conduct for United States Judges.

- d. **Can we ban a certain class of people from coming to the United States?**

In the Immigration and Naturalization Act, Congress afforded the Executive Branch the authority to impose certain entry restrictions on foreign nationals. *See generally Trump v. Hawaii*, 138 S.Ct. 2392 (2018). Otherwise, please see the answers above.

2. In Justice Kavanaugh’s confirmation hearing, he said he would “interpret the Constitution as written, informed by history and tradition.” In your confirmation hearing, you indicated to Senator Kennedy that the definition of a right is one that is deeply rooted in our history and tradition.

- a. **The authors of the Fourteenth Amendment, which guarantees the equal protection of the law and was adopted in 1868, almost certainly believed that racially segregated schools were permissible. Does that mean that *Brown v. Board of Education* was incorrectly decided?**

Brown is an important precedent of the Supreme Court, one that corrected the egregious wrongs of *Plessy v. Ferguson*. I am not aware of anyone who believes *Brown* was incorrectly decided, although legal scholars have debated the historical context surrounding the enactment of the 14th Amendment. *See, e.g.,* M. McConnell, The Originalist Case for *Brown v. Board of Education*, 19 Harvard Journal of Law and Public Policy 457 (1995). As an inferior court judge, I would faithfully apply the Supreme Court’s decision in *Brown* and its progeny.

- b. **If *Brown* was correctly decided, doesn’t that suggest that the meaning of the Constitution can change over time?**

I would faithfully apply the Supreme Court's body of case law addressing the application of the Constitution to modern-day issues. Beyond that, it would not be appropriate for me to comment on issues that could come before me as a judge. See Canons 2 and 3 of the Code of Conduct for United States Judges.

3. In your hearing you made reference to the *Hobby Lobby* case, in which then-Judge Gorsuch wrote, "All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability."

a. Do religious people have to follow laws that violate their consciences?

The interplay between government regulation and one's religious views has been the subject of numerous Supreme Court decisions, *see, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990), as well as federal regulation, including in the Religious Freedom Restoration Act. As in an inferior court judge, I would faithfully apply Supreme Court precedent interpreting the Free Exercise Clause, the RFRA, and other relevant authorities. Beyond that, it would not be appropriate for me to comment on issues that could come before me as a judge. See Canons 2 and 3 of the Code of Conduct for United States Judges.

b. Do they have to pay taxes if their tax money goes toward activities that violate their consciences?

Please see the answer above.

c. How do you decide which laws they can ignore and which ones they are required to follow?

Please see the answers above.

4. A study by the Williams Institute on Sexual Orientation Law and Public Policy found that 15 percent to 43 percent of gay and transgender workers have experienced some form of discrimination on the job. Ninety percent reported some form of harassment or mistreatment on the job due to sexual orientation. In your brief before the Second Circuit in *Zarda v. Altitude Express*, you argued that "[t]he essential element of sex discrimination under Title VII is that employees of one sex must be treated worse than similarly situated employees of the other sex, and sexual orientation discrimination simply does not have that effect." The Second Circuit rejected your arguments.

a. Since *Price Waterhouse, Inc. v. Hopkins* and *Oncale v. Sundowner Offshore Services, Inc.*, courts have generally held that if discrimination is based on the perception that a victim did not conform to gender norms, there was a cause of action under Title VII. Given your brief before the Second Circuit, what

assurances can you provide us that you will follow the guiding precedents in this area of the law?

For matters in the appellate courts, the Solicitor General's office must approve any positions taken by the United States. The position taken by the United States in *Zarda* is the same position the Civil Division has always held, including over past administrations, and career civil servant lawyers in the Civil Division worked on the brief. The positions taken in the United States' brief in *Zarda* are those of the United States. As an inferior court judge, I would faithfully apply all Supreme Court precedents. Further, there would be no place for discrimination in my chambers or courtroom.

5. In October 2017, you supervised the Justice Department's efforts to dismiss a suit challenging the Trump Administration's ban on the recruitment and accession of transgender individuals into the military, citing threats to unit cohesion and concern that "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties." The American Medical Association, the American Psychological Association, and the American Psychiatric Association each expressed opposition to this discriminatory ban. I worry this brief fits into a narrative of your work at DOJ undermining protections for LGBT individuals and racial minorities. **How does this ban, in your view, not single out a specific underrepresented group for discrimination, which would implicate footnote 4 in *United States v. Carolene Products*?**

These matters are at issue in pending litigation in numerous courts around the country. The positions taken in those cases are those of the United States and the Department of Justice. The Department has filed numerous briefs in those cases articulating its legal position. Related issues are also addressed in the February 22, 2018 Memorandum from the Secretary of Defense and the Department of Defense Report and Recommendations on Military Service by Transgender persons. As a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct. As a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court.

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

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

Judges must “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. If confirmed to the bench, I would faithfully adhere to these commands. I would also adhere to decisions of the Supreme Court, which have played a significant role in protecting the rights of all persons, including “discrete and insular” minorities, as that phrase is used in *Carolene Products*.

7. Many are concerned that the White House's denouncement in 2017 of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

Our constitutional structure of government separates governmental power between three coordinate branches of government, with the understanding that the branches will respect one another's constitutionally conferred powers. I have not had occasion to confront the specific issue of an executive branch official intentionally refusing to comply with a court order. If that question came before me as a judge, I would faithfully adhere to Supreme Court precedent, including those cases establishing the Judicial Branch's independence.

- (b) **What examples would you cite of proper limits on the assertion of executive power by the president?**

Please see the answer above. As a lawyer in the Civil Division, I have been involved with numerous cases, many of which are still pending, regarding challenges to executive action. It would therefore be improper for me to comment on the subject outside of court.

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

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

On many occasions, the Supreme Court has held that the Equal Protection Clause applies to gender-based classifications, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (applying “heightened scrutiny” and holding that VMI had not shown an “exceedingly persuasive justification” for its gender-biased admissions

policy). I would faithfully apply Supreme Court precedent if confirmed to serve on the court of appeals.

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

I do not know what Justice Scalia meant by this characterization. If confirmed to serve as a judge, I would faithfully apply Supreme Court precedent interpreting the Voting Rights Act.

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

The Foreign Emoluments Clause of the Constitution, Article I, Section 9, reads as follows: “[N]o person holding any Office of Profit or Trust under them shall, without the consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

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

Congress’s authority is expressly prescribed in the Constitution. In addition to other constitutional provisions authorizing specific powers to the Congress, the Thirteenth, Fourteenth, and Fifteenth Amendments each grant Congress the power to enforce those Amendments “by appropriate legislation.” These Amendments were enacted at a critical point in our nation’s history, and have been the subject of significant treatment by the courts. As a judge, I would faithfully apply those precedents from the Supreme Court and the Sixth Circuit.

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

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

As a judge, I would faithfully apply the Supreme Court’s decision in *Lawrence* as well as other Supreme Court precedent, all of which is binding upon inferior courts.

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

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

In determining whether recusal is warranted, I would faithfully apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and other applicable provisions. This would cover, for example, cases that I have worked on previously in my career as a practicing lawyer.

- (b) Will you recuse yourself from all cases that you have been involved in as an attorney for the Justice Department?**

Yes, as this is required by the provisions noted above.

Senator Dick Durbin
Written Questions for Chad Readler and Eric Murphy
October 17, 2018

For questions with subparts, please answer each subpart separately.

Questions for Chad Readler

1. **Will you pledge that if you are confirmed to the 6th Circuit you will recuse yourself from any litigation involving the Affordable Care Act, given your publicly-expressed views on the Act's constitutionality?**

I have not publicly expressed personal views on the Affordable Care Act's constitutionality. In determining whether recusal is warranted, I would faithfully apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and other applicable provisions.

2. Tens of millions of Americans have a pre-existing condition such as cancer, asthma, diabetes, or heart disease. Before the enactment of the Affordable Care Act (ACA), insurance companies used people's medical histories as a reason to deny them coverage or charge outrageous premiums. The ACA now prohibits health insurance companies from denying people coverage because of pre-existing conditions, and it prohibits insurers from charging people higher premiums because of their health history.

The Justice Department had been defending the ACA against partisan attacks from Texas and other Republican-controlled states. But the brief you signed in *Texas v. U.S.* marked a change in DOJ's position. The American Medical Association and other medical groups said that your new position, if adopted, would "wreak havoc on American health care."

- a. **When DOJ decided to change positions and stop defending the Affordable Care Act's protections for those with pre-existing conditions, did you consider the impact of this new position on the millions who would lose health coverage?**

This matter is currently in litigation. The position of the Department of Justice is articulated in the June 7, 2018 letter from Attorney General Sessions to Speaker Paul Ryan, as well as in the briefs filed by the Department in the *Texas v. United States* case. As a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. *See* Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any

request for potentially privileged or confidential information should be directed to the Department.

- b. **Did you or your DOJ colleagues coordinate with other federal agencies in making this decision to change positions? If yes, please discuss the nature and extent of this coordination.**

In representing the interests of the United States in litigation, lawyers at the Department of Justice routinely communicate with attorneys representing other components of the federal government when those components have “equities” in a matter in litigation. Also, please see the answer above.

- c. **In making this decision to change positions, did you or your DOJ colleagues coordinate with Texas or other states that were challenging the constitutionality of the ACA’s provisions protecting those with pre-existing conditions? If yes, please provide details on this coordination.**

I was unaware of Texas’ lawsuit before it was filed. Otherwise, please see the answers above.

- d. **Did anyone force you to approve and sign the DOJ brief in the *Texas v. U.S. Affordable Care Act* case?**

As the Acting Assistant Attorney General, my name appeared on all briefs filed by the Civil Division, unless I was recused from the matter. This is a customary and longstanding practice within the Department of Justice.

- e. **Did anyone compel you to advance the legal theories put forward in the DOJ brief in the *Texas v. U.S.* case?**

Please see the answer above.

2. On June 21, 2018, you filed a brief on behalf of the Justice Department requesting that the U.S. District Court for the Central District of California modify the 1997 Flores Settlement to allow the government to detain children indefinitely in ICE family detention facilities. The court rejected your position. Judge Dolly Gee stated in her July 9 order: “Absolutely nothing prevents [the government] from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion.”

Wasn’t Judge Gee correct in concluding that the government can choose to reinstate prosecutorial discretion? In other words, isn’t it true that the Trump Administration’s practice of zero tolerance in border cases is a choice and is not required by law?

Litigation over the Flores Settlement commenced long before my arrival at the Department of Justice in 2017, and has been on-going for many years. The Department’s position is reflected in the numerous briefs filed as part of the litigation. As a lawyer in

the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

3. The plain language of the Flores Settlement states that the government “shall place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs,” so long as that setting is consistent with the government’s interests to ensure the child’s timely appearance for agency and court proceedings and to protect the child’s well-being and that of others. These conditions can clearly be met via one of ICE’s Alternatives to Detention programs. For example, individuals enrolled in ICE’s Family Case Management Program had 100 percent attendance at court proceedings before the Administration terminated the program last year.

a. **How is an ICE detention facility the least restrictive setting for a child?**

Please see the answer to Question 2.

b. **Did you consider the opinions of medical and child-welfare experts before you filed a brief seeking permission to modify the Flores Settlement so that the Trump Administration can indefinitely detain children?**

Please see the answer above. To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rules of Professional Conduct 1.6; Ohio Rules of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

c. **Are you aware that the American Academy of Pediatrics has found that DHS facilities “do not meet the basic standards for the care of children in residential settings” and that two of DHS’s own medical consultants who investigated ICE family detention centers concluded that they pose “a high risk of harm to children and their families”?**

Please see the answers above.

4.

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

As a lower court judge, I would be bound by the Supreme Court’s interpretation of constitutional provisions that govern cases before me. Where a constitutional question is not answered by Supreme Court precedent, a judge has many tools to

utilize in resolving the constitutional question, including consideration of the original public meaning of the relevant constitutional provision.

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

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

The Civil Division is currently litigating cases pending in Maryland, New York, and Washington, D.C. that raise questions regarding the application and interpretation of the Foreign Emoluments Clause. The Department's legal position is articulated in numerous briefs filed in those cases. As a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

5. In 2004, you wrote an op-ed in the *Los Angeles Daily Journal* entitled "Make Death Penalty for Youth Available Widely." You argued that the death penalty should be constitutional for minors under the age of 18, specifically for 16- and 17-year-old children. You argued the ultimate penalty should be available for states, local prosecutors and juries because "in today's progressive society our children are growing up faster than at any time before." Of course, the Supreme Court disagreed with you and ruled that the death penalty for children under the age of 18 was unconstitutional in *Roper v. Simmons*.

- a. **Do you think the availability of the death penalty would provide a meaningful deterrent for 16- and 17-year olds who might commit crimes?**

The article's title was selected by the *Daily Journal* and was not disclosed to me prior to publication. The article itself addressed a case then pending before the Supreme Court involving a 17-year old who had committed a premeditated murder and had been sentenced to death by a jury and judge in Missouri. The case asked whether a state could constitutionally employ the death penalty in that circumstance. As the facts of the case revealed, the defendant had plotted the murder with friends and had "assured his friends they could 'get away with it' because they were minors." *Roper v. Simmons*, 543 U.S. 551 (2005).

- b. **Do you believe there are racial disparities in the way that minors are treated under the criminal justice system?**

I have not represented any minor clients in criminal matters. In the many pro bono

cases I handled in private practice for indigent adult criminal defendants, I saw firsthand the impact socioeconomic factors can play in our criminal justice system, specifically, the challenges faced by indigent defendants. A disproportionate percentage of my pro bono indigent clients were from minority communities, and many of them faced significant challenges in navigating the criminal justice system.

6. On April 14, 2014, the *Akron Beacon Journal* reported the following:

The phrase in the Ohio Constitution that requires the state to provide an adequate system of public schools would be stricken from the document if the head of a constitutional modernization subcommittee has his way. Chairman Chad Readler, a Columbus attorney who leads the Constitutional Modernization Commission's schools and local government committee, wants to remove the phrase "thorough and efficient" from Article VI of the Constitution.

The effect of your proposal would have been to remove the courts from oversight of the appropriateness of public education provided in Ohio. It would have reversed a 1997 Ohio Supreme Court case, *DeRolph v. State*, in which the court found the state had "failed in its constitutional responsibility to provide a thorough and efficient system of public schools." You would have left issues like school funding solely in the hands of the legislature.

- a. **Do you believe there is a right to public education in Ohio?**

Yes, as set forth in Article VI of the Ohio Constitution. Various decisions from the Ohio state courts have helped define the extent of the rights encompassed in Article VI.

- b. **Do you believe there should be a right to public education in Ohio?**

Public education is critical to the success and well-being of Ohio and its residents. I feel fortunate to have attended public schools my entire educational life, from my first day of kindergarten to my last day of law school.

- c. The *Akron Beacon Journal* noted that at the same time you were pushing for this change to the state Constitution, you were "actively involved in the privately run charter school movement." You served as Chair of the Ohio Alliance for Public Charter Schools from 2010 to 2016. You also took positions in numerous lawsuits arguing in support of school privatization. **Given your activism on this issue, will you commit, if you are confirmed to the 6th Circuit, to recuse yourself from any case involving school privatization or constitutional or statutory protections for equal public education?**

Charter schools (called "community schools") in Ohio are public schools. See Ohio Rev. Code 3314.02 ("A community school created under this chapter is a public school . . ."). If confirmed, I would adhere to the recusal requirements in

28 U.S.C. § 455 as well as those in Canon 3 of the Code of Conduct for United States Judges, and other applicable provisions.

7. Last October, you testified before this Committee on the Administration's decision to end DACA. You cited the President's Immigration Principles & Policies document as the basis for legislation that you believe Congress should pass. You said, in response to a written question, that "these proposals will help restore the rule of law to our immigration system."

The Trump Administration proposal you endorsed would slash legal immigration. According to the conservative Cato Institute, it would have banned at least 57 percent of all legal immigrants since 1965, nearly 23 million people. **How in your view would drastically slashing legal immigration help restore the rule of law?**

I appeared before the Committee not in my individual capacity, but as the representative of the Department of Justice and the Attorney General. The Attorney General has frequently shared his views regarding the significance of the rule of law to our immigration system. It would not be appropriate to share my personal views on these policy issues. *See* Canons 2 and 3, Code of Judicial Conduct.

8. You represented tobacco companies extensively in private practice. The Campaign for Tobacco-Free Kids sent the Committee a letter after you were nominated raising serious concerns about your ability to be impartial on tobacco-related matters if you are confirmed.

The letter said, quote, "Both men [you and Eric Murphy] personally and extensively represented R.J. Reynolds during their time at Jones Day....Mr. Readler represented RJR in products liability and commercial speech cases."

- a. **Will you commit that if you are confirmed you will recuse yourself from matters involving the tobacco industry?**

If confirmed, I would adhere to the recusal requirements in 28 U.S.C. § 455 as well as those in Canon 3 of the Code of Conduct for United States Judges, and other applicable provisions.

- b. **Please provide a list of all tobacco-related matters you have worked on, directly or indirectly, at the Justice Department.**

I have recused from all tobacco-related matters during my service at the Department of Justice. By Department regulation, I was required to recuse from all matters involving R.J. Reynolds. Although not required to do so, I voluntarily extended that recusal to include all matters involving the tobacco industry. Because the broader recusal was not required by regulation and had to be communicated to the over 1,000 lawyers in the Civil Division, early in my tenure my name inadvertently appeared on one filing related to a matter involving the tobacco industry (but not R.J. Reynolds). I did not review the filing nor did I participate in the matter.

9. You say in your questionnaire that you were a member of the Federalist Society from 2001 - 2017.

a. **Why did you join the Federalist Society?**

Most of my involvement with the Federalist Society has been with the Columbus Lawyers Chapter. Our Chapter organizes six lunches a year where speakers debate local and national issues of interest. The programs drew a wide and diverse audience. Participating in those events was both educational and a means for meeting members of the Columbus legal community, especially during my first years practicing law.

- 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."

The Constitution affords the President the right to make nominations to the federal judiciary, and the Senate the right to offer their advice and consent as to those nominations. I defer to the President and the Senate as to how those rights are exercised. As a judicial nominee, it would not be appropriate for me to comment on political and policy questions, *see* Canon 5.

- c. **Please list each year that you have attended the Federalist Society's annual convention.**

I have not kept track of my attendance. I estimate that I have attended at least some aspect of most of the last 15 annual conventions.

- d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I attended the Attorney General's speech and applauded along with the audience at various times during his address.

- 10.

a. **Is waterboarding torture?**

Waterboarding is not a topic I have studied or otherwise examined during my legal career. I understand that federal law defines “torture” as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340.

b. Is waterboarding cruel, inhuman and degrading treatment?

Please see my answer above. I understand that, under federal law, no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual, *see* 42 U.S.C. § 2000dd-2(a)(2).

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

Please see the answers above.

11. Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?

As a judicial nominee, it would not be appropriate for me to comment on political and policy questions, *see* Canon 5.

12. Do you think the American people are well served when judicial nominees decline to answer simple factual questions?

The Constitution affords the President the right to make nominations to the federal judiciary, and the Senate the right to offer their advice and consent as to those nominations. I defer to the President and the Senate as to how those rights are exercised. As a judicial nominee, it would not be appropriate for me to comment on political and policy questions regarding the nomination and confirmation process, *see* Canon 5.

13.

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

I have no personal knowledge regarding whether the Judicial Crisis Network or any of its supporters played a role in supporting my nomination or any other nomination. More broadly, federal law and Supreme Court decisions govern the process for regulating political speech. If confirmed, I would faithfully apply those laws and precedents to the cases before me.

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

As a nominee for judicial office, I cannot comment on the political aspects of the confirmation process. *See* Canon 5, Code of Conduct for United States Judges.

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

Please see the answers above.

14.

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

I have not studied this issue nor formed an opinion on it. Further, as a nominee to serve in the federal judiciary, it would be inappropriate for me to answer questions regarding matters that might come before me.

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

As a lower court judge, I would be bound by the Supreme Court's interpretation of constitutional provisions that govern cases before me. Where a constitutional question is not answered by Supreme Court precedent, a judge has many tools to utilize in resolving the constitutional question, including consideration of the original public meaning of the relevant constitutional provision as well as historical practices at the time the provision was adopted and further traditions developed thereafter. As noted above, I have not studied this question nor attempted to determine the original public meaning of the Pardon Clause in this context.

**Nomination of Chad Readler, to be
United States Circuit Judge for the Sixth Circuit
Questions for the Record
Submitted October 17,
2018**

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. Do you agree with Justice Elena Kagan that findings of fact should be made by trial courts and by Congress and that “appellate courts do not make findings of fact, do not have the competence to make findings of fact, so for the most part rely on the findings of fact made in other institutions”? Please explain.

In our federal court structure, the trial court (either the judge or jury, depending upon the nature of the case) is deemed to be the “finder of fact,” and factual findings made by the fact-finder are owed deference by appellate courts under binding precedent. I would faithfully adhere to precedent from the Supreme Court and Sixth Circuit on this issue if confirmed to the bench.

2. As Chair of the Education, Public Institutions, Miscellaneous Local Government Committee of the Ohio Constitutional Modernization Commission, you sought to eliminate a provision of Ohio’s Constitution that provides students with the right to a “thorough and efficient” education. You described the legal arguments against school privatization and charter schools as “at bottom, [] nothing more than outdated preferences for public education.” Do you believe there is a right to public education in Ohio? Do you believe there should be?

Public education is critical to the success and well-being of Ohio and its residents. I have volunteered hundreds of hours to promote public education opportunities in the state.

Separately, I was appointed to serve on the bi-partisan Ohio Constitutional Modernization Commission and was appointed to chair the committee reviewing the education provisions in the Ohio Constitution. Because those provisions had been the subject of significant treatment by the Ohio Supreme Court in recent years, the committee decided to consider the impact of those decisions, which expanded the courts’ role in setting education standards, on the existing constitutional language, originally enacted in 1851. In reviewing the history surrounding the language’s adoption in 1851, I understood the constitutional framers to be ensuring that Ohio enacted a public school system accessible by all students, as in 1851 many children in Ohio did not have access to a public school. I did not read that history as indicating that the “thorough and efficient” provision was also enacted to allow the courts to set education standards, overriding decisions of the state and local boards of education, the state legislature, and the state governor.

Article VI of the Ohio Constitution establishes certain guarantees with respect to public education, and the Ohio Supreme Court has interpreted Article VI in many subsequent decisions, including *Miller v. Korns* and *DeRolph v. State*. As a federal court judge, I would look to state court decisions with respect to the interpretation of questions of state law.

3. Had it been successful, your proposal to eliminate the Ohio constitutional provision providing students with the right to a “thorough and efficient” education would have reversed the 1997 Ohio Supreme Court case *DeRolph v. State*. In that case, the Ohio Supreme Court found the state had “failed in its constitutional responsibility to provide a thorough and efficient system of public schools.”

- a. Your arguments as Chair of the Committee indicate that you believe the Ohio Supreme Court got *DeRolph* wrong. What constitutional responsibility do you believe states have to provide a thorough and efficient public education?

Please see the answer above. States are free to control their public education systems subject to their respective state constitution and subject to any applicable federal regulatory and constitutional requirements.

4. You have signed dozens of amicus briefs in your capacity as Acting Assistant Attorney General.

- a. What do you believe is the appropriate role of an amicus brief?

The best amicus briefs bring to the court’s attention issues not addressed by the parties, or enhance arguments included in the parties’ briefs. As many judges and courts have said, an amicus brief should not merely repeat the arguments of the parties. With respect to the Department of Justice, it often files amicus briefs to shed light on governmental equities in important cases, given the unique interests of the United States. It is for this reason that the Supreme Court often invites the Solicitor General to participate in case as an amicus.

- b. How much weight do you believe the Supreme Court should place on amicus briefs?

It would depend upon the case and the nature of the brief. Most cases are resolved by the arguments in the parties’ briefs, but courts do on occasion make reference in their opinions to amicus briefs that were particularly helpful to the court in resolving the case.

- c. Do you believe federal judges and the public would be better served if the identity of the individuals and groups funding amicus briefs were disclosed? Why or why not?

I have not given thought to this issue previously. If I am confirmed to serve as a

judge, I will consult with my colleagues regarding the rules for our circuit that govern amicus briefs.

- d. Please list the amicus briefs for which you served as the primary author in your current position.

None. As Acting Assistant Attorney General, my name went on all briefs filed by the Civil Division unless I was recused.

- e. In the amicus briefs you worked on:
- i. Did you work on or provide any advice challenging the Affordable Care Act's individual mandate?

I do not recall working on any amicus briefs the Department filed in cases addressing the Affordable Care Act's individual mandate.

1. If so, which case(s)?

Please see the answer above.

2. If so, what advice did you provide?

Please see the answer above.

- ii. Did you work on or provide any advice supporting the right to refuse service to same-sex couples?

I reviewed at least one draft of the amicus brief the Department filed with the Supreme Court in *Masterpiece Cakeshop*. As the case was pending in the Supreme Court, the Solicitor General's office would have been responsible for preparing the Department's brief.

3. If so, which case(s)?

Please see the answer above.

4. If so, what advice did you provide?

Internal deliberations within the Department of Justice and the content of any legal advice may be privileged, and may also be subject to the ethical duty of confidentiality. *See* Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to

me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

- ii. Did you work on or provide any advice arguing against sexual orientation as a protected class?

I provided comments on the government's brief in *Zarda v. Altitude Express*, a case in the Second Circuit involving whether sexual orientation should be considered a protected class.

1. If so, which case?

Please see the answer above.

2. If so, what advice did you provide?

Please see the answer to subpart ii.2 above.

5. You stated, “[Donors] have relied historically on association privacy rights preserved by the First Amendment to anonymously support organizations they believe in and support political speech without having to disclose the donors behind that speech . . . While some donors may not care about this, it’s likely that many will and make them think twice about if they want to contribute to an organization.” You have also been quoted as stating, “There has been a long history in our country of association privacy . . . We’ve also had a long history of political speech, and those rights are threatened by the disclosure of donor names to the government.”

- a. Do you support campaign donor anonymity regardless of the amount and purpose of the donation? Please explain.

The statements cited above were made in regard to my representation of clients who participated as amici in cases involving non-profit donor disclosure rules. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge, *see* Canons 2 and 3 of the Code of Conduct for United States Judges, or on political and policy questions, *see* Canon 5.

- b. Do you believe that political speech is threatened by the disclosure of the individuals and groups making political contributions? Please explain.

Please see the answer above. Further, as a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge, *see* Canons 2 and 3 of the Code of Conduct for United States Judges, or on political and policy questions, *see* Canon 5.

- c. Do you believe that democracy would be strengthened or weakened if individuals or organizations engaging in political spending were required to disclose their donors? Please explain.

Please see the answers above.

- d. In *Doe v Reed*, 130 S.Ct. 2811 (2010), Justice Scalia wrote, “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (McIntyre) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.” Do you agree with Justice Scalia?

Please see the answers above.

6. As a judge, would your personal views prevent you from objectively evaluating scientific evidence that demonstrates that there is overwhelming consensus that human activity is a contributing factor to climate change?

No, they would not prevent such evaluation.

7. 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 do. Judges should interpret and apply statutes in a neutral manner, without a preference as to outcome or party, to ensure the fair treatment of all parties before the court.

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

Generally speaking, judges should not consider the practical consequences of a particular ruling. That is the work of lawmakers. One instance where judges might consider practicality is in applying the absurdity doctrine, *see, e.g., United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989), or when required to do so by law, for example, in weighing the factors governing the issuance of a preliminary injunction.

8. 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?

Empathy is an essential human attribute. Every person has some amount of empathy, including judges, that we employ in our daily lives. Empathy, however, should not be the basis for a judge ruling for one party over another. Rather, judges vow to “administer justice without respect to persons.” 28 U.S.C. § 453.

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

We all learn from our personal experiences, and every judge carries her personal life experiences with her to the bench. For the reasons stated above, however, those personal experiences should not be the basis for ruling for one party over another, *see* 28 U.S.C. § 453.

9. 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.

10. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

As indicated above, the judicial oath requires that judges not put a finger on the scale for either party, but instead to “administer justice without respect to persons.” 28 U.S.C. § 453. I would faithfully adhere to that command. I would also draw on my time as a practicing attorney, where I represented clients ranging from large corporations to indigent individuals caught up in the criminal justice system. The many experiences I enjoyed on behalf of pro bono clients in particular gave me special insights into the challenges faced by litigants unable to afford counsel. Those experiences would serve me well, if I am confirmed to the bench.

**Nomination of Chad Readler, to be United States Circuit Judge for the
Sixth Circuit
Questions for the Record
Submitted October 17, 2018**

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?

I would look to Supreme Court precedent for the governing framework, an issue most recently addressed in *Obergefell v. Hodges*, and addressed in numerous cases previously, including *Washington v. Glucksberg*.

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

Yes, this is a factor the Supreme Court has relied upon.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes, this is a factor the Supreme Court has relied upon. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

- 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?

As an inferior court judge, I would be bound by both decisions of the Supreme Court as well as prior decisions of the Sixth Circuit, *see United States v. Camp*, 903 F.3d 594, 597 (6th Cir. 2018); *see also* Sixth Circuit Rule 32.1(b). Precedent from other circuits can carry persuasive force, but would not be binding on me.

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

Yes.

- 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*).

Like all Supreme Court decisions, *Casey* and *Lawrence* are precedents binding on inferior courts. I would consider and apply those precedents as well as other Supreme Court precedent relevant to the issues at hand.

- f. What other factors would you consider?

I would look to the relevant factors articulated in Supreme Court and Sixth Circuit precedent, as those decisions would be binding upon me, and to factors articulated in precedent from other courts for their persuasive value.

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

Under Supreme Court precedent, the Equal Protection Clause requires that courts apply heightened scrutiny for classifications based upon race or gender.

- 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?

The Supreme Court has addressed in many cases the proper means for interpreting and applying the Fourteenth Amendment, which renders the question above purely academic. As an inferior court judge, I would faithfully apply the Supreme Court's precedent in this area.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I did not participate in the *Virginia* litigation or any preceding cases.

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

In *Obergefell*, the Supreme Court held that the Fourteenth Amendment prohibits states from "barr[ring] same-sex couples from marriage on the same terms accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). If confronted with the question above as a judge, I would apply *Obergefell* and other relevant precedent in resolving the matter.

- 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 the answers above. Beyond that, this question is otherwise unsettled and could come before me as a judge. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge. See Canons 2 and 3 of the Code of Conduct for United States Judges.

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 this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and its progeny. I would faithfully follow those decisions.

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. I would faithfully follow those decisions.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003) and its progeny. I would faithfully follow those decisions.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see the answers 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, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

As the Supreme Court acknowledged in *Virginia* and *Obergefell*, in some instances courts may look to changed understandings of society. These Supreme Court precedents provide guidance on when it is appropriate to look at changed understandings of society. With respect to particular legal issues, as a judicial nominee, it would not be appropriate for me to comment on issues that could come before me as a judge. See Canons 2 and 3 of the Code of Conduct for United States Judges.

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

Those issues are governed at the trial court level by Federal Rule of Evidence 702 and

the Supreme Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Appellate courts review the trial court's legal determinations *de novo*, but owe deference to a trial court's factual findings.

5. 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.

- a. 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?

Legal scholars have debated this question. *See, e.g.*, M. McConnell, The Originalist Case for *Brown v. Board of Education*, 19 Harvard Journal of Law and Public Policy 457 (1995). As an inferior court judge, however, I would faithfully apply the Supreme Court's decision in *Brown* and its progeny.

- 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-papers/democratic-constitutionalism> (last visited October 15, 2018).

Legal commentators have offered significant commentary on originalism and its application in various contexts. As an inferior court judge, I would faithfully apply the Supreme Court's precedent interpreting these constitutional guarantees. Beyond that, it would not be appropriate for me to comment on issues that could come before me as a judge. *See* Canons 2 and 3 of the Code of Conduct for United States Judges.

- c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

Where the Supreme Court has interpreted a constitutional provision, the Court's decision addressing that provision would be controlling and dispositive as to matters considered by the inferior courts. In the absence of binding precedent, courts have many tools available to them in interpreting a constitutional provision, including consideration of the provision's original public meaning.

- d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see the answer above. More generally, courts are frequently asked to

apply constitutional provisions to modern-day circumstances, and have various tools available to them to do so. *See, e.g., United States v. Jones*, 565 U.S. 400 (2012).

- e. What sources would you employ to discern the contours of a constitutional provision?

Please see the answers above. In general, courts first consider precedent. If precedent does not resolve the matter, courts consider, among other things, the text and structure of the Constitution, the original public meaning of those terms in the provision, and the application of the constitutional provision in any relevant analogous circumstances.

6. In 2016, you submitted an amicus brief on behalf of the Buckeye Institute for Public Policy Solutions in *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304 (3d Cir. 2015). Delaware had determined the state’s interest in an informed electorate was served by requiring 501(c)(3) organizations that “refer[red] to a clearly identified candidate” in advertising materials distributed close in time to an election to disclose some donor information. The Third Circuit examined “Delaware’s unique election landscape” and held that “Delaware’s interest in an informed electorate [was] sufficiently important” to compel the disclosure.

- a. In your brief, you stated, “[e]ven if Delaware did have an interest in requiring disclosure of the contributors to such communications, its disclosure requirements fail to accomplish that interest.” Why did you imply that Delaware lacked a compelling interest to require disclosure?

In *Delaware Strong Families*, I filed a brief advocating the position of my clients in that case. In my clients’ brief supporting a request for Supreme Court review in the case, the issue was described this way:

“Delaware’s law sweeps far beyond information that would inform its electorate about the origins and uses of campaign funds. It requires disclosure of all donors who contribute to any organization that dares to mention a candidate’s name in the weeks preceding an election, even where the organization does not endorse the candidate, or critique her opponent. And by attributing these communications to an organization’s entire database—without regard to whether a donor earmarked funds for the relevant publication—Delaware’s law threatens to misinform voters about the constituencies behind certain causes.”

- b. You also stated in the brief that “the breadth of Delaware’s disclosure requirements will, if anything, result in *misinforming* the electorate.” How does providing additional information to the public about who is funding election-related materials leads to “misinforming” voters?

Please see the answer above.

7. In the government’s petition for a writ of certiorari in *Hargan v. Garza*, 874 F.3d 735 (D.C. Cir. 2017), the government “respectfully submit[ted] that [the Supreme] Court may wish to issue an order to show cause why disciplinary action should not be taken against

respondent's counsel – either directly by [the Supreme] Court or through referral to the state bars to which counsel belong – for what appear to be material misrepresentations and omissions to government counsel designed to thwart [the Supreme] Court's review.” Your name appears on the brief. During your testimony before the Senate Judiciary Committee, Senator Blumenthal asked you about your role in *Hargan v. Garza*. You stated, “I’m not sure I even reviewed that brief.”

- a. Besides signing your name to the brief, did you have any other involvement with this case?

When the case was pending in the district court, I consulted with lawyers at the Department of Justice and the Department of Health and Human Services. I did not have a substantial role in preparing the brief filed on behalf of the United States, and I did not appear in court in the matter. I believe I reviewed briefly the briefs filed by the United States in the appellate courts.

- b. Did Jane Doe's counsel have an ethical or legal obligation to keep the government informed of the timing of Doe's abortion procedure?

Those issues are addressed in the briefs filed by the United States.

- c. What prompted the government to take the unusual step of suggesting that the Supreme Court discipline Doe's counsel?

Please see the answer above. To the extent this question relates to internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

8. You were asked about the Presidential Advisory Commission on Election Integrity during your nomination hearing. Specifically, Senator Leahy asked you, “Do you agree with the President that there were three to five million votes cast illegally?” You responded, “I think it is improper for judges and judicial nominees to comment on political issues, and I think the issue you raised is a political issue.” Do you know of any evidence that supports the claim that three to five million votes were cast illegally in the 2016 presidential election?

As a judicial nominee, it would not be appropriate for me to comment on political and policy questions, *see* Canon 5.

9. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the government took the position that “[i]t is a fundamental separation-of-powers principle, long recognized by this court and Congress in the INA, that the political branches’ decisions to exclude aliens abroad generally are not judicially reviewable. That principle bars any review of respondents’

statutory claims.”

- a. Provide an example of a claim for violation of the antidiscrimination provision of the Immigration and Nationality Act based on the interpretation of justiciability articulated in this brief.

In *Hawaii v. Trump*, the Supreme Court considered the merits of Hawaii’s claim that the United States acted in violation of the INA: “[W]e may assume without deciding that plaintiffs’ statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.”

- b. Can federal courts review executive orders to determine whether they discriminate against noncitizens on the basis of religion or nationality?

Please see the answer above.

10. During your nomination hearing, when you were asked about a brief filed in April 2018 to defend the Trump administration’s zero tolerance policy, you stated, “I’m not sure I was even aware of those issues. Those cases were being handled by lawyers who had been with the Department [of Justice] for a long time.” On June 20, 2018, you argued the government’s position in *United States of America v. State of California, et al.*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018) before Judge Mendez.

- a. When did you become aware of the zero tolerance policy?

I became involved with the litigation addressing issues involving what has been referred to as the “zero-tolerance policy” around the time the district court in *Ms. L v. U.S. Immigration and Customs Enforcement* issued its June 26, 2018 decision granting a preliminary injunction to the plaintiffs.

- b. Why did you decide that you would present the arguments in this case rather than a career Department of Justice attorney?

United States v. California involved issues important to the Department of Justice and the Attorney General. The Attorney General had previously announced the filing of the lawsuit during a trip to California. The *California* case is a preemption case that does not involve the zero-tolerance policy.

**Questions for the Record for Chad A. Readler
From Senator Mazie K. Hirono**

1. On your Senate Judiciary Committee Questionnaire, you reported that two clubs you belonged to until just last year have membership policies that discriminate on the basis of sex. Both the “Kit Kat Club” and the “Review Club” are open only to men. The Questionnaire asks you to describe any action you have taken to change these discriminatory policies and practices. You did not list any.

a. Did you ever take any action to change the discriminatory policies of either club?

The Kit-Kat Club is a century-old essay or “book” club based upon an 18th century English literary club. The Club does not own a facility or charge membership dues. It meets seven times a year over dinner. For each dinner, a member presents an essay written in anticipation of the dinner. The Club is not a “networking” club; member essays cannot address a member’s business or professional interests. Essays typically address topics like history, culture, literature, education, philosophy or the arts. The Club is limited to 39 members. Members come from a variety of professional communities, including medicine, the arts, teaching, non-profit, law, and community development. Most members are age 55 or over, with some in their 70s and 80s. I was the youngest member when I joined, which I did to pursue interests outside of my daily law practice and career at a large law firm. I was a member of the Club for less than three years, and around the time I resigned, the Club was starting to consider whether to revise its membership policies to allow women to join. I would have likely supported making such a change to the membership rules, had I remained in the Club. Women did attend the Club’s annual meeting.

The Review Club does not have any membership rules. Over a century ago, a resident of Columbus gathered over dinner with friends to share highlights of his recent trip to Europe. That meeting inspired the “Review Club,” which today meets over dinner about six times a year, with each dinner hosted by a different member. The Club does not own a facility or charge membership dues. I do not know who has attended dinners over the last century as there are no attendance records or membership rules. The handful of dinners I attended were attended by men only except when the dinner speaker was a woman. The speakers addressed a variety of topics, from medicine to community issues to current events. The Club was not a “networking” club. The average age of the attendees was about 70, and I was the youngest attendee at nearly all of the dinners I attended. I was invited to participate in the Club dinners by a 90-year old World War II veteran I respected and whose company I enjoyed.

b. If not, why not? If yes, why did you stay in the club when they failed to change its discriminatory policies and practices?

Please see the answers above.

2. Typically nominees who belonged to discriminatory clubs try to hide behind the claim that they joined these clubs at a time when the culture and norms about discrimination were different. You, however, joined these clubs only recently – in 2014. Historically, clubs like the ones you joined were ways for community and business leaders to make connections to increase their status and income and excluding women was a way to keep women from gaining those advantages and perpetuate inequality between men and women.

a. Why, in this day and age, did you join clubs that discriminate on the basis of sex?

Please see the answers above.

b. By being a part of these clubs from 2014 to 2017, what message do you think that sends to litigants that may come before you regarding your understanding of the historical context of sex and gender discrimination?

The Review Club did not have membership rules.

My understanding is that essay or book clubs like the Kit-Kat Club are relatively common.

c. Given this historical context and your decision to join these clubs in 2014, can you understand why women with claims of sex discrimination might have reason to doubt your ability to rule fairly?

Please see the answers above.

Over my career, I have strived to promote opportunities for women. I have done so by finding beneficial professional opportunities for women at my law firm (especially as part of our appellate pro bono program), hiring women into our leadership team at the Department of Justice, traveling to Kenya with Lawyers Without Borders to train Kenyan lawyers on trial methods for enforcing domestic violence laws, supporting female attorneys running for judicial office, among other endeavors. If I were fortunate enough to be confirmed, there would be no place for sex discrimination in my courtroom or chambers.

3. At your hearing, I asked you about your role in leading the administration's efforts to gut the Affordable Care Act (ACA) through the courts. In *Texas v. United States*, you signed a brief in which the Department of Justice (DOJ) chose not to defend the constitutionality of the ACA's individual mandate and argued that the ACA's protection for those with pre-existing conditions should be struck down. You claimed at the hearing that your role in that case was to "consult with whatever members of our career group of public servants who are not appointees" and make recommendations to "leadership." But your brief in that case was so controversial, three career DOJ attorneys assigned to the case not only refused to sign the brief, but they also took the unusual step of filing a court motion to withdraw from the case. Moreover, one of those attorneys, who had been at DOJ for more than two decades, resigned and left the Department.

a. Did you consider refusing to sign the brief, which has been done by leaders in the Justice Department in the past?

This matter is currently in litigation. The position of the Department of Justice is articulated in the June 7, 2018 letter from Attorney General Sessions to Speaker Paul Ryan, as well as in the briefs filed by the Department in the *Texas v. United States* case. As a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

As the Acting Assistant Attorney General, my name appeared on all briefs filed by the Civil Division, unless I was recused from the matter. With respect to my role as part of the broader Department of Justice, I would refer the Committee to the August 9, 2018 letter submitted to the Committee on my behalf by Deputy Attorney General Rosenstein: “Our leadership team relies on Mr. Readler for his wise advice and counsel, and we benefit greatly from his intellect and experience. We also appreciate his willingness to accept the direction and decisions of Department leadership about challenging legal matters when the right answer is unclear.”

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

b. Did you consider resigning from your politically appointed position in protest?

Please see the answer above.

c. At the hearing, you went out of your way to claim that your role in the *Texas v. United States* was to consult with the career attorneys who are not politically appointed by the President, like you are. But the career attorneys in that case refused to sign the brief that you signed and took the further step of withdrawing from the case. Why did you point out at the hearing that your role in that case was to consult with career attorneys when, given the clear disagreement by the career attorneys with the brief, it appears that you ignored their input by signing that brief?

Throughout the briefing process, I was aware of the views of lawyers in the Civil Division who offered advice on the legal issues presented by the litigation. I considered that advice in articulating the position of the Civil Division to Department leadership.

Otherwise, please see the answer above.

- d. **The position in the brief was clearly a political decision agreed to by you and other political appointees of the Justice Department. In reaching this position, did you consider the practical implications of the policy you adopted to join Texas and other states in undermining the Affordable Care Act—a law that was duly enacted by the Congress?**

Please see the answer above.

4. In *Texas v. United States*, you not only abandoned the Department of Justice’s long-standing commitment to defend duly enacted laws, but you also affirmatively argued that the court should strike down key provisions of the Affordable Care Act based on troubling legal arguments advanced by a group of Republican attorneys general and governors that legal scholars have described as “absurd” and “ludicrous.”

- a. **What ethical obligations do you believe attorneys have to present legally sound arguments before a court?**

Attorneys should not make arguments that are unethical, frivolous, or have no reasonable basis in law or fact.

- b. **Do you believe that the refusal of career Justice Department attorneys to sign the brief and their decision to withdraw from the case indicate the questionable nature of the government’s position?**

As I stated during my hearing, the career lawyers referred to here have not commented publicly on this matter, and it would be improper for me to comment publicly on decisions of career civil servants in the Civil Division.

- c. **Do you believe legal scholars are incorrect in describing the arguments advanced by the Republican attorneys general and governors in *Texas v. United States* as “absurd” and “ludicrous”?**

Please see the answers to Questions 3 and 4.

5. President Trump nominated you to the Sixth Circuit the very day the brief announcing the decision that Department of Justice would not defend the Affordable Care Act was filed.

- a. **What conversations, if any, did you have with anyone in the Trump administration regarding your role in supporting the Justice Department’s position in *Texas v. United States* and its impact on your ultimate nomination to the Sixth Circuit?**

No such conversations took place.

- b. **What conversations, if any, did you have with anyone in the Trump administration regarding your role in defending the administration’s policies—including the family separation policy, the Muslim ban, efforts to rescind DACA, attacks on sanctuary cities, excluding protections for LGBTQ individuals from Title VII of the Civil**

Rights Act of 1964, justifying discrimination against same-sex couples in *Masterpiece Cakeshop v. Colorado Civil rights Commission*, and the transgender military ban—and its impact on your ultimate nomination to the Sixth Circuit?

No such conversations took place.

6. As head of the Justice Department’s Civil Division, you spearheaded the Department’s brief in *Zarda v. Altitude Express*, in which the Department argued that Title VII of the Civil Rights Act of 1964 does not cover employment discrimination on the basis of sexual orientation—the exact opposite position of that taken by the Equal Employment Opportunity Commission (EEOC) since 2015, including in that same case. Your position in that case was a reversal of the position taken by the Obama administration.
 - a. **While the Civil Division of the Justice Department defends the United States against lawsuits brought against the United States under Title VII, it is the Civil Rights Division of the Justice Department that is tasked with affirmatively enforcing the protections under Title VII. Why did the Civil Division, without any career attorneys from the Civil Rights Division, choose to file an amicus brief in *Zarda v. Altitude Express* to narrow the scope of Title VII, when the court had not invited the Justice Department to participate in that case?**

The position taken by the United States in *Zarda* is the same position the Civil Division has always held, including over past administrations, and career civil servant lawyers in the Civil Division worked on the brief.

For matters in the appellate courts, the Solicitor General’s office must approve any positions taken by the United States. As noted in the brief filed by the United States:

“The United States, through the Attorney General, enforces Title VII against state or local government employers, 42 U.S.C. 2000e-5(f)(1), and the United States is also subject to Title VII in its capacity as the Nation’s largest employer. 42 U.S.C. 2000e-16. The United States thus has a substantial and unique interest in the proper interpretation of Title VII. Although the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5(f)(1), and it has filed an amicus brief in support of the employee here, the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991). The United States submits that the en banc Court should reaffirm its settled precedent holding, consistent with the longstanding position of the Department of Justice, that Title VII does not reach discrimination based on sexual orientation.”

- b. **Historically, what has been the Justice Department’s standard criteria for when it decides to reverse the federal government’s prior position on an issue?**

Litigation related to issues raised in *Zarda* is still pending. The position of the Department of Justice is articulated in the briefs filed in *Zarda*. As a lawyer in the Civil

Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. *See* Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

- c. Which of the above criteria did you find were satisfied when you reversed the federal government’s position in your amicus brief in *Zarda*?**

Please see the answer above.

- d. What process did you follow to reverse the federal government’s position regarding the protection of LGBTQ individuals from employment discrimination under Title VII?**

Please see the answers above. The Civil Division did not reverse its position in *Zarda*.

- e. In what ways and for how long did you consult with the Civil Rights Division and the EEOC before deciding to reverse the prior administration’s position regarding the scope of Title VII’s protections?**

Please see the answers above.

7. In *PHH Corporation v. Consumer Financial Protection Bureau*, you signed the Justice Department’s brief, which reversed the Department’s prior position and defended Judge Kavanaugh’s decision holding that the structure of the Consumer Financial Protection Bureau (CFPB) was unconstitutional. Your en banc brief argued that because the CFPB was a single-headed agency, the “for-cause removal restrictions” should be struck down because “there is a greater risk that an ‘independent’ agency headed by a single person will engage in extreme departures from the President’s executive policy.”

About three weeks earlier, you signed a brief in another case—*Collins v. Federal Housing Finance Agency*—where you made the opposite argument. The brief asserted that the for-cause removal restriction of the single director of the Federal Housing Finance Agency did not violate separation of powers principles.

- a. How do you explain taking such conflicting positions on behalf on the administration within a few weeks of each other?**

Litigation related to issues raised in *PHH Corporation* are still pending. The position of the Department of Justice is articulated in the briefs filed in *PHH Corporation*. As a

lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

b. Do you believe it is fair to assume that an outcome-driven litigant is likely to be an outcome-driven judge?

No. A lawyer's duty is to advance reasonable arguments that will help achieve a favorable outcome for her client. A judge's duty is to administer justice without respect to persons, *see* 28 U.S.C. § 453.

If confirmed to serve on the court of appeals, I would faithfully discharge my duty as a judge, and faithfully apply the precedent of the Supreme Court and the Sixth Circuit.

8. Earlier this year, the Justice Department reached a settlement with a company called Defense Distributed that would allow the company to post online blueprints to make 3D guns for the public to download. The settlement represented a reversal of the federal government's position going back to 2013.

a. What role did you play in the Trump administration's decision to settle the case?

This litigation has been overseen by the Civil Division. Our clients include the Department of State and Department of Commerce. As with other Civil Division matters, the litigation was handled primarily by the career civil servants in the Division, in consultation with our agency clients.

Litigation over 3D printing of guns is still pending, and as a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

b. What was the rationale for reversing the federal government's position?

Please see the answer above. To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

c. What consideration did you give to the threat to public safety in allowing Defense Distributed to make blueprints to create 3D guns publicly available?

The Attorney General has said the following: "Under federal law, it is illegal to manufacture or possess plastic firearms that are undetectable. Violation of this law is

punishable by up to five years in prison.” “We will not stand for the evasion, especially the flouting, of current law and will take action to ensure that individuals who violate the law by making plastic firearms and rendering them undetectable, will be prosecuted to the fullest extent.”

Otherwise, please see the answers above.

9. You have been a part of nearly every controversial legal fight the Trump administration has been involved in, including efforts to undermine the protections under the Affordable Care Act for those with pre-existing conditions, defending discrimination against LGBTQ individuals, the Muslim ban, the child separation policy, efforts to rescind DACA, attacks on sanctuary cities, efforts to undermine women’s reproductive rights, and President Trump’s violation of the Emoluments Clause, to name just a few.

- a. If confirmed, will you recuse yourself if any cases regarding these issues come before you?**

If confirmed, I would adhere to the recusal requirements in 28 U.S.C. § 455 as well as those in Canon 3 of the Code of Conduct for United States Judges, and other applicable provisions.

- b. Will you acknowledge that your involvement in these controversial cases creates at the very least an appearance of bias on these issues?**

Please see the answer above.

**Nomination of Chad A. Readler
United States Court of Appeals for the Sixth
Circuit Questions for the Record
Submitted October 17, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison system is greater than 10 to 1.⁴

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

Yes.

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

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

In the many pro bono cases I handled in private practice for indigent criminal defendants, I saw firsthand the impact socioeconomic factors can play in our criminal justice system, specifically, the challenges faced by indigent defendants. A disproportionate percentage of my pro bono indigent clients were from minority communities, and many of them faced significant challenges in navigating the criminal justice system.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

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

largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

- a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue.

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this issue.

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

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

- a. Do those statistics alarm you?

Based upon my experiences representing clients on death row, I believe that all death penalty cases deserve detailed review by the courts.

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

As an inferior court judge, I would faithfully apply Supreme Court precedent interpreting the 8th and 14th Amendments. It would not be appropriate to share my personal views on these issues. *See* Canons 2 and 3, Code of Judicial Conduct.

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

Please see the answer above.

5. During your hearing, you acknowledged that you had made a recommendation to Attorney

⁶ *Id.*

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

General Sessions about what position the Department of Justice (DOJ) should take in *Texas*

v. United States, Texas’s ongoing lawsuit challenging the Affordable Care Act (ACA). When I asked you what your recommendation was, you said you were not “comfortable” answering the question. Please explain whether any specific judicial canon or other ethical rule prevents you from answering this question. Or, if you have reconsidered, please state what recommendation you made to Attorney General Sessions.

To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. *See* Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

6. As my colleagues noted at your hearing, three career attorneys withdrew their names from this case shortly before your brief was filed on June 7, 2018. Did you speak with any of these three attorneys about their concerns regarding DOJ’s positions? If you personally did not speak to them, did someone on your staff inform you of these attorneys’ concerns?

Throughout the briefing process, I was aware of the views of lawyers in the Civil Division who offered advice on the legal issues presented by the litigation.

7. During your hearing, you stated that DOJ’s position on whether the mandate is severable from the remainder of the ACA is similar to the position that DOJ took on severability when the first challenge to the ACA, *NFIB v. Sebelius*, reached the Supreme Court.⁸ But there is one obvious difference: In 2017, Congress enacted the Tax Cuts and Jobs Act, which eliminated the penalty for failing to purchase minimum essential coverage.⁹ Congress did not make any other changes to the ACA.

As your own brief acknowledged, “the Supreme Court’s test for severability is essentially an inquiry into legislative intent,” and the “enacted text” of a statute “is the best indicator of intent.”¹⁰ How could you have concluded that Congress did not intend for the ACA’s minimum coverage provision to be severable from the rest of the statute, when Congress just last year explicitly decided to eliminate the penalty for failure to purchase minimum coverage while leaving the rest of the statute intact?

This matter is currently in litigation. The position of the Department of Justice is articulated in the June 7, 2018 letter from Attorney General Sessions to Speaker Paul Ryan, as well as in the briefs filed by the Department in the *Texas v. United States*

⁸ 567 U.S. 519 (2012).

⁹ Pub. L. No. 115-97, § 11081.

¹⁰ Defendants’ Mem. in Response to Plaintiffs’ App. for Preliminary Injunction at 12, *Texas v. United States*, No. 4:18-cv-167, ECF No. 92 (N.D. Tex. June 7, 2018) (internal quotations omitted).

case.

8. President Trump announced your nomination to the United States Court of Appeals for the Sixth Circuit on the very same day that you filed this brief in *Texas v. United States*.

- a. Did you communicate with any attorneys or other staff in the White House—by phone, through emails, or through memoranda—about this brief before you filed it?

In representing the interests of the United States in litigation, lawyers at the Department of Justice routinely communicate with attorneys representing other components of the federal government when those components have “equities” in a matter in litigation. With respect to *Texas v. United States*, the Attorney General’s June 7, 2018 letter to Speaker Ryan explains that the conclusion he reached regarding the litigation was made “with the approval of the President of the United States.”

- b. On or prior to June 7, 2018, did the topic of this litigation ever arise in the course of any discussions you had about your potential judicial nomination with (1) White House attorneys or other White House staff and/or (2) attorneys in DOJ’s Office of Legal Policy?

No.

9. In your capacity as acting Assistant Attorney General for the Civil Division, you supervised DOJ’s defense of the Trump Administration’s forcible separation of parents from their young children at the border, including in instances where parents and children were seeking asylum. In *Ms. L. v. U.S. Immigration and Customs Enforcement*, DOJ attorneys have denied that any such practice ever existed. For example, during a May 4, 2018 hearing, the district court judge noted the plaintiffs’ contention that the government had a policy of separating families and specifically asked, “What is the government’s position; is there a policy or is there not such a policy or practice?” The Department’s attorney answered, “I would say, your Honor, there is no—there is not such a policy.”¹¹

- a. During the course of this litigation, did you ever have any discussions about what DOJ attorneys should say if asked whether such a policy exists or existed?

I became involved with this litigation around the time the district court issued its June 26, 2018 decision granting a preliminary injunction to the plaintiffs. My role was to work with Department lawyers and our agency clients to comply with the court’s order. To the extent this question relates to advice I gave or received as part of confidential, internal deliberations within the Department of Justice, the content of that advice may be privileged, and may also be subject to the ethical duty of confidentiality. See Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or

¹¹ Transcript at 5, *Ms. L. v. U.S. Immigration & Customs Enforcement*, No. 18-cv-428 (S.D. Cal. May 4, 2018).

confidential information should be directed to the Department.

- b. Did you ever take any action to ascertain for yourself whether the Department of Homeland Security, U.S. Immigration and Customs Enforcement, or any other federal department or agency had a policy that required or resulted in the separation of parents and children in instances involving immigration enforcement? Such action would include making a personal inquiry to officials in the White House or the Department of Homeland Security, or directing your staff to make such an inquiry.

Please see the answer above.

- c. Did any of your senior staff in the Civil Division ever make such an inquiry?

Please see the answer above.

- d. As far as you are aware, did any attorneys within the Civil Division's Office of Immigration Litigation ever make such an inquiry?

Please see the answer above.

- 10. More generally, what policies or practices (if any) did you put in place to ensure that Civil Division attorneys were making accurate representations to the courts in cases involving challenges to novel policies and practices put in place by the Trump Administration?

The career public servant attorneys in the Civil Division have a longstanding tradition of ethical conduct and adherence to rules governing candor with the court. That tradition continues today. As the Acting Assistant Attorney General, I would not have condoned the making of any knowing misrepresentations in court.

- 11. You were in large part responsible for supervising the defense of a series of "travel bans" instituted by President Trump, beginning with an order issued on January 27, 2017. The first travel ban blocked the entry of nationals from Iraq, Syria, Iran, Yemen, Libya, Somalia, and Sudan—all of which are majority-Muslim countries.¹² It even barred entry by nationals of these countries who are lawful permanent residents of the United States.¹³ It was enacted seven days after President Trump took office and was not grounded in any findings of fact.

- a. Do you personally believe that the first travel ban was *not* motivated by religious animus against Muslims?

The January 27, 2017 Executive Order was issued before I began my tenure at the Department of Justice. Litigation over the series of Orders and Proclamations referenced above is still pending, and as a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

¹² Exec. Order No. 13769 § 3(c) (Jan. 27, 2017), *revoked by* Exec. Order No. 13780 (Mar. 6, 2017).

¹³ *See Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017).

- b. If you had become aware of facts that showed, unequivocally, that the first travel ban *was* motivated by religious animus against Muslims, would you have nevertheless continued to defend it in ongoing litigation?

Please see the answer above and the answer to Question 10.

12. During your hearing, you stated several times that you did not read all of the briefs filed by Civil Division attorneys on which your name has appeared.

- a. During your time as acting Assistant Attorney General, did you ever review a draft of a brief and provide substantive feedback or edits to the authors or to other staff? If so, on approximately how many occasions did this occur?

Occasionally, I would offer comments or edits to draft briefs, but this would comprise only a small fraction of the number of briefs on which my name was listed as Acting Assistant Attorney General.

- b. Did you review any drafts of DOJ's June 7, 2018 filing in *Texas v. United States*? If so, did you provide any substantive feedback or edits to any of your subordinates?

Yes.

- c. As you are aware, it is DOJ's typical practice to include the name of the relevant Assistant Attorney General on briefs filed by DOJ litigating divisions. What purpose do you believe this practice serves?

In accordance with 28 U.S.C. § 506, the "President shall appoint, by and with the advice and consent of the Senate, 11 Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties." Included in those Assistant Attorneys General is one to head the Department's Civil Division. Pursuant to Title 4 of the Justice Manual, the Attorney General has delegated his authority over civil litigation to the Assistant Attorney General for the Civil Division. In that sense, the Assistant Attorney General appears on briefs as the representative of the Attorney General. Including the name of the relevant Assistant Attorney General on the brief indicates which division is handling the litigation.

**Questions for the Record from Senator Kamala D. Harris
Submitted October 17, 2018
For the Nomination of**

Chad Readler, to the U.S. Court of Appeals for the Sixth Circuit

1. When you served as Acting Assistant Attorney General, the Department of Justice filed a brief in *Texas v. United States*, which argued that the Affordable Care Act's individual mandate, as amended by the Tax Cuts and Jobs Act, is unconstitutional. The brief also argued that, because Congress had found that the pre-existing coverage provisions were essential to the operation of the individual mandate, the two provisions were inseverable and the pre-existing coverage provisions were also unconstitutional.

According to a 2016 analysis by the Kaiser Family Foundation, if the Affordable Care Act were invalidated, approximately 52 million Americans under age 65 could lose access to health insurance because of a wide range of preexisting conditions, from diabetes to cancer to pregnancy.¹

- a) **Did the Justice Department consider that fact before taking the position that the pre-existing coverage provisions should be struck down?**

Internal deliberations within the Department of Justice and the content of any legal advice may be privileged, and may also be subject to the ethical duty of confidentiality. *See* Model Rule of Professional Conduct 1.6; Ohio Rule of Professional Conduct 1.6. Such privilege and confidentiality belongs to the Department, not to me — I am before this Committee as a nominee, not as a representative of the Department. Any request for potentially privileged or confidential information should be directed to the Department.

More broadly, *Texas v. United States* is still pending in litigation. As a lawyer in the Civil Division, it would be improper for me to comment on pending litigation outside of court. As a judicial nominee, commenting on pending litigation would also violate Canon 2 of the Code of Judicial Conduct.

- b) **Attorneys typically distinguish between policy arguments and legal arguments. However, the U.S. Supreme Court has repeatedly stated that it considers reliance interests when evaluating its own precedent. For instance, in *Dickerson v. United States*, the Supreme Court noted the importance of reliance interests when it upheld the constitutionality of Miranda warnings.**

- a. **Do you believe that courts must consider reliance interests before striking down legislation? Why?**

¹ <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/>.

As an inferior court judge, I would faithfully apply all Supreme Court precedent, including those decisions addressing the weight to be given reliance interests in resolving constitutional questions.

2. When you served as Acting Assistant Attorney General, the Department of Justice filed a Supreme Court merits brief defending the constitutionality of President Trump’s proclamation that suspended or severely restricted entry of individuals from Iran, Syria, Chad, Libya, Yemen, and Somalia, as well as North Korea and Venezuela. In June 2018, the Supreme Court upheld this proclamation by a 5-4 vote.

a) Did you have any role in advising the president on this version of the proclamation? If so, what was that role?

I have never spoken to the President. As a general matter, in representing the interests of the United States in litigation, lawyers at the Department of Justice routinely communicate with attorneys from other components of the federal government when those components have “equities” in a matter in litigation.

b) Did you have any role in advising the President on prior versions of the proclamation seeking to suspend or severely restrict the entry of individuals from Muslim-majority countries? If so, what was that role?

The January 27, 2017 Executive Order was issued before I joined the Department of Justice. Otherwise, please see the answer above.

3. In *Northeast Ohio Coalition for the Homeless v. Husted*, the plaintiffs challenged two Ohio laws—Senate Bills 205 and 216. These Ohio laws required county boards of elections to reject certain ballots of absentee voters and provisional voters; reduced the number of post-election days for absentee voters to cure errors and provide valid identification; and limited the ways in which poll workers could assist in-person voters.

When you were at Jones Day, you assisted with an amicus brief, which argued that the district court erred in concluding that the Ohio laws violated Section 2 of the Voting Rights Act. Among other things, you argued that Section 2 “does not require affirmative action to ameliorate underlying socio-economic disparities that might make minority voters less equipped to navigate the usual burdens of voting.”

a) Do you stand by this argument today?

I participated in the *Northeast Ohio Coalition* litigation as an advocate for clients—the Buckeye Institute and the Judicial Education Project—to express their views to the court as amici participants. The clients had an interest in election integrity issues addressed in the case, as explained in the amici brief. I faithfully advanced the arguments favored by my clients. As a judicial nominee, it would not be appropriate for me to comment on legal issues that could come before me as a judge. See Canons 2 and 3 of the Code of Conduct for United

States Judges.

- b) Do you believe that disparate impact may be probative of whether there was discriminatory intent in enacting a law?**

As an inferior court judge, I would faithfully apply Supreme Court precedent with respect to disparate impact issues, and with respect application and enforcement of Section 2 of the Voting Rights Act. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986). Otherwise, please see the answer above.

- c) Do you believe that Section 2 of the Voting Rights Act allows courts to consider disparate impact when evaluating whether a voting law must be struck down?**

Please see the answers above.

- d) How would you distinguish between a “normal burden of voting” and an impermissible burden?**

Please see the answers above.

- e) If we follow the argument set forth in your brief, could there ever be a violation of Section 2 without an express statement that a law was enacted with discriminatory intent?**

Please see the answers above.

- a. If yes, under what circumstances?**

Please see the answers above.

- b. If no, do you believe that is consistent with the intent of Congress?**

Please see the answers above.

4. You are a well-documented private charter school advocate. As part of your work on the Ohio Constitutional Modernization Commission, you proposed eliminating from the Ohio state constitution language that sets forth the threshold for adequacy of public education systems in the state. The state constitution requires a “thorough and efficient” public education system. That language was the basis of several court decisions in Ohio that found that funding systems insufficiently served Ohio’s children. If you were successful, it is likely that courts would have no role—or at least a far more restricted role—in determining the adequacy of public education systems in Ohio.

You have also said that the legislative and executive branches are best positioned to decide education policy and that the check on their actions is re-election, not the courts.

Elections happen every four years for the most part, and students cannot wait over four years for action when education systems are constitutionally inadequate. The overwhelming majority of students in America are educated in public school systems. The funding structure of those systems is therefore critical. I worry that as a judge, you would not consider any federal challenges to school funding in an unbiased manner, because you clearly believe that courts should not have a role in such disputes.

a) Please explain your reasons for advocating for the removal of the “thorough and efficient” language from the Ohio state constitution.

Public education is critical to the success and well-being of Ohio and its residents. I have volunteered hundreds of hours to promote public education opportunities in the state.

Separately, I was appointed to serve on the bi-partisan Ohio Constitutional Modernization Commission and was appointed to chair the committee reviewing the education provisions in the Ohio Constitution. Because those provisions had been the subject of significant treatment by the Ohio Supreme Court in recent years, the committee decided to consider the impact of those decisions, which expanded the courts’ role in setting education standards, on the existing constitutional language, originally enacted in 1851. In reviewing the history surrounding the language’s adoption in 1851, I understood the constitutional framers to be ensuring that Ohio enacted a public school system accessible by all students, as in 1851 many children in Ohio did not have access to a public school. I did not read that history as indicating that the “thorough and efficient” provision was also enacted to allow the courts to set education standards, overriding decisions of the state and local boards of education, the state legislature, and the state governor.

b) Do you believe that state courts should have no role in determining whether public education systems are providing constitutionally sufficient education services and conditions?

No. Article VI of the Ohio Constitution establishes certain guarantees with respect to public education, and the Ohio Supreme Court had interpreted Article VI in many subsequent decisions, including *Miller v. Korns* and *DeRolph v. State*. As a federal court judge, I would look to state court decisions with respect to the interpretation of questions of state law.

c) Do you believe the U.S. Constitution contains provisions that govern the adequacy of local public education systems? If yes, please identify the applicable constitutional provisions.

As an inferior court judge, I would follow binding Supreme Court precedent with respect to constitutional protections relating to public education. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972).

- d) Do you believe that states have the right to determine what they consider adequate public education standards? If so, do you believe that those standards may exceed any federal constitutional standards of adequacy for public education systems?**

Yes, states may determine what they consider adequate public education standards, subject to any applicable federal regulatory and constitutional requirements. Yes, states may impose standards that exceed any federal constitutional standards.

- e) How much deference should a federal court give to states in assessing whether any aspect of the state's public education system is constitutional?**

Please see the answers above.

5. You wrote an article that was published in the Los Angeles Daily entitled "Make Death Penalty for Youth Available Widely." In that article, you explicitly stated that the death "penalty should be available in nearly all circumstances, including when the offender is 16 or 17." I would expect to see such a statement in 1904, or maybe even 1974, but this article was written in 2004. By 2004, there was significant scientific evidence concerning the brain development in juveniles and its impact on behavior and decision-making. While your views are clear that 16- and 17-year-olds should be eligible for the death penalty, your views in the article are not clear as to the low-end age-range of death penalty eligibility. You say that the case of an 11-year-old that murders his gym teacher for refusing to allow recess is a "far cry" from a premeditated murder committed by a 17-year-old, but you do not say that an 11-year-old should be ineligible for the death penalty.

My problem with your article is that it paints the picture of not only an outdated and dangerous approach to criminal sentencing, but a biased approach as well.

In 2005, the Supreme Court in *Roper v. Simmons* ruled that it was unconstitutional to execute any person who was under the age of 18 at the time the crime was committed. You obviously disagreed with that decision based on the arguments set forth in your article. As a lower court judge, you would be required to enforce the *Roper* decision, but that was a 5-4 decision and it is possible that one day it will be overturned. If that happens, you may be in a position to determine whether an 11-year-old is eligible for the death penalty.

- a) At the time you wrote your article, what were your views on the low-end age threshold for death penalty eligibility?**

The article was written to express my view with respect to the facts and issues in *Roper v. Simmons*, 543 U.S. 551 (2005). The case involved a 17-year old who had committed a premeditated murder and had been sentenced to death by a jury and judge in Missouri. The case asked whether a state could constitutionally employ the death penalty in that circumstance. As the facts of the case revealed, the defendant had plotted the murder with friends and had “assured his friends they could ‘get away with it’ because they were minors.” *Roper v. Simmons*, 543 U.S. 551 (2005).

- b) If *Roper* is overturned and the Supreme Court does not set any definitive age parameters for death penalty eligibility, at what age would you believe defendants should never be eligible for the death penalty, regardless of the facts of the case?**

In numerous cases decided before *Roper*, the Supreme Court had held that 16 was the minimum age at which one could be executed. See *Thompson v. Oklahoma* and *Stanford v. Kentucky*. Further, some states have set the minimum age for enforcing the death penalty at 17 or 18, and other states have outlawed the death penalty entirely.

6. Numerous media reports have stated that Deputy Attorney General Rod Rosenstein discussed with senior officials at the Department of Justice the possibility of secretly recording President Trump and invoking the 25th Amendment.

- a) Were you present for any conversations in which Deputy Attorney General Rosenstein discussed secretly recording President Trump?**

No.

- b) Were you present for any conversations in which Deputy Attorney General Rosenstein discussed the 25th Amendment of the Constitution in any context?**

No.

- c) Did you, at any time, have any direct conversations with any member of the media, or cause information to be provided to the media indirectly, regarding Deputy Attorney General Rosenstein’s alleged discussions pertaining to the 25th Amendment or secretly recording President Trump?**

No.