Nomination of Robert Luck to the U.S. Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2018, you joined a unanimous opinion upholding a mandatory arbitration clause in a cellphone contract. The customer in that case purchased his phone online and completed the transaction without ever viewing the terms of purchase, which were only available on a separate webpage. The opinion you joined nevertheless concluded that the customer had been put on "inquiry notice" of the mandatory arbitration provision. (*MetroPCS v. Porter* (2018))

   Given the increase in e-commerce and online purchases, what standard should be used to determine whether customers are given adequate notice of mandatory arbitration provisions?

   In *MetroPCS Communications, Inc. v. Porter*, 273 So. 3d 1025 (Fla. 3d DCA 2018), Florida's Third District Court of Appeal explained that under Florida law "both courts and legal commentators have concluded that well-settled legal principles of contract formation suffice to decide cases, such as this one, involving contracts entered into and evidenced by electronic means. Hence, we look to those well-settled principles to determine whether the parties here agreed to arbitrate disputes arising from their electronic contract." *Id.* at 1028 (citations omitted). One of those well-settled principles is that a "person has no right to shut his eyes or ears to avoid information, and then say that he has no notice." *Id.* at 1029 (quoting *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932) and citing *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74-75 (2d Cir. 2017) ("Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms.")).

2. **In your time on either the Florida Supreme Court or the Third District Court of Appeals, have you ever written or joined an opinion granting a new trial to a plaintiff in a civil suit? If so, which case or cases and what were the issues involved?**

   I have written an opinion reversing a trial court's improper denial of a plaintiff's new trial motion in a civil suit. *See, e.g.*, *DePrince v. Starboard Cruise Servs., Inc.*, 43 Fla. L. Weekly D171b (Fla. 3d DCA 2018) ("Because the trial court did not follow the holdings from the first appeal, *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586 (Fla. 3d DCA 2015) (*DePrince I*), in instructing the jury on the elements of unilateral mistake, we reverse and remand for a new trial.").

3. In January 2019, the Florida Supreme Court issued an opinion in the case *Glass v. Nationstar Mortgage*, where it held that a borrower who was the prevailing party in a foreclosure action was entitled to attorney's fees. Four months later, after you joined the Florida Supreme Court, the Supreme Court withdrew this opinion without explanation. The withdrawal left in place a lower court ruling holding that a borrower who was the prevailing party in a foreclosure action was not entitled attorney's fees.

a. Before your appointment to the Florida Supreme Court, did you and Governor DeSantis ever discuss the Court's decision in *Glass v. Nationstar Mortgage*?

No.

b. Did you and Governor DeSantis otherwise discuss your views on the award of attorney's fees in foreclosure cases?

No.

c. Please explain to us why you joined the court in withdrawing a prior Supreme Court opinion.

Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in *U.S. Bank National Ass'n v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in *Villasol Community Development District v. TC 12, LLC*, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001). After careful review, we determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

4. In 2017, you authored an opinion on tribal sovereign immunity. In your opinion, you wrote that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity." (*Miccosukee Tribe of Indians v. Lewis Tein*)

a. What are the "reasons" for "doubt[ing] the wisdom of perpetuating the doctrine of tribal immunity"?

Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998). There, the Court explained that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*

b. What is your understanding of the nature and scope of the United States' treaty obligations with Indian tribes?

"[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

5. It was reported in the Tampa Bay Times that Federalist Society Executive Vice President Leonard Leo interviewed the finalists for the Florida Supreme Court vacancies, including you. (https://www.tampabay.com/florida-politics/buzz/2019/01/24/adam-smith-desantis-puts-conservative-stamp-on-florida-supreme-court/)

What questions did Leonard Leo ask you in his interview with you? How did you answer?

Florida follows the Missouri Plan for selecting appellate judges. A judicial nominating commission made up of nine members solicits applications for eligible attorneys, investigates and interviews the applicants, and selects three to six applicants as finalists for each open position. The finalists are forwarded to the Governor, who selects among the finalists. Governor-Elect DeSantis then had an advisory committee – made up of former general counsels to the governor, a former United States Senator, prominent litigators, a transactional attorney, and Mr. Leo – interview the finalists. Finally, Governor-Elect DeSantis interviewed the finalists himself. With ten months having gone by, and there having been three interviews, one each for the judicial nominating commission, the advisory committee, and the Governor-Elect, I don't recall what questions were asked by which interviewer (although the judicial nominating commission interview is recorded at https://thefloridachannel.org/videos/11-4-18-florida-supreme-court-judicial-nominating-commission-part-1/).

6. 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?

It is never appropriate for a lower court to depart from Supreme Court precedent.

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

A lower court judge must always faithfully apply Supreme Court precedents, though there may be infrequent occasions in which a lower court judge may respectfully point out inconsistencies or confusion among Supreme Court precedents, or identify issues that may warrant further review.

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

In the Eleventh Circuit Court of Appeals, a panel is "bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of this Court sitting en banc." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

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

The Supreme Court has the authority to overrule its own decisions. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). As a lower court nominee it is not my place to comment on how the Supreme Court should decide its cases or apply the principle of stare decisis. I am aware that the Supreme Court generally is reluctant to overrule its prior decisions absent "special justification." *See Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *see also Rodriguez de Quijas*, 490 U.S. at 484.

7. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as "super-stare decisis." One text book on the law of judicial precedent, co-authored by Justice 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"? "superprecedent"?

Roe v. Wade is binding Supreme Court precedent that all lower courts are bound to faithfully apply. Lower courts are bound to apply all Supreme Court precedent regardless of whether it is referred to as "super-stare decisis" or "superprecedent."

b. Is it settled law?

Roe v. Wade has been affirmed by the Supreme Court numerous times. It is binding precedent that I will faithfully apply if confirmed.

8. 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?**

   Obergefell is binding Supreme Court precedent that I will faithfully apply if confirmed.

9. 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 express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Eleventh Circuit decisions.

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

   The Supreme Court's decision in *Heller* explained that "nothing in this 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." 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?

   As a judicial nominee, it would not be appropriate for me to express a personal view on the relationship between *Heller* and prior case law. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Eleventh Circuit decisions.

10. 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 held that "the First Amendment protection extends to corporations." *Citizen United v. Fed. Elections Comm'n*, 558 U.S. 310, 342 (2010). It is inappropriate

for me to express an opinion about the case. *Citizen United* is binding precedent that I will apply, if confirmed.

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

See response to Question 8(a).

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

The Supreme Court has held that the Religious Freedom Restoration Act applies to closely-held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014). *Hobby Lobby* is binding precedent that I will apply, if confirmed. It is inappropriate for me comment further on this issue because it could come before the court in pending or impending litigation.

11. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2014. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

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

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

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

I am not familiar with this statement, and I do not know what the Federalist Society meant by it.

d. 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.

e. Why did you decided to join the Federalist Society in 2014, ten years after you graduated from law school?

I went to Federalist Society programs while I was in law school, although I did not become a dues paying members until 2014. I started paying dues in 2014 because I could afford it and there was a discount for programs for dues paying members.

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 difference 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?

No.

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"?

The Supreme Court and the Eleventh Circuit have issued many opinions regarding administrative law. If confirmed, I would faithfully apply those precedents.

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

As a sitting justice and a judicial nominee, it is inappropriate for me to comment on this political issue that is likely to come before the court in pending or impending litigation.

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

    The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). If confirmed, I will faithfully apply Supreme Court and Eleventh 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 at 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.

    After receiving the questions on October 24, 2019, I reviewed the questions, performed research, and drafted responses. After completing my draft answers, I shared my draft with the Office of Legal Policy at the Department of Justice, and, after receiving feedback, made edits that I deemed appropriate. After finalizing my responses, I approved submission of my responses.

Written Questions for Robert J. Luck
Submitted by Senator Patrick Leahy
October 23, 2019

1. Earlier this year, the Florida Supreme Court issued an opinion in *Glass v. Nationstar Mortgage*, holding that a borrower who was the prevailing party in a foreclosure action was entitled to attorney's fees. But four months later, after you had joined the court, the Florida Supreme Court withdrew this opinion without explanation. As a result, a borrower who prevailed in a foreclosure action was not entitled to attorney's fees. You did not participate in the original January 2019 opinion, but you did participate in the decision to withdraw.

(a) Why did the Florida Supreme Court withdraw this opinion?

Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in *U.S. Bank National Ass'n v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in *Villasol Community Development District v. TC 12, LLC*, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001). After careful review, we determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

(b) Some people have questioned whether the decision to withdraw the original opinion was politically motivated or biased toward lenders. **Should judges be required to provide explanations when withdrawing opinions in order to avoid the appearance of bias?**

All judges should carefully consider whether a given action will create an appearance of bias.

2. In 2017, in *Miccosukee Tribe of Indians v. Lewis Tein,* you wrote that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity." Tribal immunity remains a functioning legal doctrine.

   (a) How can you assure us that you will fairly adjudicate cases in which tribal rights or immunity is implicated?

   Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

3. In January of 2019, when accepting your appointment to the Florida Supreme Court, you praised Governor DeSantis for his pro-Israel policies, including moving the United States embassy in Israel and supporting recognition of Israel's claim to the Golan heights.

   (a) If confirmed, given your recently stated political opinions on these issues, would you consider recusing yourself from any cases involving U.S. policy toward Israel?

   During my January 2019 remarks, I said, "As a congressman, Governor DeSantis led a one-man congressional delegation to Israel to help the President select the site for the United States's embassy in Yerusheliam, in Jerusalem. On the opening day of the embassy, Governor DeSantis traveled back to Israel so he could be there for the historic day." I also said, "As a congressman, Governor DeSantis sponsored legislation and held committee hearings to support the United States's recognition of the Golan as a integral and inseparable part of the state of Israel." If confirmed and faced with a recusal issue, I will carefully review and address it by reference to section 455 of Title 28 of the United States Code and all applicable canons of the Code of Conduct for United States Judges, as well as any and all other laws, rules, practices, and procedures governing such circumstances, and consult with other judges.

4. In 2018, in *Diocese of Palm Beach, Inc. v. Gallagher*, you reversed a trial court ruling that allowed a defamation suit filed by a Catholic priest against the Diocese of Palm Beach to proceed. The plaintiff priest had received a text message from the diocese's music minister stating that another priest had shown photographs containing child pornography to a 14-year-old boy. He then notified the police. When the diocese refused to promote him and reassigned him to a different parish, the plaintiff felt he was being

retaliated against. In response to his complaints, the diocese called him a liar and unfit to be a priest. The plaintiff then brought a defamation suit. In your opinion, you held that the case could not go forward because the case arose out of "an employment dispute between him and the diocese." As a result, you said the case could not "be resolved without the courts excessively entangling themselves in what is essentially a religious dispute."

(a) Do you believe religious institutions can retaliate against whistleblowers without any legal recourse for whistleblowers?

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), a case involving a claim of improper termination of a school minister, the United States Supreme Court held that:

> [The minister] no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. [The minister] continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that [the Church] was wrong to have relieved [the minister] of her position, and it is precisely such a ruling that is barred by the ministerial exception.

Id. at 194 (citation omitted). The priest in *Diocese of Palm Beach, Inc. v. Gallagher*, 249 So. 3d 657 (Fla. 4th DCA 2018), sought the same prohibited relief. Based on *Hosanna-Tabor*, the Fourth District Court of Appeal was compelled to reverse on First Amendment grounds. But the court was careful to note that "not every church-priest dispute is shielded by the ecclesiastic abstention doctrine. Where the 'dispute can be resolved by applying neutral principles of law without inquiry into religious doctrine and without resolving a religious controversy, the civil courts may adjudicate the dispute.'" *Id.* at 665 (citation omitted).

5. Chief Justice Roberts wrote in *King v. Burwell* that

> "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions?'"

a) Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I would faithfully follow applicable precedent concerning the methods for interpreting statutes.

6. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch previously called them "disheartening" and "demoralizing."

   (a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

   The independence of the federal judiciary is a central feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in the public arena that may follow.

   (b) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

   Please see my response to Question 6(a).

7. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and will not be questioned*." (Emphasis added.)

   (a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

   Article III of the Constitution confers the judicial power upon the courts to resolve specified cases or controversies. If a court were presented with a case or controversy involving a national security decision, the court would be obliged to consider the applicable law and facts in reaching a decision.

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

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

   As a general matter, courts have discretion in determining how to respond to a litigant's failure to comply with its orders. It is inappropriate for me to comment on this issue further because it could come before the courts in pending or impending litigation.

9. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

The Constitution expressly divides war-related powers between Congress and the President. *See* U.S. Const. art. I, §§ 8(1), (11)-(14), art II, § 2. In *Hamdi v. Rumsfeld*, the Supreme Court stated: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 542 U.S. 07, 536 (2004); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forced has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.").

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

Please see my response to Question 9(a).

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

In this and every other area of constitutional law, lower courts should faithfully apply the text and principles established in the Constitution, as interpreted by the Supreme Court. If confirmed, I will apply the Supreme Court's separate of powers precedent, including the precedent referenced in response to Question 9(a). Otherwise, it is inappropriate for me to comment on this issue as it could come before the courts in pending and impending litigation.

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

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

The Supreme Court has held that the Equal Protection clause in the Fourteenth Amendment applies to women. *United States v. Virginia*, 518 U.S. 515, 532 (1996). This is binding precedent on all lower courts that I will apply, if confirmed.

12. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

    I am not familiar with this statement, and it is not binding precedent. If confirmed, I will faithfully apply the Voting Rights Act and any binding Supreme Court and Eleventh Circuit precedent interpreting this Act.

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

    The Emoluments Clause in the Constitution states that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. The application of this clause is the subject of pending litigation and it is inappropriate for me to comment on this case.

14. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

    (a) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

    Appellate courts are not factfinders. They must decide cases based on the factual record developed below.

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

    The Reconstruction Amendments give Congress the power to counteract racial discrimination "by appropriate legislation." U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

16. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and

certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

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

The decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

17. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

The Supreme Court has stated that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. S.C. Public Ry. Comm'n*, 502 U.S. 197, 202 (1991). It is never appropriate for lower courts to depart from Supreme Court precedent. With respect to circuit precedent, a panel of the Eleventh Circuit is "bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of this Court sitting en banc." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

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

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

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. If confirmed, I would carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as other applicable rules or guidance. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which

I served as a lawyer, or as a trial or appellate judge. In every case, I will carefully consider whether recusal is necessary.

19. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

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

    In the referenced footnote, the Supreme Court indicated that courts have a role in ensuring that democratic processes are open and work as intended and legislation does not undermine participation by citizens entitled to representation. The Supreme Court also introduced the idea of varied levels of scrutiny in assessing constitutionality depending on the constitutional issue presented. If confirmed, I will faithfully follow Supreme Court precedent on this and any other issue.

20. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

    (a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

    Yes.

21. **Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims he has an "absolute right" to pardon himself. Do you agree?**

    I have not researched this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on issues that may require consideration in future cases.

22. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Supreme Court has held that the Commerce Clause gives Congress the power to regulate activity that "substantially affects" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). The Supreme Court has further held that Congress has the power to enforce the Fourteenth Amendment where there is a "congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

23. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

    (a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

    In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held, among other things, that the President's Proclamation No. 9645 was lawfully issued under 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiff's attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." *Id.* at 2409. The Court also held that "plaintiff's request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.* The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court and Eleventh Circuit. As a judicial nominee, it would not be appropriate for me to opine on abstract legal concepts that may require consideration and application in future cases.

24. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion?**

I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.

The Supreme Court held that an "undue burden" exists where "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). In *Whole Woman's Health v. Hellerstadt*, the Court further held that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right." 136 S. Ct. 2292, 2309 (2016). I will apply *Casey* and all other Supreme Court precedent addressing abortion, if confirmed.

25. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

    (a) Do you think that the qualified immunity doctrine should be reined in? Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?

    The doctrine of qualified immunity has repeatedly been applied by the Supreme Court. *See, e.g.*, *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). I will apply this and all other Supreme Court and Eleventh Circuit precedent, if confirmed. It is inappropriate for me to state a personal opinion on the merits of this doctrine as this issue routinely comes before the courts.

26. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress's constitutional duty to decide how the government spends money.

    (a) With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?

I have not studied this issue previously. In any case concerning a conflict between legislative and executive power, I would apply Supreme Court and Eleventh Circuit precedent regarding the specific powers at issue and the separation of powers.

27. During Justice Kavanaugh's confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting "revenge on behalf of the Clintons" and warned that "what goes around comes around." The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

    (a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?

    Yes, the Constitution creates an independent judiciary with protections to insulate judges from political influence. These protections and the obligation that judges act independently and impartially, without favor to any interest beyond fair application of the law, are essential to the rule of law. If confirmed, I will perform my role with fidelity to the judicial oath of office and the fundamental values of independence and impartiality.

Senator Dick Durbin
Written Questions for Luck
October 23, 2019

For questions with subparts, please answer each subpart separately.

Questions for Robert Luck

1. On January 4, 2019, before you joined the Florida Supreme Court, the Court issued a decision in *Glass v. Nationstar Mortgage, LLC* allowing an award of attorneys' fees to a borrower who prevailed in a foreclosure dispute against the mortgage industry. However, shortly after you and two other justices were appointed to the Supreme Court by Governor DeSantis, the Court granted a request for rehearing by the lender and, on April 18, 2019, issued a one-page per curiam opinion withdrawing its January opinion. In other words, the Court changed its ruling from three months earlier so that the mortgage industry would now win. The Court's April 18 opinion simply said that "upon further consideration, we conclude that jurisdiction was improvidently granted" and provided no further explanation as to why the January opinion was withdrawn.

   This looks like the state Supreme Court was simply changing precedent—almost immediately after three justices were appointed by a Republican governor—without even discussing the reasons for making this reversal. **Why did the Florida Supreme Court not even explain its decision to reverse this precedent that helped borrowers in mortgage disputes?**

   Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in *U.S. Bank National Ass'n v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in *Villasol Community Development District v. TC 12, LLC*, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001). After careful review, we

determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

2. You note in your questionnaire that after you graduated law school in 2004 and clerked in 2005, you "worked as a law clerk/JD at Greenberg Traurig, P.C. in Miami from 2005 to 2006." You also say in your questionnaire that you did not become a member of the Florida bar until 2006.

   a. **Why did you work as a law clerk at the Greenberg Traurig law firm, instead of working as an attorney?**

      I was hired by Greenberg Traurig as a law clerk rather than as an attorney because I was not yet a member of the Florida Bar.

   b. **Did you take the bar exam prior to 2006? If so, in which state?**

      No.

3.

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

      The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). But ultimately, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Lower court judges must follow the Supreme Court's precedents regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

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

      I have not had occasion to study this Clause, its history, or any applicable precedents that may bear on it. In addition, inasmuch as there is active or impending litigation concerning this Clause, as a judicial nominee it would not be appropriate for me to opine on this topic.

4. You say in your questionnaire that you have been a member of the Federalist Society since 2014.

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

      I joined the Federalist Society because it is the most active voluntary bar association in South Florida in terms of inviting speakers from different backgrounds and viewpoints. I enjoyed attending these talks and debates and learning about different sides of an issue.

   b. On January 24, 2019, the *Tampa Bay Times* reported that when Governor DeSantis was considering candidates for three Florida Supreme Court vacancies, the Federalist Society "screened the pool of justices DeSantis considered." The *Times* went on to note that "Federalist Society Executive Vice President Leonard Leo even flew down from Washington to Orlando to interview the 11 finalists for the three Florida vacancies." **Did you meet with Leonard Leo as you were being considered for the Florida Supreme Court vacancies?**

      Florida follows the Missouri Plan for selecting appellate judges. A judicial nominating commission made up of nine members solicits applications for eligible attorneys, investigates and interviews the applicants, and selects three to six applicants as finalists for each open position. The finalists are forwarded to the Governor, who selects among the finalists. Governor-Elect DeSantis then had an advisory committee – made up of former general counsels to the governor, a former United States Senator, prominent litigators, and a transactional attorney – interview the finalists. Mr. Leo was part of the advisory committee. Finally, Governor-Elect DeSantis interviewed the finalists himself. I met with the judicial nominating commission, the advisory committee, and Governor-Elect DeSantis, as part of the Florida Supreme Court application process.

   c. **If the answer to (b) is yes, why did you meet with Leonard Leo?**

      Please see my response to Question 4(b).

   d. **If the answer to (b) is yes, was this the first time you had met with Leonard Leo?**

      Yes.

   e. **If the answer to (b) is yes, did Leonard Leo ask you about any topics or cases during your interview? If so, which ones?**

      Because it's been ten months since the interview, and there were three interviews – one each for the judicial nominating commission, the advisory committee, and the Governor-Elect – I don't recall what

questions I was asked by which interviewer. But I know I was never asked by any interviewer about specific cases.

f. **If the answer to (b) is yes, did Mr. Leo ask you about your views on any issues during your interview? If so, which ones?**

Please see my response to Question 4(e)

g. **If the answer to (b) is yes, did Mr. Leo at any point disclose who was contributing financially to his efforts to screen finalists for the Florida Supreme Court?**

No.

h. **If the answer to (b) is yes, did you at any point ask Mr. Leo whether any donors with interests before the Florida Supreme Court had helped fund his efforts?**

No.

5. On May 21, *The Washington Post* reported that Leonard Leo is at the center of millions of dollars in dark money donations that are being used to influence the selection of judicial nominations. The *Post* reported that Leo "defended the practice of taking money from donors whose identities are not publicly disclosed." The *Post* quoted Leo saying that his advocacy efforts "were all very much fueled by very wealthy people, and oftentimes wealthy people who chose to be anonymous."

a. **Do you have any concerns about wealthy people or special interests making undisclosed donations to organizations that help choose judicial nominees?**

I am not aware of any donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters.

b. **Do you believe that undisclosed donors who support judicial nomination efforts should make their donations public so that judges can have full information when they make decisions about recusal in cases these donors may have an interest in?**

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters. If confirmed, I will evaluate all actual or potential conflicts under 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other application rules or guidelines. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system.

6. On January 31, the *Orlando Sentinel* published an article entitled "Federalist Society celebrates new, conservative-leaning Florida Supreme Court with fireworks at Walt Disney World." The article noted that you and four other Florida Supreme Court justices were scheduled to attend a Federalist Society VIP reception at the Disney World Yacht and Beach Club Resort shortly after your appointment to the Florida Supreme Court.

    a. **Did you attend this event?**

    Canon 4B of the Florida Code of Judicial Conduct states that, "A judge is encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government …." The commentary to Canon 4B states that the "canon was clarified in order to encourage judges to engage in activities to improve the law, the legal system, and the administration of justice. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including, but not limited to, the improvement of the role of the judiciary as an independent branch of government, the revision of substantive and procedural law, the improvement of criminal and juvenile justice, and the improvement of justice in the areas of civil, criminal, family, domestic violence, juvenile dependency, probate and motor vehicle law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law." Consistent with Canon 4B, and my role as a justice on the highest court of the state, I attended the two-day Florida Chapters Conference of the Federalist Society, which included in the reception, in late January and early February. Those same months, I also attended events hosted by the Florida Bar, the Dade County Bar Association, the Florida Association of Women Lawyers – Miami-Dade Chapter, the Cuban American Bar Association, the Florida Supreme Court Historical Society, the Florida Court Personnel Institute and the Florida Supreme Court Teachers' Institute.

    b. **If the answer to (a) is yes, did you meet any Federalist Society donors at this event?**

    Not that I am aware of.

    c. **If the answer to (a) is yes, do you know if any of the attendees at this event were involved in matters pending before the Florida Supreme Court?**

    Hundreds of lawyers and judges throughout the state attended the Florida Chapters Conference and the other events I mentioned in Question 6(a). As with all legal events that I attend consistent with Canon 4B, there are lawyers in attendance who may be litigating cases in front of the Florida Supreme Court.

c. **If the answer to (a) is yes, did you think it was appropriate for you to attend this conference after Leonard Leo had reportedly interviewed you for your current position?**

Please see my response to Question 6(a).

7. Prior to your appointment to the Florida Supreme Court, the Court decided to grant review of a case, *City of Miami Beach v. Florida Retail Federation*, in which the intermediate appellate court had invalidated on preemption grounds a local minimum wage ordinance that set a higher wage than state law. But in February 2019, after your appointment, the Supreme Court reversed its decision and dismissed the appeal, which effectively ended the chances for workers in Miami Beach to save this higher minimum wage ordinance. **Why did the Supreme Court change its mind and reverse its decision to grant review in this case?**

I dissented from the Court's decision to discharge jurisdiction. *City of Miami Beach v. Fla. Retail Fed'n, Inc.*, No. SC17-2284, 2019 WL 446549, at *1 (Fla. Feb. 5, 2019). I don't know why other members of the Court voted to discharge jurisdiction, but the exercise of jurisdiction is a highly discretionary decision that involves a number of individual factors.

8. **Do you believe that a child is capable of fairly representing himself or herself in court without counsel in a legal proceeding, for example an immigration proceeding?**

I have not had occasion to study this issue closely, but my understanding is that Federal Rule of Civil Procedure 17(c) allows a general guardian, committee, conservator, or fiduciary to sue or defend on behalf of a minor, and if a minor does not have an appointed representative the minor may sue by a next friend or by a guardian ad litem. The rule requires a court to appoint a guardian ad litem or issue another appropriate order to protect a minor who is unrepresented in an action.

9.

a. **Is waterboarding torture?**

I have not had occasion to study this issue closely, but my understanding is that waterboarding would constitute torture when intentionally used "to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2304(1) (defining "torture")

b. **Is waterboarding cruel, inhuman and degrading treatment?**

I have not had occasion to study this issue closely, but my understanding is that under 42 U.S.C. § 2000dd-2(a)(2), no person in the custody or under the control of the United States government may be subject to any interrogation technique not authorized in the Army Field Manual. It is also my understanding that the Army Field Manual does not authorize waterboarding.

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

I am aware that, in connection with his recent confirmation proceedings, Attorney General William P. Barr acknowledged that "section 1045 of the National Defense Authorization Act for Fiscal Year 2016 [42 U.S.C. § 2000dd-2] prohibits the use of waterboarding on any person in U.S. custody." He explained that "statute clarifies that no individual in U.S. custody may be subjected to any interrogation technique that is not authorized or listed in the Army Field Manual, and its prohibits the Army Field Manual from including techniques involving the use or threat of force."

10.

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

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters.

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

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters. If confirmed, I will evaluate all actual or potential conflicts under 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other application rules or guidelines. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system.

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

Please see my responses to Questions 10(a) and 10(b).

11.

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

I have not researched this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on hypothetical issues that may require consideration in future cases.

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

Please see my response to Question 11(b).

Nomination of Robert J. Luck
to the United States Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

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?

        As requested, I read the story and watched the video before responding to this request.

    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?

        Judicial independence and impartiality are fundamental and essential principles underlying the American judicial system. Otherwise, as a judicial nominee, it is inappropriate for me to opine on political matters related to the nomination and confirmation of federal judges.

    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.

        I am not aware of any such advocacy.

    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?

        I believe the federal judiciary has a defined role as one of the three branches of government established by the Constitution. Otherwise, as a judicial nominee, this question poses a political issue on which it is inappropriate for me to comment.

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 with the point of the metaphor that a federal judge's role is strictly to apply the law to the facts of the case, without favor or preference to any party.

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

        In general, a judge should not consider the practical consequences when considering how to rule in a case. In limited circumstances, however, Supreme Court and Circuit precedent, and applicable statutory provisions, might require a judge to engage in such consideration, for example, when deciding whether a party would suffer irreparable harm if a stay or preliminary injunction were not issued.

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?

    Rule 56 requires a court to grant summary judgment is there is no "genuine dispute as to any material fact," and the Supreme Court has held that whether there is a "genuine dispute" depends on whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Supreme Court has held that a "reasonable jury" standard is objective, not subjective. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993).

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 judge's decision must be governed exclusively by the law and the facts and cannot be affected by sympathy for one party or another. That obligation is embodied in the judge's oath to "administer justice without respect to persons." 28 U.S.C. § 453. Empathy can play an important role, however, in reminding a judge of the importance of being respectful to litigants; of giving all parties a full and fair hearing; and of working hard to ensure that parties receive a ruling that is based on the law and not on an individual judge's personal preferences.

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

        Different judges may have developed expertise in particular areas of the law over their years of practice, which will asset them in more readily evaluating cases that arise in those areas. Judges should always strive to attain a full understanding of the factual and legal issues that arise in any case that comes before them to ensure that each litigant obtains a decision that is grounded in the law and facts.

5. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court's decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act's individual mandate and Medicaid expansion plan. Biksupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, "came after weeks of negotiations and trade-offs among the justices."
    a. In your view, what is the role of negotiating with other judges when deliberating on a case?

       Appellate judges must discuss, and even debate, the legal issues presented in a case as part of the decision-making process as they reach agreement on the decision and the reasoning of the decision. These discussions must focus on governing law, including precedent, and not on outside considerations. Through this process, the panel members identify which judge will author the opinion for the court and whether any panel members will write a concurring or dissenting opinion.

    b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague's, in another?

       Every case must be decided on its own merits. I would not condition or trade my vote in one case based on the outcome of any other case.

    c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

       I think it is non-negotiable for a lower court judge to faithfully apply binding precedent of the Supreme Court and the applicable Circuit, regardless of what the judge's personal views might be.

6. 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.

7. 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 right to a jury trial is a bedrock principle in the American judicial system. The Declaration of Independence listed denial of the right to jury trial as one of the grievances against England that justified separation, and the Constitution enshrines the right to jury trial in both criminal and civil cases. U.S. Const. amends. V, VI, VII. The role of the jury is to decide the facts of the case and, in so doing, serve as a check on the power of government.

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

       As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation.

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 7(b).

8. What do you believe is the proper role of an appellate court with respect to fact-finding?

Generally, federal appellate courts are not fact-finding bodies and are bound by the factual record developed in trial courts or administrative proceedings.

9. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Yes.

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

The Supreme Court addressed this issue most recently in *Whole Woman's Health v. Hellerstedt*, and held that courts "must review legislative 'fact finding under a deferential standard'" but not give them "'dispositive weight.'" 136 S. Ct. 2292, 2310 (2016) (citations omitted). I will apply this and all other Supreme Court and Eleventh Circuit precedent addressing this issue, if confirmed.

11. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct 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.

    If confirmed, I commit to comply with the Code of Judicial Conduct, including the obligation to avoid impropriety or the appearance of impropriety. I will evaluate my participation in any activity to ensure compliance with my ethical and legal obligations. If I have any question about whether any activity complies with the Code of Judicial

Conduct I will consult with the ethics attorneys at the Administrative Office of the U.S. Courts.

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 11(b).

Senate Judiciary Committee
"Nominations"
Questions for the Record
Senator Amy Klobuchar

Questions for Justice Robert Luck, nominee to be U.S. Circuit Judge for the Eleventh Circuit

In the 2017 case *Miccosukee Tribe of Indians v. Lewis Tein*, you wrote an opinion in which you expressed skepticism about tribal sovereign immunity, describing the doctrine as "a policy choice" and questioned "the wisdom of perpetuating the doctrine."

- What is your view of the role that the principles of tribal sovereignty, treaty rights, and the federal trust responsibility play in our legal system?

  Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). There, the Court explained that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

As a state court judge, you presided over a number of criminal proceedings. I cosponsored the First Step Act, which provides greater discretion to trial judges in sentencing low-level drug offenders.

- What principles will guide your review of lower court sentencing decisions if you are confirmed?

  The Eleventh Circuit Court of Appeals has developed a two-step process for reviewing sentences from the district courts: "In reviewing the reasonableness of a sentence, we follow a two-step process. We first ensure the sentence was procedurally reasonable by reviewing whether, among other things, the District Court miscalculated the guideline range. We then determine whether the sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) factors." *United States v. Fox*, 926 F.3d 1275, 1278 (11th Cir. 2019) (citations omitted). I will follow the precedents from the Supreme Court and the Eleventh Circuit on sentencing, and any changes made by the First Step Act, if confirmed.

Nomination of Robert J. Luck, to be United States Circuit Judge
for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

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

      Yes, a right expressly stated in the Constitution is protected from federal interference by the clause enumerating the right and may be protected from state interference under the Supreme Court's Fourteenth Amendment incorporation doctrine. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). I would apply all precedent relevant to the right at issue.

   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. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that fundamental rights are those that are "deeply rooted in this Nation's history and tradition." I would apply this precedent and consider the sources relied on by the Supreme Court.

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

      I would apply the binding precedent from the Supreme Court and Eleventh Circuit regarding the right at issue. I would also evaluate decisions from other circuits for their persuasive value. *See Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1328 (11th Cir. 2018) ("Following our precedent and persuasive decisions from other circuits, we conclude that the crime-fraud exception may defeat work product protection in this circumstance.").

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

      Yes.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

As an inferior court judge, I would follow all binding Supreme Court and Eleventh Circuit precedent, including *Lawrence* and *Casey*.

f. What other factors would you consider?

I would consider all factors recognized by the Supreme Court and Eleventh Circuit.

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 has held that the Fourteenth Amendment's Equal Protection clause applies to gender as well as race. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

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?

If confirmed, I will apply Supreme Court precedent. Arguments that are contrary to binding precedent will not dictate my decision.

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

I understand that *United States v. Virginia* was not the first time that the Supreme Court struck down a gender-based classification relating to educational opportunities. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). I don't know why there was not an earlier challenge to Virginia Military Institute's former male-only admission policy.

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*, the Supreme Court held that same-sex couples be afforded the right to marry "on the terms as accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). If confirmed as an inferior court judge, I would follow all binding Supreme Court and Eleventh Circuit precedent regarding the Fourteenth Amendment.

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

The Fourteenth Amendment guarantees that no State may "deny to any person within its jurisdiction the equal protection of the law." That constitutional protection

extends to all persons. As a sitting judge and nominee, it would not be appropriate for me to comment on the merits of a matter pending or impending in any court.

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 recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will faithfully apply this 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 recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. If confirmed, I will faithfully apply this 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 has recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully apply this 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 responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
   a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

      If confirmed as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Eleventh Circuit precedent, and when applicable precedent makes it appropriate to consider such evidence, I will do so in accordance with controlling precedent.

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

Under Federal Rule of Evidence 702, as well as precedent in the *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), line of cases, expert opinions from these disciplines may be admissible into evidence.

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?

   If confirmed, I would faithfully discharge my duty to apply all Supreme Court and Eleventh Circuit precedents, including *Obergefell*. To the extent that the question relates to issues that may be the subject to pending or impending litigation, it would be inappropriate for me as a sitting state court justice and judicial nominee to make any further comment.

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

   Please see my response to question 5(a).

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
   a. 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. 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?

   This is a topic for academic debate among legal scholars. *See, e.g.*, Robert H. Bork, The Tempting of America 76 (1990) ("[T]he result in *Brown* is consistent with, indeed is compelled by, the original understanding of the fourteenth amendment's equal protection clause."). If confirmed as an inferior court judge, I will follow all binding Supreme Court and Eleventh Circuit precedent regarding *Brown* and its progeny.

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 Oct. 22, 2019).

Please see my response to Question 6(a).

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 and the Eleventh Circuit have issued numerous decisions regarding different constitutional provisions. In some of these, the Supreme Court has carefully considered the original public meaning of the constitutional text, and found that to be dispositive. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). If confirmed, I would be obliged to follow all Supreme Court and Eleventh Circuit precedent, regardless of whether they rely on the original public meaning of the constitutional text.

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

Yes, if dictated by Supreme Court precedent. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

If confirmed, I would follow Supreme Court and Eleventh Circuit precedent regarding what sources are properly considered in applying constitutional provisions in cases brought before the court.

7. In *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So.3d 938 (Fla. 3d DCA 2016), the court of appeals reversed the trial court after withdrawing its prior opinion. The dissenting opinion stated that the majority's "two holdings [were] inconsistent with each other," and, "when taken together, these holdings effectively rewrite Florida statute of limitations jurisprudence in foreclosure cases."
   a. Please explain when it is appropriate for a court to withdraw its prior opinion to overrule a trial court and a unanimous panel opinion.

I was not serving on Florida's Third District Court of Appeal when it decided *Beauvais*. The *Beauvais* panel opinion was decided in 2014. The en banc court issued its opinion in 2016. I did not join the Third District Court of Appeal until February 2017. That said, in Florida, a district court of appeal can rehear a case that was decided by a panel where a majority of the en banc court agrees that the "case or

issue is of exceptional importance" or an en banc decision is "necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(a).

b. In general, should a court attempt to reconcile existing precedents, rather than read a precedent broadly to overturn decades of jurisprudence?

The Eleventh Circuit has said that "[t]he holdings of a prior decision can reach only as far as the facts and circumstances frame the precise issue presented in that case." *Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1275 (11th Cir. 2006). If confirmed, I will follow Supreme Court and Eleventh Circuit precedent on how broadly to read prior decisions and if and how to reconcile them.

Questions for the Record for Robert J. Luck
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees 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?

   Judges are duty-bound to decide cases without regard to bias, prejudice, or preference. I agree that training to help judges understand and fulfill this obligation is important.

   b. Have you ever taken such training?

   Yes.

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

   If confirmed, I will participate in any training opportunities offered to assist me in learning my role and performing to the best of my ability.

3. After you were appointed as a Florida Supreme Court Justice in January 2019, you withdrew a prior Florida Supreme Court opinion that had been issued just a few days before your appointment. In *Glass v. Nationstar Mortgage, LLC*, the prior composition of the Supreme Court had held that a borrower who was the prevailing party in a foreclosure action was entitled to attorney's fees. But merely four months later, you decided to change Florida Supreme Court precedent in favor of the mortgage industry, by joining an opinion that withdrew the prior precedent without explanation. According to Law.com, an attorney in Florida who has practiced foreclosure defense and real estate law for 32 years, and who had filed an amicus brief in this case, described your withdrawal of precedent as follows: "I have never in my lifetime seen a Supreme Court do what this Supreme Court is doing in *Glass*." He added, "For the new judges to undo what the old judges have done is very unusual and, I would say, disturbing. . . . They effectively put into question the integrity of the process, and they should never, ever do that."

a. Do you believe undoing prior state Supreme Court precedent is a significant decision that warrants explanation? If so, why did you fail to explain the reasoning behind your decision to withdraw the prior precedent in *Glass*?

Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in U.S. Bank National Ass'n v. Anthony-Irish, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in Villasol Community Development District v. TC 12, LLC, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with Provident Management Corp. v. City of Treasure Island, 796 So.2d 481 (Fla. 2001). After careful review, we determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

b. Do you think it is proper, for justices to undo, without explanation, prior precedent decided by a different composition of justices?

See my response to question 3(a).

c. In your view, what factors or criteria are relevant in determining whether to reverse or undo prior precedent?

It is never appropriate for a lower court to depart from Supreme Court precedent. In the Eleventh Circuit Court of Appeals, a panel is "bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of this Court sitting en banc." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

d. In your view, how important is it for a judge to avoid putting the integrity of the judicial process in question?

Canon 1 of the Florida Code of Judicial Conduct states that "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved."

4. When a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records do not matter, that as judges they will simply "follow the law." Cases, however, are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

   a. Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?

   Different judges may have developed expertise in particular areas of the law over their years of practice, which will asset them in more readily evaluating cases that arise in those areas. Judges should always strive to attain a full understanding of the factual and legal issues that arise in any case that comes before them to ensure that each litigant obtains a decision that is grounded in the law and facts.

   b. What do you view as the work of "judging"? If cases were as easy and clear-cut as simply "following the law," why would we need judges at all?

   The work of judging is to analyze and interpret the law enacted by the political branches and faithfully apply binding precedent to specific cases and controversies presented by the litigants. This work requires the exercise of reason and judgment. It is the judge's role to analyze the governing law, come to a reasonable interpretation of that law, and then fairly apply it to the case presented.

5. **Why do you want to be a federal judge? What in your personal or professional background has most motivated you to want to serve?**

   Serving as a judge is incredibly humbling and rewarding because, in simple terms, a judge's job is to help litigants solve difficult problems. I believe that the rule of law depends on our system and its foundational principles of fairness, equal treatment under the law, and due process. I have seen the essential role our system and these values have in our society serving the federal judiciary as a law clerk, as a federal prosecutor, and as a state court judge and justice. If confirmed, it would be an incredible privilege to uphold the Constitution and the laws of this nation by serving on the federal bench.

6. **What do you believe is the fundamental role of a federal judge?**

   The fundamental role of any judge is to protect the rule of law by ensuring a fair and just application of the law to the specific cases brought before the court.

Nomination of Robert J. Luck
United States Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR BOOKER

1. In his inaugural address earlier this year, Governor Ron DeSantis—who appointed you the Supreme Court of Florida—said:

> I also understand that the role of the judiciary, while important, must be limited. It is a self-evident truth that in our constitutional system, courts lack the authority to legislate, but for far too long Florida has seen judges expand their power beyond proper constitutional bounds and substitute legislative will for dispassionate legal judgment, damaging the constitutional separation of powers, reducing the power of the people and eroding individual liberty.
>
> To my fellow Floridians, I say to you: judicial activism ends, right here and right now. I will only appoint judges who understand the proper role of the courts is to apply the law and Constitution as written, not to legislate from the bench. The Constitution, not the judiciary, is supreme.[1]

In your remarks earlier this year accepting your appointment to the Supreme Court of Florida, you quoted from Governor DeSantis's inaugural address and then stated: "This morning, Governor, with you standing by my side, I have taken an oath to make the Constitution, and not the judiciary, supreme."[2]

   a. Do you agree with Governor DeSantis's statement that "for far too long Florida has seen judges expand their power beyond proper constitutional bounds and substitute legislative will for dispassionate legal judgment, damaging the constitutional separation of powers, reducing the power of the people and eroding individual liberty"? Please explain your answer.

      I'm not sure what Governor DeSantis meant by that quote in his inaugural address.

   b. In the U.S. Supreme Court's landmark decision in *Marbury v. Madison*, Chief Justice Marshall famously declared more than two centuries ago, "It is emphatically the province and duty of the judicial department to say what the law is."[3] How do you understand the meaning of Governor DeSantis's statement that "[t]he Constitution, not the judiciary, is supreme," in light of the judiciary's mandate to interpret the Constitution and "say what the law is"?

      I understood Governor DeSantis's statement to mean that we are state and nation of laws, and not of men and women. The law, as reflected in our Constitution, is what is paramount, and not the force or will of any one person. I see this as consistent with Chief Justice Marshall's opinion in *Marbury*.

[1] Ed Whelan, *Transforming the Florida Supreme Court*, NAT'L REV. (Jan. 11, 2019), https://www.nationalreview.com/bench-memos/transforming-the-florida-supreme-court.
[2] Speech Accepting Appointment to the Supreme Court of Florida, Scheck Hillel Cmty. Sch., Miami, Fla. (Jan. 14, 2019), *in* SJQ Attachments to Question 12(a) at 385.
[3] 5 U.S. 137, 177 (1803)

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

Yes. The principle of judicial restrain is related to the separation of powers and the recognition that it is Congress, not the courts, that enact laws. Based on this principle, the Supreme Court has held, for example, that courts should "avoid reaching constitution questions in advance of the necessity of deciding them, *Camreta v. Greene*, 563 U.S. 692, 705 (2011), and should consider non-constitutional arguments challenging a statute before reaching constitutional arguments, *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[4] Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent that I will apply, if confirmed. As a sitting justice and a judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[5] Was that decision guided by the principle of judicial restraint?

The majority opinion and some of the separate opinions in *Citizens United* addressed the issue of judicial restraint. *Citizens United* is binding Supreme Court precedent that I will apply, if confirmed. As a sitting justice and judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[6] Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent that I will apply, if confirmed. As a sitting justice and judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

3. As a Justice on the Supreme Court of Florida, you concurred with a majority opinion that affirmed the lower court's decision to deny the defendant's motion for post-conviction relief. The defendant, who had been sentenced to death and was under an active death warrant, argued that Florida's lethal injection protocol violated his Eighth Amendment rights because a prior health condition made him more susceptible to suffer a seizure. The Court's opinion concluded that the defendant's concerns were "speculative and conclusory allegations" that were "insufficient to warrant an evidentiary hearing, let alone relief."[7]

a. In your assessment, what makes a defendant's concerns about such suffering so "speculative and conclusory" that an evidentiary hearing or other relief must be denied, consistent with the Eighth Amendment's prohibition on cruel and unusual punishments?

Under Florida and federal law,

> [T]o prevail on an Eighth Amendment method of execution challenge, "a condemned prisoner must: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay v. State* (*Asay VI*), 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015); *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) ("(re)confirm[ing] that anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test").

Long v. State, 271 So. 3d 938, 944 (Fla. 2019).

In the case of Robert Joe Long, the trial court held an evidentiary hearing on his method of execution claim. Based on the evidence, the trial court found that Long "failed to make either of the required showings" and competent substantial evidence supported the trial court's findings. *Id.*

> Specifically, in finding that Long failed to establish that the use of etomidate presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, the postconviction court found the testimony of the State's expert, Dr. Yun, "to be more credible" than that of Long's expert, Dr. Lubarsky:
>
> > The Court finds credible Dr. Yun's testimony that the massive dose of 200 milligrams of etomidate would produce such a deep state of burst suppression and unconsciousness that it would eliminate any possible seizure activity, and render a person—even someone with traumatic brain injury and/or temporal lobe epilepsy—unaware of noxious stimuli. Even if Defendant had a seizure, the Court finds credible Dr. Lubarsky's testimony that the seizure itself is not painful, as well as Dr. Yun's testimony that Defendant would be unconscious and insensate. The Court further finds more credible Dr. Yun's testimony that 200 milligrams of etomidate would render a person unconscious for at least 30 minutes, rather than the maximum of 8 minutes asserted by Dr. Lubarsky. The Court further finds the possible risks associated with the "cascade of events" described by Dr. Lubarsky is highly speculative. Defendant has not shown that if he is administered 200 milligrams of etomidate, he is likely to have a seizure, even a partial undetectable seizure as described by Dr. Wood.
>
> *Id.*

b. Did you have any personal hesitations about denying the defendant a further opportunity to determine whether Florida's lethal injection protocol was "sure or very likely to cause serious illness and needless suffering," consistent with the Eighth Amendment's prohibition on cruel and unusual punishments?[8]

The defendant was afforded an evidentiary hearing on his method of execution claim. My concurrence in *Long* was based solely on the facts and the law, and not on my personal sympathies or prejudices.

4. In another case you handled on the state appellate court, you opened your opinion with the line, "There are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity."[9] You then concluded: "Granting immunity to Indian tribes is a policy choice made by our elected representatives to further important federal and state interests. It is a choice to protect the tribes understanding that others may be injured and without a remedy. The immunity juice, our federal lawmakers have declared, is worth the squeeze."[10]

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[4] 554 U.S. 570 (2008).
[5] 558 U.S. 310 (2010).
[6] 570 U.S. 529 (2013).
[7] *Long v. State*, 271 So. 3d 938, 944-45 (Fla. 2019).
[8] *Id.* at 944.
[9] *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 658 (Fla. Dist. Ct. App. 2017) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)).
[10] *Id.* at 668.

a. In your view, what are the grounds for "doubt[ing] the wisdom of perpetuating the doctrine of tribal immunity"?

Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). There, the Court explained that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

b. If you are confirmed to serve on the Eleventh Circuit, how would your approach to cases involving tribal immunity differ from how you handled such cases as a state court judge?

Please see my response to Question 4(a).

5. For part of your time at the U.S. Attorney's Office for the Southern District of Florida, you worked under the direction of Alex Acosta. As the U.S. Attorney, Mr. Acosta oversaw a lenient and controversial plea deal in 2008 for a sex crimes prosecution of Jeffrey Epstein.

a. While at the U.S. Attorney's Office, were you involved in any way in any legal matter involving Mr. Epstein? If so, please explain.

No. As I explained at the hearing, the U.S. Attorney's Office for the Southern District of Florida is large, spanning from Key West to Fort Pierce along the eastern coastline of Florida. The Epstein case was investigated out of the Office's West Palm Beach branch. I was assigned to the Miami branch, 50 miles south. Also, in my time at the U.S. Attorney's Office, I was assigned to handle mostly gun violence cases and white collar investigations. I did not handle sex trafficking cases in the Office.

b. During your time at the U.S. Attorney's Office or afterward, did you learn any nonpublic information about Mr. Epstein or the Office's handling of his case? If so, please explain the nature of the information you learned.

No. Please see my response to Question 5(a).

6. You became a member of the Federalist Society in 2014.[11] Why did you join the Federalist Society at that time?

I joined the Federalist Society because it is the most active voluntary bar association in South Florida in terms of inviting speakers from different backgrounds and viewpoints. I enjoyed attending these talks and debates and learning about different sides of an issue.

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

As I said at my hearing, I agree with Justice Kagan that "we are all originalists." Although the term "originalism" may have different meanings to different persons, I take it to refer generally to the act of interpreting a text in accordance with its original public meaning, namely, how reasonable persons with knowledge of the law would have interpreting it at the time of its adoption. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, however, lower court judges must follow the precedents of the Supreme Court. That is so regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

   The Supreme Court has held that the starting point for statutory interpretation is the text of the statute. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (quotations and alternations omitted)). The Supreme Court has further explained that if "the statutory text is plain and unambiguous," it must be applied "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). Although the term "textualist" may have different meanings to different persons, I take it to refer generally to the primacy of the text in statutory interpretation. Ultimately, lower court judges must follow the precedents of the Supreme Court. That is so regardless of whether a given precedent is regarded as "textualist" in approach or not.

9. 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?

      The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). If confirmed, I will apply Supreme Court and Eleventh Circuit precedent regarding the use of legislative history.

   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 Question 9(a).

10. 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

[11] SJQ at 5.

demonstrated, however, that widespread voter fraud is a myth.[12] 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.[13]

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

As a sitting justice and judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

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

Please see my response to Question 10(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 Question 10(a).

11. 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.[14] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[15] 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.[16] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[17]

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

Racial bias does exist in our society, contrary to the fundamental principle of equality under the law embodied in the Constitution. As a justice, I strive to ensure that every person who enters the courtroom is treated with respect and receives fair treatment under the law.

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 taken implicit bias training from Professor Rachel Godsil and former federal district court judge Mark W. Bennett as part of Florida's judicial education programs. I do not recall what materials they used.

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 average of 19.1 percent longer.[18] Why do you think that is the case?

As a sitting justice and judicial nominee, it would not be appropriate for me to comment on matters that are political and could be the subject of litigation.

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[12] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[13] *Id.*
[14] 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.
[15] *Id.*
[16] 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.
[17] *Id.*
[18] 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.

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.[19] Why do you think that is the case?

Please see my response to question 11(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 judges have an essential role to play in ensuring the fair administration of law to the cases brought before them. District judges must apply the law without regard to a person's race and take steps to eliminate any potential for implicit racial bias.

12. 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.[20] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[21]

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 have not studied this question sufficiently to have an informed view.

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.

Please see my response to Question 12(a).

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

I believe that every institution, including the judiciary, benefits from a diversity of backgrounds and experiences.

14. 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.

15. Do you believe that *Brown v. Board of Education*[22] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I agreed at my hearing, I do believe that *Brown v. Board of Education* was correctly decided and holds a unique place in the history of American jurisprudence. When the Supreme Court held that the separate-but-equal doctrine violated the Equal Protection

clause of the Fourteenth Amendment, and overruled *Plessy v. Ferguson*, it corrected a historic wrong.

16. Do you believe that *Plessy v. Ferguson*[23] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Please see my response to Question 15.

17. 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.

18. 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

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[19] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).
[20] 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.
[21] *Id.*
[22] 347 U.S. 483 (1954).
[23] 163 U.S. 537 (1896).

heritage."[24] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

As a sitting justice and judicial nominee, it would not be appropriate for me to comment on political matters.

19. 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, bring them back from where they came."[25] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that due process protections apply to all "persons" in the United States, including aliens, regardless of their entry status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will apply this Supreme Court precedent, if confirmed.

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

Questions for the Record from Senator Kamala D. Harris
Submitted October 23, 2019
For the Nomination of

Robert J. Luck, to be United States Circuit Judge for the Eleventh Circuit

1. At your nominations hearing, Senator Grassley and Senator Cruz asked you to describe the role of legislative history when interpreting a statute. You responded that the relevant law is the text of the statute, and that floor statements are not approved by both houses of the legislature.

    a. **In your view, is it ever appropriate for a judge to consider legislative history?**

    The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). If confirmed, I will apply Supreme Court and Eleventh Circuit precedent regarding the use of legislative history.

    b. **If confirmed, would you be open to considering legislative history when interpreting the meaning of a statute? If yes, under what circumstances?**

    Please see my response to Question 1(a).

    c. **Do you believe it is ever appropriate for a judge to consider the impact of a potential ruling when deciding a case? Why or why not?**

    In general, a judge should not consider the practical consequences when considering how to rule in a case. In limited circumstances, however, Supreme Court and Circuit precedent, and applicable statutory provisions, might require a judge to engage in such consideration, for example, when deciding whether a party would suffer irreparable harm if a stay or preliminary injunction were not issued.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

    a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

    Judges have a direct responsibility to ensure that litigants are afforded due process and fair and equal treatment under the law.

b. **If confirmed, what steps will you take to help ensure that our justice system is a fair and equitable one?**

If confirmed, I will perform my role consistent with the requirements imposed by law and the Code of Judicial Conduct. I also believe in the principles of procedural fairness, which seek to ensure fairness within the judicial system and promote public perception that the system is fair. These principles include demonstrating that the parties' positions have been heard and fairly considered, that the decision-makers are neutral and transparent in their decision-making, and that all parties are treated with respect and courtesy.

c. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Racial bias does exist in our society, contrary to the fundamental principle of equality under the law embodied in the Constitution. As a judge, I strive to ensure that every person who enters into the courtroom is treated with respect and receives fair treatment under the law.