Senator Chuck Grassley
Questions for the Record

Julie Elizabeth Carnes
Nominee, United States Circuit Judge for the Eleventh Circuit

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

   Response: I do not believe that a judge's gender, ethnicity, or any other demographic factor should influence the judge's decision as to the outcome of a case. A judge should objectively decide the facts of the case and apply the applicable law, with no thumb on the scale that would favor or disfavor any person or group based on gender, ethnicity, or other extraneous factor.

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

   Response: The most important attribute of a judge is the commitment to follow the rule of law in adjudicating cases. Realization of this attribute requires several discrete traits. First, in all decisions, large or small, a judge must act fairly by applying legal principles consistently and by exercising any appropriate discretion even-handedly as to all parties. Second, to be able to apply the rule of law, a judge must first know what the applicable legal principles are in a particular case. Given the complexities of federal litigation, a judge therefore cannot fulfill a commitment to follow the rule of law without a strong work ethic. I believe that I have demonstrated the above traits throughout my judicial career.

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

   Response: A good judge must have a keen sense of fair play and be committed to acting fairly in each case before her. A judge should be open-minded as to all arguments presented and even-handed in her rulings. A judge must also be willing to put in the time necessary to render decisions that are correctly reasoned. Because the perception of justice can often be as important as the actual rendering of justice, a judge should be transparent in her decision-making and lucid as to the reasons for a decision. As to personal demeanor, a judge should be pleasant and courteous, and should try to put attorneys and litigants at ease. A judge should not be unfairly demanding, and should be considerate of lawyers and litigants with regard to scheduling and other similar types of issues that often accompany litigation. I believe that I possess the above traits.

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

Response: I am fully committed to following precedents of higher courts, whether or not I necessarily agree with those precedents.

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

Response: To the extent that the dispute involved construction of language in a statute, regulation, constitutional provision or other written document, I would first review the provision to determine whether a reading of its plain language resolved the issue. If not, I would then apply the appropriate canons of construction. In addition, I would look to Supreme Court and Eleventh Circuit case law in an effort to find persuasive authority concerning the issue before me or concerning an analogous type of issue. If no helpful Supreme Court or Eleventh Circuit authority existed, I would look for persuasive authority from other federal circuits.

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

Response: Should I be confirmed to the Eleventh Circuit, the only circumstance in which I would be permitted to reconsider precedential decisions of that court would be when sitting with the court *en banc*. As a member of a federal court of appeals, I would be bound to apply all applicable precedent from the United States Supreme Court, whether or not I agreed with a particular decision.

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

Response: A congressional enactment should be declared unconstitutional "only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Even when an enactment does exceed constitutional limits, it should not be struck down on constitutional grounds if there is an alternative ground for invalidating the statute. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

8. Please describe your understanding of the workload of the Eleventh Circuit. If confirmed, how do you intend to manage your caseload?

Response: I understand that the workload of the Eleventh Circuit is substantial, as only the Ninth and Fifth Circuits have more appeals filed each year. Further, the Eleventh Circuit has the highest number of filings, per active judge, than any other federal circuit. If confirmed, I will first seek the input of current Eleventh Circuit judges as to their procedures for expeditiously resolving cases. I will then adopt, for my own chambers, what I discern to be the best practices among those judges. To efficiently, but also fairly,

resolve all cases before me, I will continue to exhibit the same strong work ethic on the circuit that I have demonstrated as a district court judge.

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

Response: In my view, it is never proper for a judge to rely on foreign law or the views of the "world community" in determining the meaning of the Constitution absent a decision by the Supreme Court that clearly and absolutely compels such reliance in the given case.

10. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: I offer my twenty-two year record on the bench of the Northern District of Georgia as evidence that, if confirmed, my decisions will remain grounded in precedent and the text of the law, rather than in any underlying ideology or motivation.

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

Response: I offer my twenty-two year record on the bench of the Northern District of Georgia as evidence that, if confirmed, I will put aside any personal views and be fair to all who appear before me.

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

Response: The Eleventh Circuit applies the prior precedent rule, which means that all Eleventh Circuit panel decisions must follow binding circuit precedent unless (1) the Supreme Court has either overruled the precedent or issued a decision that conflicts with that precedent or (2) the Eleventh Circuit, sitting *en banc*, has overturned the precedent. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236-37 (11th Cir. 2008). Pursuant to Federal Rule of Appellate Procedure 35(a), the court should only sit *en banc* when "necessary to secure and maintain uniformity of the court's decisions," or when the court is presented with a "question of exceptional importance."

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

Response: In cases in which I am called upon to make a factual determination, I first research and identify the legal principles that will be applicable to the case, after which I hold a hearing. My ultimate factual findings are based on credibility determinations as to

the witnesses and on a thorough familiarity with the written record. In cases where no judicial factual findings are required, I first review the briefs and read any applicable statutes, rules, or contracts at issue. Then, as to cases arising under federal question jurisdiction, I do research to identify applicable Supreme Court or Eleventh Circuit authority, both precedential and persuasive. As to cases arising under diversity jurisdiction, I research applicable state court authority. If there is no governing authority from the above courts, I consider, as potentially persuasive authority, decisions from other courts. Before issuing the opinion, I will have read the entire factual record of the case and will apply the applicable legal standard to those facts.

14. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work and interaction with colleagues on the Court?

Response: Because circuit court judges decide cases either in panels of three judges or *en banc*, the issuance of opinions is necessarily a collaborative process. For that reason, I believe that collegiality is essential for a circuit court to function well. If confirmed to the Eleventh Circuit, I will treat with respect and civility my colleagues and their positions on a given issue. While it is the duty of each judge to honestly convey his or her reasoning and conclusions, I believe that personal attacks against a colleague undermine not only the person against whom they are directed, but also the court itself.

15. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.

a. In the penultimate sentence of the Court's opinion, Justice Kennedy wrote, "This opinion and its holding are confined to those lawful marriages."[1]

i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.

Response: Yes. *Windsor* held that Section 3 of the Defense of Marriage Act ("DOMA") "is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). The statement quoted in the above question limits the holding of *Windsor* to the facts before the Court, and is therefore part of the case's holding.

ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes "lawful marriages"?

[1] *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

Response: By "lawful marriages," the Court was referring to "those persons who are joined in same-sex marriages made lawful by the State" and "those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Windsor*, 133 S. Ct. at 2695-96.

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Yes.

iv. Are you committed to upholding this precedent?

Response: Yes. I will uphold all current Supreme Court precedent.

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, "By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."[2]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. The Court's opinion recognizes the "virtually exclusive province of the States" to define and regulate marriage, subject to "discrete" exceptions in which Congress has properly "regulate[d] the meaning of marriage in order to further federal policy," and "subject to constitutional guarantees." *United States v. Windsor*, 133 S. Ct. 2675, 2690-92 (2013) (internal quotation marks omitted).

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If confirmed, I am committed to giving full force and effect to all portions of *Windsor* that are applicable to the facts in the case before me.

c. Justice Kennedy also wrote, "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."[3]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

[2] *Id.* at 2689-2690.
[3] *Id.* at 2691.

Response: Yes. The Court's full opinion is binding precedent entitled to full force and effect by lower courts.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If confirmed, I am committed to giving full force and effect to all portions of *Windsor* that are applicable to the facts in the case before me.

d. Justice Kennedy wrote, "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[4]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. The Court's full opinion is binding precedent entitled to full force and effect by lower courts.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If confirmed, I am committed to giving full force and effect to all portions of *Windsor* that are applicable to the facts in the case before me.

e. Justice Kennedy wrote, "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'"[5]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. The Court's full opinion is binding precedent entitled to full force and effect by lower courts.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If confirmed, I am committed to giving full force and effect to all portions of *Windsor* that are applicable to the facts in the case before me.

[4] *Id.* (internal citations omitted).
[5] *Id.* (internal citations omitted).

16. At a speech in 2005, Justice Scalia said, "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says."

a. Do you agree with Justice Scalia?

Response: Yes.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

17. Do you think judges should consider the "current preferences of the society" when ruling on a constitutional challenge? What about when seeking to overrule longstanding Supreme Court or circuit precedent?

Response: Unless Supreme Court or Eleventh Circuit precedent has clearly directed consideration of the "current preferences of the society" in a specific context that mimics the case before the court, a circuit judge should not consider such preferences in deciding a constitutional challenge or a challenge to longstanding circuit precedent.

18. What is your judicial philosophy on applying the Constitution to modern statutes and regulations?

Response: The Constitution applies to modern statutes and regulations in the same way that it applies to older legislation.

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

Response: As discussed in response to Question 17 above, absent binding precedent requiring that a judge attempt to identify the evolving norms and traditions of society, a judge should not base an interpretation of the Constitution on such speculation. The Constitution enshrines timeless values and was not intended to be dispensed with simply because of a perception that certain provisions no longer enjoy popularity with particular segments of society. The Supreme Court, however, has held that, in some contexts, an appraisal of the "evolving standards of decency" can be appropriate. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)**.**

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

Response: Current Supreme Court jurisprudence recognizes "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment

Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Court has elsewhere characterized this legislative discretion as "room for play in the joints" between the two clauses. *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970). Because of this, the Supreme Court currently recognizes that "the government may . . . accommodate religious practices . . . without violating the Establishment Clause," provided that the accommodation does not "devolve into 'an unlawful fostering of religion.'" *Cutter*, 544 U.S. at 713 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) and *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987)).

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

Response: The Supreme Court has held that the death penalty is an acceptable form of punishment in certain circumstances, so long as procedural safeguards are observed. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976). If confirmed, I will apply all binding precedent on that subject.

22. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: To the extent that this statement refers to a view that the meaning of the Constitution changes over time, I disagree with it. The brilliance of the United States Constitution is that the drafters identified timeless principles whose wisdom and permanence resonate with each new age. Granted, technological and other developments cause our country to function far differently than at the time of its founding, thereby presenting legal scenarios that were perhaps not envisioned by the Founders. Nevertheless, the bedrock principles articulated in the Constitution remain the standard by which we evaluate these new legal issues. Any changes to the Constitution should occur not by disregarding provisions that might seem outdated or inconvenient, but by the intentionally arduous task of amending the Constitution, the process for which is set out in Article V.

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

Response: While the Supreme Court has not found a general right to privacy protected by the Constitution, it has declared that various provisions in the Bill of Rights and the Fourteenth Amendment encompass privacy rights and interests. For example, the Court has found privacy interests in the First Amendment right of association, the marital relationship and the rearing of children, in one's bodily integrity, and in one's home. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Missouri v. McNeely*, 569 U.S.__, 133 S. Ct. 1552, 1558 (2013); and *Kyllo v. United States*, 533 U.S. 27, 34-40 (2001). Further, the Court has described the Fourth Amendment as protecting "privacy interests." *Kentucky v. King*, 563 U.S.__, 131 S. Ct. 1849, 1862 (2011).

a. Where is it located?

Response: The Supreme Court has found privacy interests to exist in the First, Third, Fourth, and Fifth Amendments, and also in the Due Process Clause of the Fourteenth Amendment. Please see my citations in Question 23, above; *see also Katz v. United States*, 389 U.S. 347, 350 n.5 (1967).

b. From what does it derive?

Response: Please see response to Questions 23 and 23(a).

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

Response: The contours of the privacy interests found by the Supreme Court would depend upon the particular Constitutional provision at issue and the facts of the case before the court. As a member of a subordinate court, I would be guided by the Supreme Court's determinations as to the contours of the right.

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

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

Response: No, I do not believe that the manner in which a court should find rights granted in the Constitution is by "reading between the lines." Rather, the Supreme Court has stated that the proper inquiry for determining whether an unenumerated right is protected by the Constitution is to evaluate whether that alleged right, objectively viewed, is "deeply rooted in this Nation's history and tradition" and is "'implicit in the concept of ordered liberty' such that neither 'liberty nor justice would exist if [it was] sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

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

Response: Absent a requirement by the Court to do so, and a definition of what those terms mean, I do not believe that it is appropriate for a judge to go searching for "penumbras" or "emanations" in the Constitution.

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

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

Response: It is important that a circuit court judge base her decision only on the trial record before her. A circuit judge's independent research, and then reliance on that research to reach a decision, deprives a litigant of an opportunity to challenge the research done by the judge or to offer research that reaches a different conclusion.

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

Response: If such evidence had been admitted by the trial court and if such evidence met the requirements for admissibility set out in Federal Rule of Evidence 702 and binding precedent interpreting that rule, a circuit judge may then consider the studies.

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

Response: Other than rejecting rational basis review, the Supreme Court has not articulated a standard of scrutiny for lower courts to apply to Second Amendment challenges. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008). The Eleventh Circuit has adopted a two-step inquiry for review of such claims. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012). First, the court must "ask if the restricted activity is protected by the Second Amendment." *Id.* Then, "if necessary, [the court] would apply the appropriate level of scrutiny." *Id.* While the Eleventh Circuit did not identify what level of scrutiny to apply at the second step, the cases that it favorably cited note that the appropriate level of scrutiny depends upon "how severely the prohibitions burden the Second Amendment right." *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011); *see also Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) (requiring a "more rigorous showing than [intermediate scrutiny] . . . if not quite 'strict scrutiny'" because the ordinance at issue "c[ame] much closer to implicating the core Second Amendment right."); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 801-02 (10th Cir. 2010); and *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010).

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

Response: An activist judge is one who approaches a particular case with a determination to reach an outcome that accords with the judge's own personal views and policy preferences, as opposed to an effort to conduct an impartial review of the record and an objective analysis of applicable law.

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

Response: I received these questions on May 20, 2014. After conducting research and drafting my answers, I reviewed my responses with a representative of the Office of Legal Policy of the Department of Justice. I continued reviewing and editing my responses and, on May 22, 2014, I authorized the Office of Legal Policy to submit them on my behalf to the Committee.

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

Response: Yes.

Questions for the Record
Senator Ted Cruz

Julie Elizabeth Carnes
Nominee, United States Circuit Judge for the Eleventh Circuit

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

Response: I believe that a judge should act fairly and be committed to following the law applicable to the facts in each particular case. Further, a judge should approach her work with humility, with a keen awareness of the distinct and limited role that an Article III judge plays in our system of government, and with a commitment not to overstep those bounds. I have not thoroughly studied the complete writings of any particular Justice and am therefore unable to say which Justice's philosophy might be most analogous to my own.

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

Response: When precedent does not supply an answer to a question of constitutional interpretation, a court should consider original sources in construing the text of the particular provision at issue. The Supreme Court has most recently looked to original public meaning when considering the meaning of a constitutional provision. *See, e.g., Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Response: A federal appellate judge has no authority to overrule any Supreme Court precedent, and I would not attempt to do so were I to be confirmed as an appellate judge. As to Eleventh Circuit precedent, the prior precedent rule provides that only the Supreme Court or the Eleventh Circuit sitting *en banc* can overrule existing circuit precedent. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236-37 (11th Cir. 2008). A circuit court should only sit *en banc* when "the proceeding involves a question of exceptional importance" or it "is necessary to secure or maintain uniformity of the court's decisions." FED. R. APP. P. 35(a) (2013).

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

Response: Based on the particular facts before it in the *Garcia* case, the Supreme Court held that state sovereign interests were adequately protected through "procedural safeguards inherent in the structure of the federal system." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985). In other cases, however, the Court has relied, among other things, on the Tenth Amendment to articulate judicially-recognized limitations on federal power *vis-a-vis* state sovereign interests. *See, e.g.*, *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

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

Response: The Supreme Court has recognized three broad categories of activity that Congress may regulate under the Commerce Clause: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities that substantially affect interstate commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971). In *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court invalidated federal statutes as exceeding Congress's Commerce Clause authority. In doing so, the Court emphasized the non-economic nature of the conduct regulated by the statutes at issue. *See Morrison*, 529 U.S. at 610-11, 613; *Lopez*, 514 U.S. at 560-61, 566-67. However, the Court has not held that Congress may never regulate non-economic activity. Further, in a concurring opinion, Justice Scalia has written that "Congress may regulate even non-economic activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring).

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

Response: The President's power to issue executive orders "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In gauging the extent of the President's power in a particular situation, the Supreme Court has relied on the "tripartite" method of analysis articulated in Justice Jackson's concurring opinion in *Youngstown*, noting that the latter sets forth "the accepted framework for evaluating executive action in this area." *Medellin v. Texas*, 552 U.S. 491, 524 (2008).

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

Response: The Supreme Court has explained that a right is considered fundamental for purposes of substantive due process analysis when, viewed objectively, it is "'deeply rooted in this Nation's history and tradition'" and is "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it were] sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted).

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

Response: The Supreme Court applies strict scrutiny to classifications that are "seldom relevant to the achievement of any legitimate state interest," and the Court has identified "race, alienage, [and] national origin" as fitting within that category. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Strict scrutiny also applies "when state laws impinge on personal rights protected by the Constitution." *Id*. The Court applies intermediate scrutiny to classifications, such as gender, that "generally provide[] no sensible ground for differential treatment." *Id.* at 440-41.

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

Response: Regardless of what my personal assessment of the need for racial preferences in public higher education may be in fifteen years, I will follow applicable precedent on that point. The current controlling authority in this area can be found in such cases as *Grutter*, cited above, and *Fisher v. Univ. of Texas*, 570 U.S.__, 133 S. Ct. 2411 (2013). Absent a change in that precedent, I would be obligated to follow those cases and any other applicable Supreme Court or Eleventh Circuit authority.