Nomination of Joseph Dawson III to the United States District Court for the District of South Carolina
Questions for the Record
Submitted November 25, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1) During your time as County Attorney for Charleston County, South Carolina, you reportedly advised the County on a property deal that involved Donald Trump, Jr. The County sold a vacant hospital building to a private development company that included Donald Trump, Jr. as part of its leadership. After selling the property to the private company, the county agreed to lease a portion of it as the anchor tenant of the new development. According to news reports, the private developer went bankrupt, and the county had to buy the property back for approximately $33 million. One newspaper reported that the failure of the deal "raise[d] questions about the lease agreement vetted by the county's legal team." (David Blade; *Donald Trump Jr., the Former Charleston Naval Hospital, and a Settlement Costing County Taxpayers $33 Million: How N. Charleston's Trump Jr. Deal Unraveled*; THE POST AND COURIER (Oct. 16, 2017))

   a) At the time that the County made this lease agreement, were you aware of financial problems with the private developers?

   Charleston County entered a lease with Chicora Gardens LLC to rent approximately 92,000 square feet of a 400,000 square foot building on July 1, 2014, to relocate Charleston County's in-patient drug and alcohol treatment facility from the City of Charleston to the City of North Charleston. Chicora Gardens LLC purchased the property from the City of North Charleston, who purchased the property from the federal government at auction. Charleston County did not own the property; it did not sell it to Chicora Gardens LLC, and it did not buy it back for $33 million dollars. Rather, Charleston County terminated the lease prior to its effective date because Chicora Gardens did not complete the improvements to make the leased space suitable for an in-patient drug and alcohol treatment facility. Chicora Gardens LLC filed bankruptcy and filed an adversary proceeding against Charleston County *inter alia* for breach of the lease. Charleston County settled the adversary case by paying all Chicora Gardens LLC's creditors in full in the bankruptcy case, and the County took title to the property as part of the settlement. I wrote a memo to Charleston County Council dated July 1, 2014, marked "attorney/client privilege" which provided a summary and non-exhaustive list of issues regarding the lease.

   As the County Attorney for Charleston County, my role involved reviewing the draft lease negotiated by Charleston County and Chicora Gardens LLC and advising Charleston County regarding its provisions, potential revisions, and risks. All communications I had with Charleston County Council are protected by the attorney-client privilege and the work product doctrine.

b) Did you recommend that the County enter into the lease agreement to be an anchor tenant of the new development?

My work, research, and communications with my client on this matter are protected under the attorney-client privilege and the work product doctrine.

2) In litigation, you defended Charleston County's voting system, which was struck down as a violation of the Voting Rights Act. The County had an at-large voting system in which council members were voted upon by the entire county, rather than by voters in specific districts. The Justice Department and other plaintiffs challenged this system, arguing that it diluted the strength of minority voters. A federal district court agreed, ruling that the system "denie[d] African-Americans, on account of their race and color, equal access to the electoral and political process, in contravention of Section 2 of the Voting Rights Act." (U.S. v. Charleston County (2003)) The Fourth Circuit affirmed. In the appellant's brief before the Fourth Circuit, you are identified as the "Lead Counsel for Appellants." (*U.S. v. Charleston Cnty.*, 2003 WL 25599406 (4th Cir.))

a) Even though you were on the losing side of this case, in retrospect do you think that this change has resulted in minority voters having more influence on the Charleston County Council?

Charleston County's single member district election system has resulted in more minority members being elected to Charleston County Council.

3) 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?

Never.

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

It is generally not appropriate for inferior court judges to criticize Supreme Court precedent, and if confirmed as a district judge, I would have little occasion to write a concurring or dissenting opinion.

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

District court decisions are not precedential, although they can be persuasive. Federal Rules of Civil Procedure 59(e) and 60 provide standards for when a district court should set aside its prior rulings in a specific case. A district court should revisit its decisions when they conflict with a decision from a superior court.

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

It is only for the Supreme Court to decide when a precedent should no longer be followed, and the Court has recently and repeatedly articulated the factors it considers when determining whether stare decision requires adherence to precedent. *See*, e.g., *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020) (considering "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision" (internal quotation marks omitted)). If confirmed, I would faithfully apply all Supreme Court precedent.

4) 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 lower courts, including *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny.

b) Is it settled law?

Please see my response to Question 4(a).

5) 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?**

Like all Supreme Court precedent, *Obergefell* is settled law that is binding on lower courts, and if confirmed, I would apply it faithfully.

6) In Justice Stevens's dissent in District of Columbia v. Heller he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a) Do you agree with Justice Stevens? Why or why not?

As a judicial nominee, it would not be appropriate for me to comment on the merits or demerits of any Supreme Court opinion. If confirmed, I would faithfully apply the Court's *Heller* opinion and its progeny.

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

The Supreme Court in *Heller* noted that the "right secured by the Second Amendment is not unlimited," and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *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 justices in *Heller* disagreed on the implications of prior precedent. As a judicial nominee, it would be inappropriate for me to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases; and if confirmed, I would follow *Heller* and any Supreme Court or circuit precedent interpreting *Heller*.

7) In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a) Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The Supreme Court has held that "First Amendment protection extends to corporations." *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). If confirmed, I would faithfully apply that precedent.

b) Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see my response to Question 7(a).

c) Do you believe corporations also have a right to freedom of religion under the First Amendment?

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014), the Supreme

Court held that the Religious Freedom Restoration Act applies to closely-held corporations. That precedent is binding and, if confirmed, I would apply it. As a judicial nominee, it would not be appropriate to opine further on an issue that could be the subject of pending or impending litigation.

8) Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Together, these constitutional provisions restrict the government from denying a person the equal protection of the laws and from prohibiting a person's free exercise of religion. Both are fundamental, important rights protected by our Constitution, and I would faithfully apply all Supreme Court precedent governing the interplay of the two amendments.

9) Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

The Supreme Court has long held that state laws prohibiting interracial marriage violate the Fourteenth Amendment. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). Please also see my response to Question 8.

10) Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please see my response to Question 9.

11) Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No.

12) On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former 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?

I do not recall being asked about my views related to administrative law.

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.

c) What are your "views on administrative law"?

As an inferior court nominee, my view is that all Supreme Court and Fourth Circuit precedent regarding administrative law is binding and I would faithfully apply it.

13) Do you believe that human activity is contributing to or causing climate change?

I am generally aware that literature exists which attributes climate change to human activity, but I have not studied any particular scientific reports. It is not appropriate for me to comment further, however, as this issue has been and will likely continue to arise in litigation and is part of a national political debate. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); Id., Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

14) When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has held that the text of a statute is the starting place for construing it and that it is appropriate to consider legislative history only when the statutory text is ambiguous. *See*, e.g., *Milner v. Dep't of Navy*, 562 U.S. 562, 569, 572 (2011). If confirmed, I will follow all Supreme Court and Fourth Circuit precedent on the use of legislative history

15) 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.

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

I received these questions from the Office of Legal Policy and drafted my responses to the questions, reviewing any previous memos or litigation if the question referred to them. I then submitted my draft responses to the Office of Legal Policy, which made some recommended edits that I reviewed and then reverted the final versions to the Office of Legal Policy for submission. All answers are my own.

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to the United States District Court for the District of South Carolina
Questions for the Record
Submitted November 25, 2020

QUESTIONS FROM SENATOR WHITEHOUSE

1. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
    a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

       I had not reviewed the story or recording beforehand, but have done so now.

    b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

       The Canons of the Code of Conduct for United States Judges prohibit me from opining on political matters.

    c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

       Please see my response to Question 1(b).

    d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

       No.

    e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

       Please see my response to Question 1(b).

2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

a. Do you agree with Justice Roberts' metaphor? Why or why not?

I agree to the extent that the metaphor intends to convey the limited role of the judiciary to say what the law is and how it applies to case or controversies before Article III courts.

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

The practical consequences of a judicial decision matter when the law calls for them to play a role in the legal standard that the court applies. A good example is the standard for a preliminary injunction, which requires a court to consider, among other factors, whether the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008).

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

No, the law governing Rule 56 motions requires the court to apply an objective standard.

4. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

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

A federal judge must apply the law impartially to all litigants. However, a federal judge should be mindful of how he or she interacts with litigants and the public and should always be respectful of those who come before the court.

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

A federal judge must apply the law impartially to all litigants. However, a federal judge should be mindful of how he or she interacts with litigants and the public and should always be respectful of those who come before the court.

5. 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.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the jury play in our constitutional system?

The jury plays a key role in our constitutional system as the finder of fact in many instances, both under the Seventh Amendment as well as the Sixth Amendment.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

The Supreme Court has interpreted the Federal Arbitration Act on many occasions, and I would faithfully apply all of the Court's precedents on arbitration clauses while taking into consideration all relevant constitutional provisions that bear on a particular litigant's claims.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 6(b).

7. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has instructed that courts "must review legislative 'factfinding under a deferential standard.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). I would follow and faithfully apply all Supreme Court and Fourth Circuit precedent regarding legislative fact-finding.

8. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.
ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

The independence of Article III courts is foundational to our constitutional structure. The Code of Conduct for United States Judges and Advisory Opinion #116 are designed to ensure that the judiciary remains independent and avoids appearances of impropriety or partiality. If confirmed, I will evaluate any invitation to participate in an educational seminar consistent with the factors outlined in that Advisory Opinion and take into account its admonition that each invitation should be assessed "on a case-by-case basis."

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 8(b).

9. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct drafted a proposed advisory opinion concluding that a judge's ongoing "membership in. . . the Federalist Society is inconsistent with obligations imposed by the Code [of Conduct.]" After an aggressive lobbying campaign by Federalist Society-affiliated judges, the Committee ultimately voted to table the proposed opinion. In doing so, the Committee observed: "The nation depends on a judiciary that is impartial and independent. Consistent with the judge's oath, each individual judge should take care to make all membership decisions in a way that is consistent with the highest ideals of the profession as expressed in the Code of Conduct." (emphasis added.)

a. If confirmed, do you plan to continue your membership in the Federalist Society?

I am not a member of the Federalist Society.

b. In the draft of Advisory Opinion #117, the Committee concluded that official affiliation with ACS or the Federalist Society "could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge's impartiality on subjects as to which the organization has taken a position; and generally frustrates the public's trust in the integrity and independence of the judiciary."

i. Do you think the Federalist Society is an organization "that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency"? Why or why not?

ii. Do you think the Federalist Society "is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations"? Why or why not?

iii. Do you believe that a judge's membership in the Federalist Society may reasonably be seen by the public as engendering indirect advocacy of the organization's political, social, or civic objectives? Why or why not?

iv. Do you believe that reasonable members of the public would perceive a judge who has membership in the Federalist Society, a self-described group of conservatives and libertarians, to be partial or impartial? Why?

v. The draft opinion notes "the Federalist Society's funding comes substantially from sources that support conservative political causes." Do you believe that membership in an organization tied to such funding could give rise to the appearance of impropriety or partiality? Why or why not?

Canon 4 of the Code of Conduct for United States Judges instructs that a "judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects." That same canon states that such participation should not "detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set

forth below." Canon 5 of the Code forbids judges from joining or contributing to a "political organization," but "does not prevent a judge from engaging in activities described in Canon 4." I am not aware of any fact that would suggest that membership in the Federalist Society is not fully consistent with the Code of Conduct for United States Judges, including both Canon 4 and Canon 5.

Nomination of Joseph Dawson III, to be United States District Court Judge for the District of South Carolina
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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?

   The Supreme Court has evaluated whether a right is fundamental in a series of cases, including *Washington v. Glucksberg*, 521 U.S. 702 (1997), and its progeny. I would follow the Supreme Court's precedents as well as any applicable Fourth Circuit precedent, if confirmed.

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

      Yes.

   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. The Supreme Court stated in *Glucksberg* that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. at 720-21 (internal citations omitted). I would faithfully apply that precedent.

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

      Yes. If the right has been recognized by the Supreme Court or the Fourth Circuit, I would faithfully apply that precedent. While not binding, I would also consider precedent from other courts of appeals.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

      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*).

The Supreme Court considered this factor in the cases you cited above, and I would apply those cases faithfully.

f. What other factors would you consider?

I would consider the factors articulated by the Supreme Court in *Glucksberg* and its progeny, or any other Supreme Court or Fourth Circuit precedent.

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

The Supreme Court held in *United States v. Virginia*, 518 U.S. 515 (1996), that the Equal Protection Clause of the Fourteenth Amendment applies to both race and gender. If confirmed, this precedent would be binding on me and I would apply it faithfully.

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my response to Question 2.

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

Please see my response to Question 2.

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

In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court held that the Fourteenth Amendment protects the right of same-sex couples to marry "on the same terms accorded to couples of the opposite sex." Id. at 680. If confirmed, I would faithfully apply this precedent.

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

This issue is the subject of pending or impending litigation and therefore, under the Code of Conduct for United States Judges, I cannot express an opinion. *See* Canon(A)(6).

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

   The Supreme Court has held that such a right exists. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully apply that precedent.

   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 has held that such a right exists. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully apply that precedent.

   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 held that such a right exists. *See Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully apply that precedent.

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

      Please see my above responses.

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*, 576 U.S. 644, 668 (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 to consider evidence that sheds light on our changing understanding of society?

      The Supreme Court has instructed that societal changes can be relevant to a lower court's analysis in a variety of contexts. If confirmed, I will follow the Supreme Court's holdings on this issue, including *Obergefell* and *Virginia*.

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

Please see my response to Question 4(a). When a district court is sitting as the fact finder, scientific data might be relevant to support an element of a litigant's claim. In addition, scientific evidence and data can play an important role in trial evidence when the district court judge is acting as the gatekeeper for expert testimony. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

   a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

      The Supreme Court has stated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

   b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

      Please see my response to Question 5(a).

6. 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?

      As a general rule it would be inappropriate for me to comment on Supreme Court precedent as a judicial nominee. *See* Code of Conduct for United States Judges, Canon 3(A)(6). However, I believe that *Brown v. Board of Education* was correctly decided and holds a unique place in American jurisprudence. If confirmed, I would follow *Brown* and all Supreme Court precedent. I have not analyzed this academic issue in great detail, but I am generally aware that some originalist scholars assert that *Brown*'s holding comports with the original meaning of the Fourteenth Amendment. *See*, e.g., Michael McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995).

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' or 'equal protection,' or '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 Nov. 25, 2020).

If confirmed, I would faithfully apply Supreme Court and Fourth Circuit precedent, including precedent defining the terms "freedom of speech," "equal protection," and "due process of law."

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?

The Supreme Court has looked to the text, structure, and history of a constitutional provision, including how the provision was originally understood, in interpreting it. *See*, e.g., *District of Columbia v. Heller,* 554 U.S. 570 (2008). If confirmed, I would follow all precedents from the Supreme Court and the Fourth Circuit.

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

Please see my response to Question 6(c).

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

Please see my response to Question 6(c).

Questions for the Record for Joseph Dawson, III
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I ask each nominee to answer the following two questions:

   a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

   No.

   b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

   No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

   a. Do you agree that training on implicit bias is important for judges to have?

   Yes.

   b. Have you ever taken such training?

   No.

   c. If confirmed, do you commit to taking training on implicit bias?

   If confirmed, I will participate in training opportunities offered to federal judges on implicit bias.

3. In 2003, you defended Charleston County's at-large voting system from a challenge by the Department of Justice that Charleston's at-large voting system diluted the minority vote in violation of section 2 of the Voting Rights Act. The district court granted summary judgment to the plaintiffs, finding the at-large voting system violated the Voting Rights Act – a decision that was affirmed by the appellate court.

   a. From 1970 until the court decision in this case in 2004, 41 people had been elected to the County council but only three of them were minorities. How many minorities now hold seats on the Charleston County Council?

   There are three African American members currently serving on Charleston County Council.

b. Do you agree with the court's decision to strike down Charleston County's at-large voting system?

As a judicial nominee, it would be inappropriate for me to comment on the court's decision to strike down Charleston County's at-large voting system. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedents.

4. You were County Attorney when Charleston was considering a redevelopment project of a vacant hospital site in 2012. The County eventually signed a 25-year lease to become the anchor tenant, despite knowing that Titan Atlas Global had been hired to renovate the property. Its predecessor company, Titan Atlas Manufacturing, run by Donald Trump, Jr. and Jeremy Blackburn, had left a trail of unpaid bills, litigation, and unpaid taxes in its wake. The redevelopment project failed and eventually the County paid $33 million in order to settle the dispute.

a. As County Attorney, what was your role while considering this project? Did you advocate for or make a recommendation to the County Council on this project?

Charleston County entered a lease with Chicora Gardens LLC to rent approximately 92,000 square feet of a 400,000 square foot building on July 1, 2014, to relocate Charleston County's in-patient drug and alcohol treatment facility from the City of Charleston to the City of North Charleston. Chicora Gardens LLC purchased the property from the City of North Charleston, who purchased the property from the federal government at auction. Charleston County terminated the lease prior to its effective date because Chicora Gardens did not complete the improvements to make the leased space suitable for an in-patient drug and alcohol treatment facility. Chicora Gardens LLC filed bankruptcy and filed an adversary proceeding against Charleston County *inter alia* for breach of the lease. Charleston County settled the adversary case by paying all Chicora Gardens LLC's creditors in full in the bankruptcy case, and the County took title to the property as part of the settlement. I wrote a memo to Charleston County Council dated July 1, 2014, marked "attorney/client privilege" which provided a summary and non-exhaustive list of issues regarding the lease.

As the County Attorney for Charleston County, my role involved reviewing the draft lease negotiated by Charleston County and Chicora Gardens LLC and advising Charleston County regarding its provisions, potential revisions, and risks.

b. Looking back on the situation, are there circumstances you should have seen or considered that would have altered your judgment as the County Attorney advising the County Council about the deal?

There are always circumstances you can see or consider with hindsight. However, as the attorney for Charleston County on this transaction, my job was to advise Charleston County regarding the potential risks of a twenty-five-year lease, not to make the business decisions regarding the same.

Nomination of Joseph Dawson, III
United States District Court for the District of South Carolina
Questions for the Record
Submitted November 25, 2020

QUESTIONS FROM SENATOR BOOKER

1. In 2012, the County of Charleston was involved in a redevelopment project to transform a vacant hospital building.[1] As part of that effort, the County sold the land the hospital sat on for $5 million to Chicora Gardens LLC. Notably, Donald Trump, Jr. was one of the principals of Chicora Gardens. You wrote a memo to the County Council regarding the proposed sale. Unfortunately, in 2014, the redevelopment project fell apart, which resulted in the County having to buy back the property for $33 million.

    a. What role did you play in the redevelopment project?

    Charleston County entered a lease with Chicora Gardens LLC to rent approximately 92,000 square feet of a 400,000 square foot building on July 1, 2014, to relocate Charleston County's in-patient drug and alcohol treatment facility from the City of Charleston to the City of North Charleston. Chicora Gardens LLC purchased the property from the City of North Charleston, who purchased the property from the federal government at auction. Charleston County did not own the property; it did not sell it to Chicora Gardens LLC, and it did not buy it back for $33 million dollars. Rather, Charleston County terminated the lease prior to its effective date because Chicora Gardens did not complete the improvements to make the leased space suitable for an in-patient drug and alcohol treatment facility. Chicora Gardens LLC filed bankruptcy and filed an adversary proceeding against Charleston County *inter alia* for breach of the lease. Charleston County settled the adversary case by paying all Chicora Gardens LLC's creditors in full in the bankruptcy case, and the County took title to the property as part of the settlement. I wrote a memo to Charleston County Council dated July 1, 2014, marked "attorney/client privilege" which provided a summary and non-exhaustive list of issues regarding the lease.

    As the County Attorney for Charleston County, my role involved reviewing the draft lease negotiated by Charleston County and Chicora Gardens LLC and advising Charleston County regarding its provisions, potential revisions, and risks.

    b. Did you view Donald Trump, Jr.'s role in the project as a potential liability or selling point?

    I was not involved in the development of the proposal or its presentation to Charleston County. Therefore, I had no view of his role. My July 1, 2014, memo to Charleston County Council, listed the principals of Chicora Gardens LLC.

    c. Did your memo to the County Council detail any financial irregularities or concerns

[1] David Blade, "*Donald Trump Jr., the Former Charleston Naval Hospital, and a Settlement Costing County Taxpayers $33 Million: How N. Charleston's Trump Jr. Deal Unraveled*," THE POST AND COURIER (Oct. 16, 2017).

related to Chicora Gardens and its principals? If not, please explain why.

The purpose of my July 1, 2014, memo to Charleston County Council was a summary and non-exhaustive list of issues regarding the lease. All communications I had with Charleston County Council are protected by the attorney-client privilege and the work product doctrine.

2. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

My understanding of originalism is that a constitutional or statutory provision should be interpreted according to the plain text giving the words their original public meaning at the time the Constitution was framed, the Amendment enacted, or the statute passed. Although I prefer not to label my judicial philosophy having never served as a judge, the Supreme Court has provided guidance for how lower courts should approach matters of statutory or constitutional interpretation. I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent.

3. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

My understanding of textualism is that in constitutional or statutory interpretation the text is paramount, and the Constitution or statutory provisions should be interpreted according to the plain text. Although I prefer not to label my judicial philosophy having never served as a judge, the Supreme Court has provided guidance for how lower courts should approach matters of statutory or constitutional interpretation. I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent.

4. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

   a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

   Yes. If confirmed, I will follow United States Supreme Court and Fourth Circuit precedents to determine the meaning of statutes. The United States Supreme Court has instructed that the use of legislative history is appropriate to assist in statutory interpretation when the statute is ambiguous. *See Exxon Mobil Corp. v. Allapattach Servs., Inc*. 545 U.S. 546, 568 (2005).

   b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

   Please see my response to 4(a).

5. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

   Yes, I believe judicial restraint is an important value for appellate and district judges to follow. I understand that judicial restraint is when a judge resolves cases by applying the law as written and follows binding precedent without interjecting personal views or policy preferences into the decision-making process.

   a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[2] Was that decision guided by the principle of judicial restraint?

      As a judicial nominee, it would be inappropriate for me to comment on *Heller*. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will fully and faithfully apply *Heller* and all other Supreme Court and Fourth Circuit precedents.

   b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[3] Was that decision guided by the principle of judicial restraint?

      As a judicial nominee, it would be inappropriate for me to comment on *Citizens United v. FEC. See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will fully and faithfully apply *Citizens United v. FEC* and all other Supreme Court and Fourth Circuit precedents.

   c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[4] Was that decision guided by the principle of judicial restraint?

      As a judicial nominee, it would be inappropriate for me to comment on *Shelby County v. Holder*. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will fully and faithfully apply *Shelby County v. Holder* and all other Supreme Court and Fourth Circuit precedents.

6. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[5] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[6]

   a. Do you believe that in-person voter fraud is a widespread problem in American

[2] 554 U.S. 570 (2008).
[3] 558 U.S. 310 (2010).
[4] 570 U.S. 529 (2013).
[5] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[6] *Id.*

elections?

I understand that cases involving alleged voter fraud are and could be litigated in federal court; and therefore, it would be inappropriate as a judicial nominee for me to comment. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make any public comment on the merits of a matter pending or impending in any court.")

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to 6(a).

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to 6(a).

7. According to a Brookings Institution 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.[7] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[8] 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.[9] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[10]

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.

I have not studied the issue of implicit racial bias in our criminal justice system.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an

[7] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[8] *Id.*
[9] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[10] *Id.*

average of 19.1 percent longer.[11] Why do you think that is the case?

I believe disparities in sentencing for similarly situated defendants who commit the same crimes are a great injustice. It would not be appropriate for me to speculate as to possible causes for the statistics that you reference, but I can commit that, if confirmed as a federal district court judge, I will endeavor to ensure that similarly situated defendants who commit the same crimes receive proportional sentences irrespective of their race.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[12] Why do you think that is the case?

Please see my response to Question 7(d).

f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Federal district court judges should take seriously their task of calculating the Sentencing Guidelines and carefully evaluate their reasons for granting downward departures or variances. I think being sensitive to and conscientious of the reasons for those departures and variances is one measure that federal judges could take to ensure that impermissible considerations are not used to impose differing sentences on similarly situated defendants.

8. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[13] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[14]

a. Do you believe there is a direct link between increases in 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 am not familiar with the fact sheet you cite in your question and cannot provide an opinion on the issue.

b. Do you believe there is a direct link between decreases in 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.

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[11] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

[12] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

[13] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.

[14] *Id.*

Please see my response to 8(a).

9. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

   Yes.

10. Do you believe that *Brown v. Board of Education*[15] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Although the general rule is that a nominee should not opine on the correctness of a United States Supreme Court case, Canons 2(A) and 3(A)(6) of the Code of Conduct for United States Judges, *Brown v. Board of Education* warrants a deviation from the general rule given its historical significance. *Brown*, which corrected a grave injustice caused by *Plessy v. Ferguson*, was correctly decided.

11. Do you believe that *Plessy v. Ferguson*[16] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    No. The United States Supreme Court overturned *Plessy v. Ferguson* in *Brown v. Board of Education*.

12. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    No.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[17] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    My understanding is that recusal determinations are made by the presiding judge on a case-by-case basis and governed by 28 U.S.C. § 455 and the Code of Conduct for United States Judges. As a judicial nominee, it would be inappropriate for me to comment on matters that are the subject of political debate or any issues that could be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5.

14. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases,

[15] 347 U.S. 483 (1954).
[16] 163 U.S. 537 (1896).
[17] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,' WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.

bring them back from where they came."[18] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001) held that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Id. at 693. If confirmed, I will fully and faithfully apply all Supreme Court and Fourth Circuit precedent.

[18] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.