

**Nomination of Halil Suleyman Ozerden to the United States Court of Appeals for the  
Fifth Circuit  
Questions for the Record  
Submitted July 24, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. Please respond with your views on the proper application of precedent by judges.
- a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

An inferior court should never 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?**

All lower court judges are under an obligation to apply binding Supreme Court precedent. While it is generally improper for a circuit court judge to question Supreme Court precedent, there may be instances where respectfully identifying an issue well-positioned for Supreme Court review could be beneficial. Nevertheless, even under those circumstances a lower court judge must still follow Supreme Court precedent.

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

Generally, to overrule a decision rendered by a prior panel of the Fifth Circuit, the entire *en banc* court must vote to review the matter *en banc* and take the action of overruling the previous panel. *See Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (“Under our rule of orderliness, one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”) (quotation omitted); *see also* Fed. R. App. P. 35(a). “No court approaches the act of overruling one of its prior precedents lightly.” *United States v. Gomez Gomez*, 917 F.3d 332, 333 (5th Cir. 2019).

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

It would not be appropriate for me to express an opinion on when the Supreme Court should overturn its own precedent, as that is a matter for the Supreme Court to decide. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (only the Supreme Court has “the prerogative of overruling its own decisions”). The Supreme Court has stated that “[o]verruling precedent is never a small matter.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015). The Supreme Court has stated that adhering to prior precedent, while not an “inexorable command,” *Payne v. Tenn.*, 501 U.S. 808, 828 (1991), constitutes “the preferred course because it promotes

the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,” *id.* at 827. In determining whether to deviate from its own precedent, the Supreme Court has expressed that it may consider the unworkability of the prior decision, the age of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

2. 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”?**

As an inferior court judge, I must apply, and will continue to apply, all binding Supreme Court and Fifth Circuit precedent, including *Roe v. Wade*.

b. **Is it settled law?**

Yes, *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts, and I am bound to follow it.

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

Yes, *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I have applied, and will continue to apply, all binding Supreme Court and Fifth Circuit precedent, including *Obergefell*.

4. 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.” During your hearing, you stated that the Supreme Court’s opinion in *D.C. v. Heller* “does not limit certain common sense gun regulation” and agreed that the prevention of gun violence is a legitimate, important goal for Congress and state governments to pursue.

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

The decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding Supreme Court precedent. I will faithfully apply this precedent and all other precedents of the Supreme Court. As a sitting judge and a judicial nominee, it would not be appropriate for me to opine as to whether the majority decision or a dissent in *Heller* was correct.

**b. Under *Heller*, can Congress and state governments pursue prohibitions on possession of firearms by certain individuals, including felons and those suffering from mental illness, without infringing on the Second Amendment?**

In *Heller*, the Supreme Court stated that “the right secured by the Second Amendment is not unlimited,” and that “[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). As a sitting judge and a judicial nominee, it would not be appropriate for me to opine as to how *Heller* may apply in a future case. See Canon 3(A)(6), Code of Conduct of United States Judges. I will faithfully apply *Heller* and all other precedents of the Supreme Court.

**c. Under *Heller*, can Congress and state governments pursue prohibitions on the carrying of firearms in certain locations, including schools and government buildings, without infringing on the Second Amendment?**

Please see my answer to Question 4(b).

**d. Under *Heller*, can Congress and state governments pursue the banning of certain weapons used in military service without infringing on the Second Amendment?**

Please see my answer to Question 4(b).

**e. In what ways are private organizations limited in implementing policies that aim to prevent gun violence?**

Please see my answer to Question 4(b).

**f. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?**

Please see my answer to Question 4(b).

5. 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?**

In *Citizens United*, the Supreme Court identified over twenty prior instances in which it had "recognized that the First Amendment protection extends to corporations." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). The specific issue in *Citizens United* was the limitation on corporate expenditures for electioneering communications, and the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 365. According to the Supreme Court, "political speech does not lose First Amendment protection simply because its source is a corporation." *Id.* at 342 (quotation omitted). As a sitting judge and a judicial nominee, I am duty-bound to follow and apply *Citizens United* and all other precedents of the Supreme Court.

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

Please see my answer to Question 5(a).

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

The Supreme Court addressed whether the protections afforded by the Religious Freedom Restoration Act applied to corporations in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2012), but the issue of the applicability of the Free Exercise Clause of the First Amendment to corporations was not resolved in that case. Because there may be litigation implicating this unanswered question, it would not be appropriate for me to opine on this issue. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

6. In 2015, you granted a company's motion for summary judgment after it was sued by a former employee who claimed she was wrongfully terminated in retaliation for reporting her male supervisor's harassment of her female coworker. The Fifth Circuit reversed and held that there was a fact issue as to whether the employee reasonably believed the conduct she reported violated Title VII of the Civil Rights Act. (*EEOC v. Rite Way Services*)

**a. Is it reasonable for an individual to believe that a male supervisor mimicking slapping his female employee's behind constitutes sexual harassment under Title VII?**

The Fifth Circuit's decision in *E.E.O.C. v. Rite Way Serv., Inc.*, 819 F.3d 235 (5th Cir. 2016), concluded that such evidence was sufficient to create a fact question for resolution by a jury as to whether the conduct involved could give rise to a reasonable belief that the conduct constituted sexual harassment. As binding precedent of the Fifth Circuit, I am bound to follow it.

**b. Is it reasonable for an individual to believe that a male supervisor making lecherous comments about his female employee's figure constitutes sexual harassment under Title VII?**

Please see my answer to question 6(a).

**c. Is it reasonable for an individual to believe that a male supervisor stating he is going to look at his female employee's "tight" pants because "[he's] a man" constitutes sexual harassment under Title VII?**

Please see my answer to question 6(a).

The Fifth Circuit noted that the supervisor who had been accused of misconduct was transferred and replaced by his own brother-in-law. The brother-in-law then terminated the employee who reported the misconduct. In your Memorandum Opinion granting summary judgment to the employer, you do not appear to make note of this fact.

**d. Were you aware that the employee was ultimately fired by the brother-in-law of the supervisor whose conduct she reported?**

I do not recall whether I was aware of this fact.

**e. Is such a relationship a relevant fact that should be considered in a Title VII retaliation claim?**

The relevant inquiry in a Title VII retaliation claim is often a fact intensive one. As a sitting judge and a judicial nominee, it would be inappropriate for me to opine under what circumstances such a relationship might or might not be relevant in a future case. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

7. In 2009, you considered a suit brought by two plaintiffs who alleged they were not paid for overtime work while restoring damaged telecommunications lines following Hurricane Katrina. You applied a balancing test to determine whether the laborers should be categorized as independent contractors or as employees entitled to overtime pay under the Fair Labor Standards Act. Although you appeared to acknowledge that the facts of the case pointed in both directions for the factors of the balancing test, you granted the defendants summary judgment. The Fifth Circuit vacated and remanded, finding that the facts put the balancing test "in near equipoise" and were "not sufficient to establish" that the plaintiffs were independent contractors not entitled to overtime. (*Cromwell v. Driftwood Electric Contractors*)

**a. What is the standard that governs summary judgment in cases brought under the FLSA?**

As in other civil cases, summary judgment is appropriate in a case brought under the FLSA “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

**b. In light of that standard, why did you feel it was appropriate to dismiss the case at the summary judgment stage when the facts of the case weighed on both sides of the balancing test?**

Because there were no disputes of material fact in *Cromwell*, the Fifth Circuit agreed that “the district court was correct to resolve the matter on summary judgment.” *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App’x 57, 59 (5th Cir. 2009). The issue presented was whether the workers qualified as employees under the FLSA, which focuses upon a balancing of factors to determine “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.” *Id.* I balanced the factors set forth by precedent and determined those factors weighed in favor of finding the plaintiffs were independent contractors, but the Fifth Circuit balanced the same five factors and reached a different result. *Compare id.*, with *Cromwell v. Driftwood Elec. Contractors, Inc.*, No. 1:07cv996-HSO-JMR, 2009 WL 10707147, at \*2-\*4 (S.D. Miss. Mar. 5, 2009).

8. During your hearing, Senator Cruz quoted the First Liberty Institute in stating that you are “not a conservative,” that you have “never been affiliated with the conservative movement,” and that you have “never volunteered [your] time to advance conservative causes.” In response, you cited your work in “supporting different candidates in different campaigns,” all of which were Republican candidates, and highlighted that you were a board member of the County Republican Club.

**As a sitting judge seeking another judicial office, why did you highlight your partisan political affiliations as one of your qualifications?**

It was not my intention to highlight any past political affiliations as a qualification. I was attempting to respond to what I perceived to be a factual question about the nature and extent of my political activity while I was a private practice attorney, before becoming a judge. As a sitting judge, I am prohibited from, and I have not engaged in, partisan political activity. *See* Canon 5, Code of Conduct for United States Judges. I will continue to abide by that proscription.

9. During your hearing, you endorsed the work of various conservative organizations, including the Judicial Crisis Network, Susan B. Anthony List, and the First Liberty Institute. For example, in response to a question from Senator Hirono, you stated that you “understand and respect the things that [these groups] do and what they stand for.” You also told Senator Cruz that you “respect these organizations . . . and the work they do.”

**a. What does the Judicial Crisis Network “stand for?” What do you respect about the work Judicial Crisis Network does?**

In responding to these questions, I was merely attempting to express that I respect the right that these organizations, and others, have to express their views and advocate on behalf of their beliefs, rights which are protected by our Constitution.

**b. What does Susan B. Anthony List “stand for?” What do you respect about the work Susan B. Anthony list does?**

Please see my response to Question 9(a).

**c. What does First Liberty Institute “stand for?” What do you respect about the work First Liberty Institute does?**

Please see my response to Question 9(a).

**d. Please list all other legal or political organizations whose work and principles you respect.**

Please see my response to Question 9(a).

Canon 3(C)(1)(a) of the Judicial Conference’s Code of Conduct for U.S. Judges states that a judge “shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned,” including instances in which the judge has “a personal bias or prejudice concerning a party.”

**e. Since you have now endorsed the work and principles of the above-mentioned organizations, will you commit to recusing yourself from cases in which these organizations are a party? If not, please explain how you are not in violation of the Judicial Canons.**

The impartiality of judges, and the appearance of impartiality, are critical for ensuring public confidence in our federal courts. *See* Canon 3, Code of Judicial Conduct for United States Judges. I carefully evaluate the facts of each case to determine whether recusal is warranted. In making these determinations, I consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. I believe that my record as a sitting judge over the past 12 years demonstrates that I have, and will, continue to abide by these directives.

10. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2019. 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 did not draft the quoted phrase, so I am not in a position to offer an opinion as to what was intended by those who did.

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

Please see my answer to Question 10(a).

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

Please see my answer to Question 10(a).

**d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?**

I have not discussed my nomination to the Fifth Circuit, or any other possible nomination, with any officer or employee of the Federalist Society.

11. 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?**

I do not recall anyone asking me about my views on administrative law.

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

No.

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

Administrative law is a broad field that encompasses a wide range of legal issues. If confirmed, I would faithfully apply all binding Supreme Court and Fifth Circuit precedent, including precedent in the area of administrative law.

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

It is my understanding that there is currently pending or impending litigation which involves theories based on the allegation of injuries caused by climate change. Because there may be litigation related to this question, it would not be appropriate for me to opine on this issue. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

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

The Supreme Court has generally instructed that judges may consider legislative history in certain limited circumstances when a statute is ambiguous, but where a statute is unambiguous, resort to legislative history is not appropriate. *See, e.g., Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). I will faithfully apply Supreme Court and other applicable precedent on the use of legislative history and, where appropriate, will carefully consider any arguments that the parties may advance on this issue.

14. 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.

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

I received these questions on Thursday, July 25, 2019. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, July 29, 2019. The answers to these questions are my own.

**Senator Dick Durbin**  
**Written Questions for Ozerden and Roumel**  
**July 24, 2019**

For questions with subparts, please answer each subpart separately.

**Questions for Halil Suleyman Ozerden**

1.

a. Do you believe that circuit and district court judges mechanically apply Supreme Court and circuit precedent in all cases? Or do they ever have to decide cases that do not have a precedent squarely on point?

As an inferior court judge, it is, and will continue to be, my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, regardless of the outcome. However, circuit and district court judges do on occasion have to decide cases that do not have a precedent squarely on point.

b. What should guide lower court judges in cases where there is no precedent directly on point?

When there is no Supreme Court precedent directly on point, a lower court judge must consider whether there is circuit precedent. If there is no controlling circuit precedent on the issue, and the question is one of first impression that arises from statute, a court must first look to the statutory text and determine whether the language at issue has a plain and unambiguous meaning. If the meaning of the text is clear and unambiguous, the inquiry ends. If the language of the statute is ambiguous, a court applies the traditional canons of statutory construction.

2. Should circuit court judges ever write opinions—whether majority opinions, concurrences, or dissents—calling for the Supreme Court to review and consider reversing its own precedents, or is it inappropriate for lower court judges to opine on what the Supreme Court should do?

Inferior court judges are under a duty to observe and apply all precedent of the Supreme Court. While it is improper for a circuit court judge to question Supreme Court precedent, there may be instances where respectfully identifying an issue well-positioned for Supreme Court review could be beneficial.

3. When do you believe it is appropriate for the Supreme Court to overrule one of its precedents?

The Supreme Court itself determines when that is appropriate. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (only the Supreme Court has “the prerogative of overruling its own decisions”). The Supreme Court has made clear that

“[o]verruling precedent is never a small matter.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015). Adhering to prior precedent, while not an “inexorable command,” *Payne v. Tenn.*, 501 U.S. 808, 828 (1991), constitutes “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,” *id.* at 827. In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court has stated that it may consider factors such as the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

4. In the 2014 case *U.S. v. Mahanera*, you sentenced a defendant who was convicted of trafficking in counterfeit goods. You imposed certain special conditions of supervised release in this sentencing, including requiring the defendant to participate in drug testing and ordering that the defendant not use narcotics.

On appeal, the 5th Circuit found that you had “abused discretion by imposing special conditions . . . without explaining how they reasonably relate to the statutory factors.”  
What were your reasons for imposing these special conditions?

I do not recall the specific reasons why I imposed those particular conditions in that case.

5. In the 2011 case *A.K.W. ex rel Stewart v. Eastern Bell Sports*, a boy was paralyzed when his football helmet damaged an artery in his neck. The boy and his family sued alleging that the helmet had a defective design. You held that they could not prove causation because the particular helmet in question was not available for inspection and the helmet could have been one of four models made by this particular manufacturer. The 5<sup>th</sup> Circuit reversed your ruling, noting that the plaintiff’s expert had offered the opinion that all four models of the manufacturer’s helmet contained the same design flaw.

Please discuss your reasoning in this case.

This case arose under diversity jurisdiction and was governed by Mississippi law, specifically the Mississippi Products Liability Act (“MPLA”), Mississippi Code § 11-1-63. The plaintiff, through her expert witness, alleged that minor A.K.W.’s injuries were caused by the defective design of a football helmet, but the helmet could not be located and was unavailable for inspection. The record reflected that the helmet could have been one of several different models used by the school, all of which differed in design despite each having discrete padding systems. There was no evidence on the question of whether the helmet was in substantially the same condition at the time of the accident as when it left the manufacturer, which is a factor that must be shown under the MPLA. Nor was there evidence regarding the age, use, or history of the helmet at the time of the accident. Plaintiff had not offered any circumstantial evidence, such as photographs of the helmet on the day of the accident, or shortly thereafter, to support the plaintiff’s expert’s testimony on causation. Moreover, the expert had offered no testimony in terms of probabilities that A.K.W. sustained injuries because of a design defect in the helmet rather than due to other causes. While the expert generally opined that A.K.W.’s injuries probably would have been prevented or lessened with a different helmet, he stated that without

proper testing he would be guessing as to whether a different helmet would have in fact prevented A.K.W.'s injuries. I read Mississippi law to state that, where an allegedly defective product is unavailable for inspection, and there is no other evidence as to its condition at the time of the accident, a plaintiff cannot prove a *prima facie* defective design claim under the MPLA. See *A.K.W. by & through Stewart v. Easton-Bell Sports, Inc.*, No. 1:09CV703-HSO-JMR, 2011 WL 13199149, at \*5 (S.D. Miss. Mar. 23, 2011) (citing *Moore v. Miss. Valley Gas Co.*, 863 So. 2d 43, 47 (Miss. 2003)), *rev'd*, 454 F. App'x 244 (5th Cir. 2011). Based upon this authority and the facts in the record, I determined that the plaintiff had not presented any evidence of causation beyond mere speculation and granted summary judgment. After the Fifth Circuit reversed my decision, the case was tried to a jury, which returned a verdict in favor of the defendant. The plaintiff did not appeal.

6. In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?

Judges must base their decisions on the law and not on the identity of the litigants, the judge's personal preferences, or any other non-legal factor. That is among the reasons why judges must agree to “administer justice without respect to persons.” 28 U.S.C. § 453. Nevertheless, empathy is an important human quality and one that judges may display under appropriate circumstances while impartially applying the law. For example, judges should treat all litigants with dignity and respect and ensure that all litigants are treated equally under law. Moreover, a judge can have empathy for victims of a crime, for a defendant, or for family members of a defendant, and a judge can be empathetic in exercising his or her discretion in setting court dates and schedules to avoid unduly burdening parties, counsel, witnesses, victims, or jurors. Empathy, however, does not supersede a judge's obligation to follow the law.

7. You say in your questionnaire that you joined the Federalist Society earlier this year, after your name had been the subject to public speculation whether you might get nominated to the 5th Circuit.

a. Why did you join the Federalist Society?

The Federalist Society did not have a chapter in my geographical area until very recently, in early 2019. As my Senate Judiciary Committee Questionnaire reflects, I have been very active in different bar-related organizations and have tried to actively participate in local bar-related associations and activities. I think it is important for judges to try to promote professionalism in the practice of law, and I saw joining this newly-formed organization as another opportunity to engage with, and be accessible and visible to, attorneys.

b. Were you led to believe that joining the Federalist Society might increase your chances of getting this nomination?

No.

c. Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist? For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

The nomination and confirmation of federal judges is a matter committed to the political branches. As a sitting judge and a judicial nominee, it would not be appropriate for me to opine on such matters. *See* Canon 5, Code of Conduct of United States Judges.

8.

a. Do you have any concerns about outside groups or special interests making undisclosed donations to organizations that advocate in support of or in opposition to 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 or in opposition to my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters. *See* Canon 5, Code of Conduct of United States Judges.

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 or in opposition to my nomination, and as a sitting judge and judicial nominee, it would not be appropriate for me to opine on such political matters. *See* Canon 5, Code of Conduct of United States Judges. In making decisions about recusal, 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 applicable rules or guidelines and, as necessary and appropriate, consult with colleagues and ethics officials within the court system.

9.

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). 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), and must follow Supreme Court precedent regardless of whether a given precedent is or is not regarded as "originalist" in approach.

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 sitting judge and a judicial nominee it would not be appropriate for me to opine on this topic under Canon 3(A)(6) of the Code of Conduct of United States Judges.

10.

a. Is waterboarding torture?

Although I have not studied this issue closely, it is my understanding that waterboarding would constitute torture if it is intentionally used “to inflict severe physical or mental pain or suffering.” 18 U.S.C. § 2340(1) (defining “torture”).

b. Is waterboarding cruel, inhuman and degrading treatment?

I have not had occasion to examine this issue closely, but my appreciation of the law 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 subjected to any interrogation technique not authorized in the Army Field Manual, and that the Army Field Manual does not authorize waterboarding.

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

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

**Nomination of Halil Suleyman Ozerden  
to the United States Court of Appeals for the Fifth Circuit  
Questions for the Record  
Submitted July 24, 2019**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. During your nomination hearing, Senator Cruz (R-TX) recited a list of concerns about your nomination that were initially voiced by the First Liberty Institute. The Senator's concerns were stated as follows:

He's not a conservative; he's never been affiliated with a conservative movement; he's never volunteered his time to advance conservative causes; he's never been active in conservative legal circles; and he's never written any decisions that have advanced conservative principles.

In response to Senator Cruz, you pointed to your credentials as a board member for the Harrison County Republican Club and other similar organizations during your time in private practice.

a. Do you believe that these affiliations better qualify you to serve on the Fifth Circuit? If not, why did you cite them?

It was not my intention to highlight any past political affiliations as a qualification for the position to which I have been nominated. I was attempting to respond to what I perceived to be a factual question about the nature and extent of my political activity while I was a private practice attorney, before becoming a judge. As a sitting judge for the past twelve years, I am prohibited from, and I have not engaged in, partisan political activity. *See* Canon 5, Code of Conduct for United States Judges. I will continue to abide by that proscription.

b. Are you familiar with any of the following Advisory Opinions issued by The Federal Judiciary's Committee on the Codes of Conduct: Advisory Opinion #19 on "Membership in a Political Club," Advisory Opinion #82 on "Joining Organizations," and Advisory Opinion #93 on "Extrajudicial Activities Related to the Law"? If not, please read them. Do you believe the criteria articulated above by Senator Cruz are consistent with these judicial ethical standards? Please specify.

I have read and am generally familiar with the substance of the cited advisory opinions. However, as a sitting judge and a judicial nominee, it would not be appropriate for me to offer a commentary on political matters relating to the criteria for nomination and confirmation of federal judges. *See* Canon 5, Code of Conduct of United States Judges.

2. Your questionnaire indicates that you became a member of the Mississippi Gulf Coast Chapter of the Federalist Society earlier this year.

- a. What was your primary motivation for joining the organization?

The Federalist Society did not have a chapter in my geographical area until very recently. The Mississippi Gulf Coast Lawyers Chapter of the Federalist Society formed in early 2019, and I joined soon after. As my Senate Judiciary Committee Questionnaire reflects, I have been very active in different bar-related organizations and have tried to actively participate in local bar-related associations and activities. I think it is important for judges to try to promote professionalism in the practice of law, and I saw joining this newly-formed organization as another opportunity to engage with and be accessible and visible to attorneys.

- b. If confirmed, do you plan to remain an active participant in the Federalist Society?

If confirmed, I may attend local meetings sponsored by the Federalist Society, as well as events sponsored by other organizations, as appropriate.

- c. If confirmed, do you plan to donate money to the Federalist Society?

No.

- d. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

No.

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

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I had not read the article previously, but I have now reviewed it in response to the above 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?

As a sitting judge and a judicial nominee, it would not be appropriate for me to opine on political matters relating to the nomination and confirmation of federal judges. *See* Canon 5, Code of Conduct of United States 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 answer to Question 3(b).

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

No.

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

Please see my answer to Question 3(b).

4. 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 that Chief Justice Roberts’ metaphor provides a helpful description of the judicial role. For inferior court judges, decisions are controlled by precedent, statute, regulation, or rule. A judge is bound to render decisions based on an impartial application of the law and not based upon his or her personal views or preferences.

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

A judge’s ruling should be based upon the law as written and *stare decisis*. Considering practical consequences that might follow a decision implicates questions not for the judiciary, but for the political branches, and is generally inappropriate. Under certain limited circumstances, however, precedent instructs a judge to consider practical consequences when making a ruling. For example, when deciding whether to issue a

preliminary injunction, a judge should take into consideration the consequences, such as whether the movant will suffer irreparable harm in the absence of preliminary relief.

5. 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?

I disagree and believe that this determination is an objective one made under governing legal standards, based on the facts and law.

6. 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?

Judges must base their decisions on the law and not on the identity of the litigants, the judge’s personal preferences, or any other non-legal factor. That is among the reasons why judges must agree to “administer justice without respect to persons.” 28 U.S.C. § 453. Nevertheless, empathy is an important human quality and one that judges may display under appropriate circumstances while impartially applying the law. For example, judges should treat all litigants with dignity and respect and ensure that all litigants are treated equally under law. A judge can have empathy for victims of a crime, for a defendant, or for family members of a defendant, and a judge can be empathetic in exercising his or her discretion in setting court dates and schedules to avoid unduly burdening parties, counsel, witnesses, victims, or jurors. Empathy, however, does not supersede a judge’s obligation to follow the law.

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

A judge must ground his or her decisions in the law and cannot allow personal viewpoints to intrude on that analysis. Several components of a judge’s experience can affect the judge’s decision-making process, such as a judge’s knowledge, education, training, and ability to respect all persons and to treat them with respect and dignity. A judge’s personal preferences, however, have no place in a judge’s decision-making process.

c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

No judge, including myself, has walked in everyone else's shoes. My commitment as a judge is to apply the law impartially to the cases before me, to treat everyone in court with dignity and respect, and to treat everyone equally under the law. I believe I have done that for the last twelve years as a sitting judge. I am committed to treating all parties equally under law and to according them the dignity and respect that all persons deserve, even if they come from backgrounds different than my own.

7. 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.

8. 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 Seventh Amendment "preserved" the right to jury trial as it existed at common law. As a right specifically delineated in the Bill of Rights, the right to a jury trial is a central feature of our Constitution. My experience has confirmed that juries perform an important role in safeguarding rights.

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

Because there is active or impending litigation concerning these issues, as a sitting judge and a judicial nominee it would not be appropriate for me to comment on this topic. *See* Canon 3(A)(6), Code of Conduct of United States Judges.

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 answer to Question 8(b).

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

As a general rule, appellate courts do not engage in fact-finding; rather they evaluate the record on appeal as developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. If confirmed, I will faithfully follow any applicable precedent on the question of appellate court review of factual findings.

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

As indicated in my response to Question 9, as a general matter an appellate court considers the record that has been developed in the court below and should not engage in fact-

finding, except under limited circumstances, such as when trying to evaluate its own jurisdiction. Established standards of review govern an appellate court's review of factual findings made in the district court. Appellate courts must abide by these standards and any other applicable rules in reviewing such factual findings.

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

The Supreme Court has addressed this question on different occasions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). As inferior court judge, I will faithfully apply any applicable precedent, including precedent in this area.

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

a. Have you read Advisory Opinion #116?

Yes.

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

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

I will abide by the Code of Conduct for United States Judges, and I will consider Advisory Opinion #116 along with any subsequent advisory opinion from the Committee of Codes of Conduct relating to participation in educational seminars if I am invited to attend any such seminar. Advisory Opinion #116 makes clear that "it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis." The Opinion also identifies nine factors relating to the sponsoring organization and three factors relating to the educational program itself for a judge to consider. In deciding whether to attend any particular educational seminar, I will carefully consider the factors set forth in Advisory Opinion #116.

ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my answer to Question 12(b)(i).

iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my answer to Question 12(b)(i).

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my answer to Question 12(b)(i).

- 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.

Please see my answer to Question 12(b)(i).

- 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 answer to Question 12(b)(i).

Senate Judiciary Committee Hearing on  
“Nominations”  
Questions for the Record  
July 24, 2019  
Senator Amy Klobuchar

Questions for Mr. Ozerden, nominee to be U.S. Circuit Judge for the Fifth Circuit

As the former chief prosecutor in Minnesota’s largest county, I know that our criminal justice system must ensure the fair administration of justice while keeping our communities safe. In the Senate, I cosponsored the First Step Act, which provides greater discretion to trial judges in the sentencing of low-level drug offenders.

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

In addition to ensuring the correctness of the sentencing guidelines range and the rulings on any departures, appellate judges can review the record to ensure a meaningful evaluation of statutory factors, *see* 18 U.S.C. § 3553(a), that consider the individual circumstances of the defendant to ensure that the sentence is “sufficient, but not greater than necessary.”

In *D.C. v. Heller*, the majority opinion authored by Justice Scalia makes clear that “the right secured by the Second Amendment is not unlimited.”

- How would you evaluate the constitutionality of a statute regulating a type of firearm that has been made possible by advances in technology—for example, a firearm with a high-capacity magazine or a firearm with a bump stock—that would have been unforeseeable by the Framers?

*Heller* is binding Supreme Court precedent, and I am bound to follow it. In *Heller*, the Supreme Court stated that “the right secured by the Second Amendment is not unlimited,” and that “[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). As a sitting judge and a judicial nominee, it would not be appropriate for me to opine as to how *Heller* may apply in a future case. *See* Canon 3(A)(6), Code of Conduct of United States Judges.

**Nomination of Halil Suleyman Ozerden, to be  
United States Circuit Judge for the Fifth Circuit  
Questions for the Record  
Submitted July 24, 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?

The Supreme Court has provided guidance on the factors that courts can and should consider in the area of substantive due process. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). I will follow Supreme Court precedent.

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

Yes. The Supreme Court has held that many rights that are specifically enumerated in the Bill of Rights are incorporated against the States under the Fourteenth Amendment. *See, e.g., Timbs v. Indiana*, 139 S. Ct. 682 (2019); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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?

The Supreme Court has held that history and tradition are factors to consider in the area of substantive due process. *See, e.g., Glucksberg*, 521 U.S. at 710; *Obergefell*, 135 S. Ct. at 2598. I will apply all applicable precedent in this area.

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

As a lower court judge I would be bound by precedent of the Supreme Court, as well as that of the Fifth Circuit. If there is no Supreme Court or Fifth Circuit precedent on point, I would consider decisions from other circuits for their persuasive value.

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

As a lower court judge I would be bound by precedent of the Supreme Court, as well as that of the Fifth Circuit.

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*).

These decisions are binding Supreme Court precedent. As an inferior court judge, I will follow all binding Supreme Court precedent, including *Lawrence* and *Casey*, and all Fifth Circuit precedent.

f. What other factors would you consider?

I would consider those factors that the Supreme Court and Fifth Circuit have identified as relevant to this type of inquiry.

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 applied the Equal Protection Clause to race-based classifications and to gender-based classifications. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (gender-based classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race-based classification); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender-based classification). The Supreme Court has held that the government must demonstrate an “exceedingly persuasive justification” for such gender-based classifications. *Virginia*, 518 U.S. at 531 (1996). I will faithfully follow this and all Supreme Court precedent in this area.

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?

On several occasions, the Supreme Court has addressed the proper means for interpreting and applying the Fourteenth Amendment, and I will follow all binding Supreme Court and Fifth Circuit precedent.

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 have not researched this issue, but it is my understanding 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 will faithfully apply all Supreme Court precedent in this area.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples

the same as heterosexual couples? Why or why not?

The Supreme Court has held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). The Court in *Obergefell* further held that “the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at 2605. I will apply *Obergefell* and all other Supreme Court precedent.

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

There is active or impending litigation concerning these issues. As a judicial nominee, it would therefore not be appropriate for me to opine on this topic. *See* Canon 3(A)(6), Code of Conduct of United States Judges.

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

The Supreme Court found a right for married couples to use contraceptives in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and later in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court overturned a conviction under a law banning the distribution of contraceptives, without regard to marital status. As an inferior court judge, I would follow all binding Supreme Court and Fifth Circuit precedent in this area.

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 repeatedly recognized such a right. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). As an inferior court judge, I will follow all binding Supreme Court and Fifth Circuit precedent in this area.

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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down a state criminal law based on the liberty interest protected by the Due Process Clause for “two adults who, with full and mutual consent from each other engaged in sexual practices.” *Id.* at 578. As an inferior court judge, I will follow all binding Supreme Court and Fifth Circuit precedent in this area.

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 answers 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?

As a sitting judge and a judicial nominee, it would not be appropriate for me to opine generally on abstract legal issues that may require consideration and application in future cases. See Canon 3(A)(6), Code of Conduct of United States Judges. I will faithfully apply all Supreme Court and Fifth Circuit precedent on the question of when and how such evidence should be considered.

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

The consideration of such data and information in any case would likely depend upon the nature of the case and the particular legal issues at hand. For example, Federal Rule of Evidence 702 and precedent such as *Daubert v. Merrell Dow Pham., Inc.*, 509 U.S. 579 (1993), govern the admissibility of certain scientific, technical, or other specialized knowledge. I will apply Supreme Court and Fifth Circuit precedent on the question of when and how such evidence, data, and information should be considered.

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?

As a sitting judge and a judicial nominee, it would not be appropriate for me to opine generally on abstract legal issues that may require consideration and application in future cases. See Canon 3(A)(6), Code of Conduct of United States Judges. The decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is binding Supreme Court precedent,

and I will follow it and all other binding Supreme Court and Fifth Circuit precedent.

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

Please see my answer 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?

I am aware of scholarly debates on this question. Ultimately, however, as an inferior court judge, I will follow binding Supreme Court and Fifth Circuit precedent regardless of whether or not a given precedent is regarded as “originalist” in approach.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited July 24, 2019).

Please see my answer to Question 6(a). The scope and nature of the constitutional rights identified above have been the subject of many decisions of the Supreme Court. As an inferior court judge, I will follow all binding Supreme Court and Fifth Circuit precedent.

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

The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004). As an inferior court judge, I will follow binding Supreme Court and Fifth Circuit precedent regardless of whether or not a given precedent is regarded as “originalist” in approach.

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

Please see my answer to Question 6(c).

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

In construing any particular provision of the Constitution, I would faithfully apply the applicable precedents of the Supreme Court and Fifth Circuit, and, as appropriate, would consult the sources that those courts have indicated may be considered to discern the contours of a constitutional provision.

7. In the 2017 case *J.M. v. Management and Training Corporation*, you held that plaintiffs had failed to state a claim under 42 U.S.C. § 1983 against private prison operator MTC for an official custom, pattern, or practice of failing to protect inmates from sexual abuse or failing to train or supervise employees. You stated that in order to establish liability, a plaintiff must demonstrate a pattern of sufficiently similar and numerous prior abuses that transcends a single error. However, you declined to consider a Department of Justice Civil Rights Division report that found that “staff sexual misconduct with youth in their custody occurred on a monthly basis, at a minimum” under prior management. Further, during discovery, MTC disclosed seven additional incidents of sexual misconduct by staff that had occurred since MTC began operating the facility.

a. Why, in your view, did this evidence fail to establish a pattern of sufficiently similar and numerous abuses?

In *J.M. v. Management & Training Corporation*, No. 3:15cv841-HSO-JCG, 2017 WL 3906774 (S.D. Miss. Sept. 5, 2017), the defendants included Management & Training Corporation (“MTC”) and the correctional officer, D.H., who had been terminated by MTC. At issue in the order referenced in Question 7 was a Motion for Summary Judgment filed only by MTC. The question before me was whether MTC could be held liable on a municipal liability theory under 42 U.S.C. § 1983, as it was treated as a municipality for such claims. Under controlling precedent governing municipal liability, MTC could not be held liable premised on a theory of respondeat superior. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

In opposition to summary judgment, the plaintiff relied upon an alleged pattern or practice of MTC in an attempt to establish liability. In order to prove an official policy through pattern and practice, a plaintiff must demonstrate that there existed “a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.” *J.M.*, 2017 WL 3906774, at \*8 (quoting *Hicks-Fields v. Harris Cty., Texas*, 860 F.3d 803, 808 (5th Cir. 2017)). “A successful showing of such a pattern requires similarity and specificity; prior indications

cannot simply be for any and all ‘bad’ or unwise acts, but rather must point to the specific violation in question.” *Hicks-Fields*, 860 F.3d at 810 (quotation omitted).

The seven incidents upon which the plaintiff in *J.M.* relied involved different MTC employees and different inmates, and the vast majority were not sufficiently factually similar to the incident in this case, a requirement imposed by Fifth Circuit precedent. One of the incidents involved conduct which turned out to be unrelated to any sexual activity. Two incidents involved verbal comments made by officers to inmates which were sexual in nature, but which were not offers of sexual favors or acts, nor were they requests for sexual favors or acts. Three of the other incidents involved voluntary activity between an inmate and an MTC employee. The only remaining, and most factually analogous, incident to the one involving the plaintiff was an incident that did not result in a sexual assault and occurred more than nine months prior to the one involving the plaintiff. Binding Fifth Circuit precedent directed that one similar incident standing alone was insufficient to demonstrate a persistent, widespread practice of MTC employees sexually assaulting inmates or of MTC failing to protect inmates from sexual assault by correctional officers. *Id.* at \*10.

With respect to the Department of Justice report referenced in Question 7, that report was issued while the prison housed youths and before MTC, the defendant in *J.M.*, had taken over management of the facility. *J.M.*, 2017 WL 3906774, at \*10. The plaintiff did not point to any competent summary judgment evidence that showed sufficient specific instances of conduct during the time period after MTC took over management on June 18, 2012, until the date of the purported incident involving the plaintiff on March 7, 2015, which were sufficiently similar to the plaintiff’s alleged sexual assault to support a pattern and practice claim. Binding Fifth Circuit precedent directed that because the Department of Justice report did not set forth instances sufficiently similar to the specific violation in question, it too was not sufficient to preclude summary judgment because the constitutional deficiencies were not on “all-fours” with those complained of by the plaintiff. *See id.* at \*9 (citing *Hicks-Fields*, 860 F.3d at 809).

Although I granted summary judgment as to the plaintiff’s § 1983 claims against MTC, the plaintiff’s claims against the officer remained active for trial. The plaintiff did not appeal my ruling, and the parties settled the case two days after my order was entered.

b. What types of additional evidence would have been required in order for these claims to survive summary judgement?

Under binding Fifth Circuit precedent, in order to establish *Monell* liability under § 1983 against a municipality based upon a theory of pattern and practice, a plaintiff must demonstrate that there existed “a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.” *Hicks-Fields v. Harris Cty., Texas*, 860 F.3d 803, 808 (5th Cir. 2017) (quotation omitted). A plaintiff must also establish “actual or constructive knowledge of such

custom by the municipality or the official who had policymaking authority.” *Id.* (quotation omitted).

According to the Fifth Circuit, “[a] pattern is tantamount to official policy when it is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009) (quotation omitted). A plaintiff must demonstrate a pattern of sufficiently similar and numerous prior abuses that transcends a single error, and “[w]here prior incidents are used to prove a pattern, they must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.” *Id.* at 850-51 (quotation omitted). “A pattern requires similarity and specificity; prior indications cannot simply be for any and all ‘bad’ or unwise acts, but rather must point to the specific violation in question.” *Id.* at 851 (quotation omitted).

8. In another case, *Doe v. United States*, 831 F.3d 309 (5th Cir. 2016), you joined an opinion that dismissed claims brought under 42 U.S.C. § 1983 against the private owner and administrator of a detention center based on allegations of sexual assault by female detainees. Are there any circumstances under which you believe that a private detention facility owner or administrator would constitute a state actor for the purpose of stating of a Section 1983 claim?

Section 1983 liability results when a “person” acting “under color of” state law, deprives another of rights “secured by the Constitution” or federal law. 42 U.S.C. § 1983. Federal officials acting under color of federal law are not subject to suit under Section 1983, nor does the statute reach purely private conduct. *District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973). Where the defendants are private actors, in order for them to be considered state actors sufficient to trigger § 1983, the challenged “conduct allegedly causing the deprivation of a federal right” must be “fairly attributable to the State” based upon the particular facts of the case. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

9. In *Cromwell v. Driftwood Electric Contractors, Inc.*, you granted summary judgment to the defendant in a suit brought under the Fair Labor Standards Act (FLSA) for alleged violations of the FLSA’s overtime compensation provisions, holding that plaintiffs were not entitled to overtime pay. The Fifth Circuit vacated and remanded the judgement based on a *de novo* review of the facts, stating that the facts pointed in both directions and put the balancing test “nearly in equipoise.” When the results of a balancing test are indeterminate, what additional factors guide your decision to rule in favor of a plaintiff or defendant?

The issue presented in *Cromwell* was whether the workers qualified as employees under the FLSA, which focuses upon “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.” *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App’x 57, 59 (5th Cir. 2009). I balanced the appropriate factors and concluded that they weighed in favor of finding the plaintiffs were independent contractors. The Fifth Circuit agreed that I was correct to resolve the case on summary judgment, but it balanced the same five factors I had balanced and reached a different result. *Compare id.*, with *Cromwell v. Driftwood Elec. Contractors, Inc.*, No. 1:07cv996-HSO-

JMR, 2009 WL 10707147, at \*2-\*4 (S.D. Miss. Mar. 5, 2009). Whether additional factors should guide the decision to rule in favor of a plaintiff or defendant is a matter I would research in each individual case based upon the nature of that particular case.

**Nomination of Halil Suleyman Ozerden**  
**United States Court of Appeals for the Fifth Circuit**  
**Questions for the Record Submitted July 24, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. In 2017, you granted summary judgment in part for Management and Training Corporation in *J.M. v. Management and Training Corporation*.<sup>1</sup> In that case, an inmate filed a §1983 claim alleging that MTC and an MTC correctional officer had violated his Eighth and Fourteenth Amendment rights by sexually assaulting him.<sup>2</sup> You ruled inadmissible a DOJ Civil Rights Division report detailing regular staff sexual misconduct. In addition, during discovery of a class action lawsuit between the facility and former inmates, MTC revealed seven incidents “concerning complaints made against WCGF correctional officers or employees for engaging in sexual activity with inmates” that had occurred since it began operating the facility.<sup>3</sup> You relied on Fifth Circuit precedent to hold that these facts were “insufficient to demonstrate a persistent, widespread practice of MTC employees sexually assaulting inmates or of MTC failing to protect inmates from sexual assault by correctional officers.”<sup>4</sup>

a. Please elaborate on your decision that the facts as stated above did not establish a “persistent, widespread practice” sufficiently enough to at least warrant a trial.

In *J.M. v. Management & Training Corporation*, No. 3:15cv841-HSO-JCG, 2017 WL 3906774 (S.D. Miss. Sept. 5, 2017), the defendants included Management & Training Corporation (“MTC”) and the correctional officer, D.H., who had been terminated by MTC. At issue in the order referenced in Question 1 was a Motion for Summary Judgment filed only by MTC. The question before me was whether MTC could be held liable on a municipal liability theory under 42 U.S.C. § 1983, as it was treated as a municipality for such claims. Under controlling precedent governing municipal liability, MTC could not be held liable for D.H.’s conduct on a theory of vicarious liability. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

In opposition to summary judgment, the plaintiff relied upon an alleged pattern or practice of MTC in an attempt to establish liability. In order to prove an official policy through pattern and practice, a plaintiff must demonstrate that there existed “a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.” *J.M.*, 2017 WL 3906774, at \*8 (quoting *Hicks-Fields v. Harris Cty., Texas*, 860 F.3d 803, 808 (5th Cir. 2017)). “A successful

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<sup>1</sup> Memorandum Opinion and Order Granting in Part and Denying in Part Defendant Management & Training Corporation’s Motion for Summary Judgment, *J.M. v. Management & Training Corporation*, No. 3:15CV841-HSO-JCG, 2017 WL 3906774 (S.D. Miss. 2017).

<sup>2</sup> Memorandum Opinion, *Management & Training Corporation*, 2017 WL 3906774 at \*2-3.

<sup>3</sup> Memorandum Opinion, *Management & Training Corporation*, 2017 WL 3906774 at \*9, n.10

<sup>4</sup> Memorandum Opinion, *Management & Training Corporation*, 2017 WL 3906774 at \*10.

showing of such a pattern requires similarity and specificity; prior indications cannot simply be for any and all ‘bad’ or unwise acts, but rather must point to the specific violation in question.” *Hicks-Fields*, 860 F.3d at 810 (quotation omitted).

The seven incidents upon which the plaintiff in *J.M.* relied involved different MTC employees and different inmates, and the vast majority were not sufficiently factually similar to the incident in this case, a requirement imposed by Fifth Circuit precedent. One of the incidents involved conduct which turned out to be unrelated to any sexual activity. Two incidents involved verbal comments made by officers to inmates which were sexual in nature, but which were not offers of sexual favors or acts, nor were they requests for sexual favors or acts. Three of the other incidents involved voluntary activity between an inmate and an MTC employee. The only remaining, and most factually analogous, incident to the one involving the plaintiff was an incident that did not result in a sexual assault and occurred more than nine months prior to the one involving the plaintiff. Binding Fifth Circuit precedent directed that one similar incident standing alone was insufficient to demonstrate a persistent, widespread practice of MTC employees sexually assaulting inmates or of MTC failing to protect inmates from sexual assault by correctional officers. *Id.* at \*10.

With respect to the Department of Justice report referenced in Question 1, that report was issued while the prison housed youths and before MTC, the defendant in *J.M.*, took over its management. *J.M.*, 2017 WL 3906774, at \*10. The plaintiff did not point to any competent summary judgment evidence that showed sufficient specific instances of conduct during the time period after MTC took over management on June 18, 2012, until the date of the purported incident involving the plaintiff on March 7, 2015, which were sufficiently similar to the plaintiff’s alleged sexual assault to support a pattern and practice claim. Binding Fifth Circuit precedent directed that because the Department of Justice report did not set forth instances sufficiently similar to the specific violation in question, it too was not sufficient to preclude summary judgment because the constitutional deficiencies were not on “all-fours” with those complained of by the plaintiff. *See id.* at \*9 (citing *Hicks-Fields*, 860 F.3d at 809).

Although I granted summary judgment as to the plaintiff’s § 1983 claims against MTC, the plaintiff’s claims against the officer remained active for trial. The plaintiff did not appeal my ruling, and the parties settled the case two days after my order was entered.

2. During your hearing, you were asked whether the assessments of “conservative groups” were incorrect when they stated that you were “not a judicial conservative” and had “never written any decisions that have advanced conservative judicial principles.”<sup>5</sup> You responded that these groups “misunderstand[] your record,” implying that you believe that you are, in fact, “conservative” enough to be appointed. You also stated that you are “committed to principles of textualism.”

a. Please elaborate on how these groups “misunderstand[] your record.”

My response was merely an attempt to respond to what I understood to be a factual

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<sup>5</sup> *Judge Ozerden: The Wrong Pick*, <https://firstliberty.org/just-say-no/> (last visited July 19, 2019).

question about the nature and extent of my political activity while I was an attorney in private practice, before becoming a judge. I did not intend to convey any other impression. As a sitting judge I am bound by, and for the past twelve years I have adhered to, the Code of Conduct for United States Judges prohibiting participation in political activity. *See* Canon 5, Code of Conduct for United States Judges. I will continue to abide by this Canon in the future.

b. Do you consider yourself a “conservative” judge? If so, what do you understand a “conservative” judge to be?

I consider myself to be a fair and impartial judge, and I believe my record as a sitting judge for the past twelve years demonstrates that.

c. Anyone coming before a court should be confident that they will receive a fair and impartial adjudication. Please explain why, if you’re confirmed, any litigant in your courtroom—regardless of political ideology—should expect to get a fair hearing from an impartial judge.

I believe every litigant should have confidence that our judicial system is based on the impartial application of the law. My commitment as a judge is to apply the law impartially to the cases and controversies before me, to afford everyone in court dignity and respect, and to treat everyone equally under the law. I believe that my record as a judge over the past twelve years shows that I am fair and impartial.

3. In 2011, you granted summary judgement in *Johnson v. Northrop Grumman Shipbuilding, Inc.* in favor of an employer after an employee alleged “severe, pervasive, and ongoing harassment of African-American employees through longstanding maintenance of a racially hostile work environment.”<sup>6</sup> The employee claimed he was subjected to a racial hostility in the workplace and detailed instances where he was exposed to “offensive racially derogatory writings, depictions, and/or graffiti, on a constant basis in a number of places.”<sup>7</sup> He even said he found a hangman’s noose on company property on two separate occasions.<sup>8</sup> You concluded that even “[a]ccepting [the plaintiff’s] testimony as true, this does not rise to the level of sufficiently frequent occurrences which permeated the work environment, to support his hostile work environment claim.”<sup>9</sup>

a. Please explain why you do not believe being subject to racial epithets and observing nooses on company property is *not* “severe, pervasive, and ongoing harassment.”

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<sup>6</sup> Memorandum Opinion and Order Granting Defendant’s Motion for Summary Judgement, *Johnson v. Northrop Grumman Shipbuilding, Inc.*, 2011 WL 1045444 at \*1 (S.D. Miss. 2011).

<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*6.

The presence of nooses or the use of racial epithets in the workplace is offensive and is never acceptable. However, in *Johnson v. Northrop Grumman Shipbuilding, Inc.*, No. 1:06CV797-HSO-JMR, 2011 WL 1045444 (S.D. Miss. Mar. 17, 2011), I was bound to, and did, follow Fifth Circuit precedent in this area. Question 3(a) refers to allegations that were made in the plaintiff's complaint. See *Johnson v. Northrop Grumman Shipbuilding, Inc.*, No. 1:06CV797-HSO-JMR, 2011 WL 1045444, at \*1 (S.D. Miss. Mar. 17, 2011) ("Johnson alleges severe, pervasive, and ongoing harassment of African-American employees through longstanding maintenance of a racially hostile work environment." (citing Compl., ¶¶ 25-32)). In *Johnson*, the plaintiff asserted claims against his longtime employer, alleging in his complaint that he was subjected to a hostile work environment during his employment at a large shipyard that employed anywhere from 8,000 to 20,000 employees at any given time during the plaintiff's tenure. On October 15, 2010, the defendant employer moved for summary judgment on all claims in the complaint. The plaintiff did not respond to the motion. On November 17, 2010, I entered a text order directing the plaintiff to respond to that motion and other motions and advising the plaintiff that if he did not respond, I would proceed with the preparation of a ruling on the merits of the motions. The plaintiff never responded or submitted any evidence in opposition to the motion.

In then considering the defendant's request for summary judgment, Federal Rule of Civil Procedure 56 and binding Fifth Circuit procedure required that I review the competent summary judgment evidence in the record. As in any case, the allegations in a complaint, without the benefit of additional evidence submitted by the plaintiff in opposition to the motion, are insufficient to withstand summary judgment. While the defendant submitted plaintiff's deposition, which presented some evidence to support the plaintiff's allegations about the atmosphere at the shipyard, the evidence did not establish the frequency and recurrence of the alleged incidents. One of the alleged incidents occurred over ten years before the complaint was filed, and some were relayed to the plaintiff secondhand, *i.e.*, he did not witness them himself. Moreover, the plaintiff did not present any evidence that he had ever notified or raised concerns or complaints to his employer about any of these incidents. In light of binding Supreme Court and Fifth Circuit precedent, this entitled the defendant employer to summary judgment on plaintiff's claims. The plaintiff appealed my ruling, but the Fifth Circuit dismissed the appeal. See *Johnson v. Northrop Grumman Shipbuilding, Inc.*, No. 12-60144 (5th Cir. Apr. 30, 2012).

b. In addition to the presence of racial epithets and symbols of racialized violence, what else would someone need to articulate to meet your definition of a hostile work environment?

I am bound by Supreme Court and Fifth Circuit precedent in this regard. According to that binding precedent, a hostile work environment exists when a workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quotations omitted); see also *Johnson v. Halstead*, 916 F.3d 410, 417 (5th Cir. 2019). Whether an environment is "hostile" or "abusive" is determined by looking at all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or

a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23.

Moreover, because the ultimate focus of Title VII liability is on the employer's conduct, a plaintiff is required to show that the employer knew or should have known about the hostile work environment yet failed to take prompt, remedial action. See *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 321–22 (5th Cir. 2019), as revised (Feb. 7, 2019) (citing *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013); *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998)). "[L]iability when such a claim is based on the behavior of someone other than a supervisor requires showing that the employer knew or should have known of the hostile work environment but failed to take reasonable measures to try and stop it." *Id.* at 327. Because the plaintiff in *Johnson* had never informed his employer of the incidents he alleged, the foregoing Supreme Court and Fifth Circuit precedent dictated the result in *Johnson*.

4. Do you consider yourself a textualist? What do you understand textualism to mean?

I tend not to label myself because the term "textualist" may mean different things to different people. As an inferior court judge, my first and foremost obligation is to follow binding precedent on the meaning of any statutory term. Beyond that, the Supreme Court has held the starting point for statutory interpretation is the text of the statute. If the meaning of the text is unambiguous, the inquiry ends.

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

For reasons similar to those articulated in my response to Question 4, I tend not to label myself in light of the different meanings that people may ascribe to the term "originalist." As an inferior court judge, my first and foremost obligation is to follow and apply binding precedent. In this context, 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 Supreme Court precedent regardless of whether a given precedent is or is not regarded as "originalist" in approach.

6. 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 generally instructed that judges may under certain limited

circumstances consider legislative history when a statute is ambiguous, but that where a statute is unambiguous, resort to legislative history is not necessary. *See, e.g., Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). I have and will continue to faithfully apply Supreme Court and other applicable precedent on the use of legislative history and, where appropriate, will carefully consider any arguments that parties may advance using 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 answer to Question 6(a).

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

I view judicial restraint as the opposite of judicial activism, and yes, as defined, I believe that judicial restraint is an important value for all judges to possess. Judicial restraint is a central feature of the rule of law and reflects the notion that judges must follow the law, rather than make the law. Judges demonstrate judicial restraint by addressing the issues before them through an impartial application of the law, regardless of their personal views.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>10</sup> Was that decision guided by the principle of judicial restraint?

The decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding Supreme Court precedent. I will apply this precedent and all other precedents of the Supreme Court. As a sitting judge and a judicial nominee, it would not be appropriate for me to opine as to whether the decision in *Heller* was correct.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>11</sup> Was that decision guided by the principle of judicial restraint?

The decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is binding Supreme Court precedent. I will apply this precedent and all other precedents of the Supreme Court. As a sitting judge and a judicial nominee, it would not be appropriate for me to opine as to whether the decision in *Citizens United* was correct.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>12</sup> Was that decision guided by the principle of judicial restraint?

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<sup>10</sup> 554 U.S. 570 (2008).

<sup>11</sup> 558 U.S. 310 (2010).

<sup>12</sup> 570 U.S. 529 (2013).

The decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), is binding Supreme Court precedent. I will apply this precedent and all other precedents of the Supreme Court. As a sitting judge and a judicial nominee, it would not be appropriate for me to opine as to whether the decision in *Shelby County* was correct.

8. In your Questionnaire, you outlined the typical speech you make when presiding over naturalization ceremonies. You mention that “As citizens, you have certain responsibilities . . . These include . . . exercising the right (and responsibility) to vote in each and every election.”<sup>13</sup> Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>14</sup> 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.<sup>15</sup>

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, as a sitting judge and a judicial nominee it would not be appropriate for me to opine on this issue. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *see also* Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my answer to Question 8(a).

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

Please see my answer to Question 8(a).

9. 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

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<sup>13</sup> SJQ Attachment 12(d) at pp.4–5.

<sup>14</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>15</sup> *Id.*

more likely to be arrested for possessing drugs than their white peers.<sup>16</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>17</sup> 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.<sup>18</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>19</sup>

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

I have not studied this issue in depth, but I am aware there is a body of research which asserts this is the case. This should be a serious concern to everyone. Judges must do what they can to guard against the intrusion of racial bias into our justice system.

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

I am generally aware of data indicating that persons of color are disproportionately represented in our country's prisons.

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

I have not studied this issue specifically, but I generally recall having read articles in newspapers on this topic. I cannot recall the specific materials I have read.

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.<sup>20</sup> Why do you think that is the case?

I have not studied this issue closely, but my understanding is that the reason for these disparities is a matter of ongoing dialogue and debate. Regardless, these disparities should be a serious concern to everyone.

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

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<sup>16</sup> 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>.

<sup>17</sup> *Id.*

<sup>18</sup> 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>.

<sup>19</sup> *Id.*

<sup>20</sup> U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

mandatory minimum sentences.<sup>21</sup> Why do you think that is the case?

Please see my answer to Question 9(d).

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

Judges must do what they can to ensure that implicit racial bias does not intrude upon the criminal justice system and the impartial application of the law. I support continued study of these issues by the federal judicial system and others, which may allow for a greater understanding of the issues and how best to address them. In addition to ensuring the correctness of the sentencing guidelines range and the rulings on any departures, appellate judges can review the record to ensure a meaningful evaluation of statutory factors, *see* 18 U.S.C. § 3553(a), that consider the individual circumstances of the defendant to ensure that the sentence is “sufficient, but not greater than necessary.”

10. 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.<sup>22</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>23</sup>

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 issue sufficiently to be able to offer an informed view on it.

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 answer to Question 10(a).

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

Yes.

12. 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?

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<sup>21</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>22</sup> 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>.

<sup>23</sup> *Id.*

Appellate courts generally review the record from district courts and the briefs of the parties without the occasion to address parties or witnesses directly by name in open court. If there is a need to use a pronoun to refer to a plaintiff, defendant, or witness in a written opinion, I would review the record and the parties' briefing to assess the appropriate pronoun.

13. Do you believe that *Brown v. Board of Education*<sup>24</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. *Brown* corrected a terrible wrong in our nation's history by ending the false doctrine of separate but equal that was established in *Plessy v. Ferguson*.

14. Do you believe that *Plessy v. Ferguson*<sup>25</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, please see my answer to Question 13. *Plessy v. Ferguson* was a terrible stain on our nation's history. In *Brown v. Board of Education*, the Supreme Court correctly ruled in a unanimous decision that *Plessy* was not correctly decided.

15. 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.

16. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."<sup>26</sup> 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 judge and a judicial nominee, it would not be appropriate for me to opine on political comments regarding cases. See Canons 3(A)(6) and 5, Code of Conduct of United States Judges.

17. 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."<sup>27</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

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<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> 163 U.S. 537 (1896).

<sup>26</sup> 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>.

<sup>27</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

The Supreme Court has held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will faithfully apply the applicable Supreme Court and Fifth Circuit precedent in this area. To the extent this question asks me to opine on a political matter, as a sitting judge and a judicial nominee it would not be appropriate for me to do so. *See* Canon 5, Code of Conduct of United States Judges.

**Questions for the Record from Senator Kamala D. Harris  
Submitted July 24, 2019  
For the Nomination of**

**Halil Suleyman Ozerden, to the U.S. Court of Appeals for the Fifth Circuit**

1. At your nominations hearing, you were asked by Senator Ted Cruz to respond to the charge that you are not a conservative, have never advanced conservative causes, and have never written decisions that advanced conservative principles.

In response, you said that you previously supported political candidates and served on the board of the County Republican Club. You continued: “If you look at the totality of my record, [that charge] misunderstands my record.”

a. **Did you intend to convey to the Committee that, notwithstanding your judicial record, you have worked to advance conservative causes? If yes, why?**

It was not my intention to convey that impression to the Committee. My response was merely an attempt to respond to what I understood to be a factual question about the nature and extent of my political activity while I was an attorney in private practice, before becoming a judge. As a sitting judge I am bound by, and for the past twelve years I have adhered to, the Code of Conduct for United States Judges prohibiting participation in political activity. *See* Canon 5, Code of Conduct for United States Judges. I will continue to abide by this Canon in the future.

b. **Did you believe it was important to convey to Senator Cruz that you are a conservative? If yes, why?**

Please see my response to Question 1(a).

c. **Do you believe that judges have a responsibility to serve as impartial arbiters of the law?**

Yes. It is the obligation of a judge to apply the law fairly and impartially in every case, and that is what I have attempted to do for the past twelve years.

d. **Do you believe that your response to these questions promotes confidence in your capacity to serve as an impartial arbiter of the law? How?**

Yes. I also believe that my record as a judge for the past twelve years demonstrates that I have applied, and will continue to apply, the law fairly and impartially in each case that comes before me.

**Senator Ben Sasse**  
**Senate Judiciary Committee**  
**Questions for the Record to Judge Ozerden**  
**July 24, 2019**

In your opinion in *Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-00158-HSO-RHW (S.D. Miss. Dec. 20, 2012), you cited to the Fifth Circuit’s opinion in *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009), in which the court articulated: “Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not more litigation posturing,” *id.* at 325, as authority for dismissing the suit before you as unripe; however, the policy change contemplated by the *Sossamon* court had already occurred, *see id.* at 322, whereas the policy change at issue in *Catholic Diocese of Biloxi* involved—as your opinion acknowledged—only an “intention” of future policy change, the details of which had yet to be proposed. Slip Op. at 8–10. Nevertheless, your opinion made no effort to discuss this crucial distinction.

1. Why did your opinion fail to address this distinction?

**Response:**

As a trial court judge, I am not always able to go into as much detail in my opinions as I would like, and perhaps the opinion here could have gone into greater detail in discussing my reasoning. Although certain facts in *Sossamon* were distinguishable from those in the *Catholic Diocese* case before me, the legal proposition for which I cited *Sossamon* was the same and applied regardless of any factual distinction. Specifically, the Fifth Circuit has directed that, without evidence to the contrary, a court should assume that formally announced changes to official governmental policy are not mere litigation posturing. *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12cv158-HSO-RHW, 2012 WL 6831407, at \*7 (S.D. Miss. Dec. 20, 2012) (citing *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009)). According to the Fifth Circuit in *Sossamon*, this is because “government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties.” *Sossamon*, 560 F.3d at 325. This is a proposition that can apply in a variety of factual scenarios, and it has been applied in other contexts. *See, e.g., Comcast Corp. v. F.C.C.*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) (“We must presume an agency acts in good faith.”). Thus, the factual distinction in *Sossamon* did not change the fact that the same legal principle still applied in the *Catholic Diocese* case before me.

The *Sossamon* Court found that merely an affidavit from a prison official was sufficient to trigger the presumption, whereas in the *Catholic Diocese* case before me, the government had actually published in the Federal Register a formal Advance Notice of Proposed Rulemaking (“ANPRM”), and it represented that the specific rule challenged by the plaintiffs would be changed before the safe harbor provision expired, such that the rule as it existed at the time would never be enforced against the plaintiffs in the *Catholic Diocese* case. The Fifth Circuit’s admonition in *Sossamon* was in fact borne out in the *Catholic Diocese* case, as the government did in fact change the rule a short time later, before the safe harbor expired.

Because I did not read the factual distinction in *Sossamon* as in any way changing the legal precedent I was bound to follow, I did not discuss it. The plaintiffs in the *Catholic Diocese* case did not appeal my decision, which only dismissed the case without prejudice. When the rule was in fact amended a few months later, the plaintiffs were able to refile the case and pursue their claims. The plaintiffs were not prejudiced in any way by my decision.

**End of response.**

In *Catholic Diocese of Biloxi*, briefs by both the plaintiffs and amici grappled extensively with controlling Fifth Circuit or Supreme Court precedents and persuasive authority from other courts that countered the defendants' ripeness arguments. See Plaintiffs' Memorandum Brief in Opposition to Defendants' Motion to Dismiss at 27–34, Amici Curiae Brief in Support of Plaintiffs Filed by the American Center for Law and Justice and Seventy-Nine Members of the United States Congress at 7–12. Nevertheless, the opinion made no effort to address any of these specific arguments raised by the plaintiffs and amici. Instead, the ripeness analysis in the opinion contained only a perfunctory three-sentence summary of the arguments made by plaintiffs and amici before launching into a recitation of authorities that supported the opinion's ripeness conclusion. Indeed, the opinion's ripeness analysis did not attempt to address even a single authority that cut against its conclusion.

2. Why did the opinion's ripeness analysis fail to grapple with any countervailing authority, including those raised by plaintiffs and amici?

**Response:**

As a trial court judge, unfortunately I am not always able to go into as much detail as I would like in my opinions, and in retrospect, perhaps the opinion here could have gone into greater detail in explaining my reasoning. Although the opinion does not specifically address the authority referenced above, I attempted to make clear that I had in fact read and considered all of the parties' submissions, the record, and relevant legal authority in making my decision. In the end, in the 22 cases I was able to locate that dealt with similarly situated plaintiffs and similarly situated plans around the same time, all of those courts reached the same or a similar conclusion to the one I reached, that either the plaintiffs lacked standing or their claims were not ripe (the conclusion I reached). Under Article III, either scenario deprived a federal court of subject-matter jurisdiction to hear the case until such time as the rule was amended. Because the plain language of Federal Rule of Civil Procedure 12(h)(3) directs that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action," I was duty-bound to follow the plain text of the Rule and dismiss the case without prejudice. My decision was mandated by binding Supreme Court and Fifth Circuit precedent on the threshold Article III constitutional requirement of ripeness.

**End of response.**

In *Catholic Diocese of Biloxi*, plaintiffs argued:

The uncertainty created by the Mandate and Exemption affects Plaintiffs' ability to plan, negotiate, and implement their group health insurance plans, their employee hiring and retention programs, and their social, educational, and charitable programs and ministries. Although Plaintiffs self-insure their employees' group health plans, they must devote a substantial amount of time each year to developing their health benefits package and negotiating with the third-party administrators ("TPAs") to determine the costs for handling claims and related services. The process of determining the health care package for a plan year requires up to 16 months before the plan year actually begins. If, however, Plaintiffs decide that the only practical option is to attempt to qualify for the Exemption, they will need to undertake a major overhaul of their corporate structures, hiring practices, and the scope of their programming—a process that could take years. Indeed, it would be practically impossible for Plaintiffs to find a qualified workforce under such restrictions, because of the relatively few number of Catholics residing in Mississippi and surrounding areas. As the Diocese of Jackson explained in comments on the proposed rulemaking, it faces "a very real risk that the Diocese could soon be forced to choose from three untenable options: offer contraception coverage, limit its ministries to serving Catholics only, or stop offering insurance to its employees altogether." And Plaintiffs must budget now for the possibility of incurring fines and penalties imposed by Defendants for failure to comply with the Mandate.

Plaintiffs' Memorandum Brief in Opposition to Defendants' Motion to Dismiss at 6–7 (citations omitted). The opinion acknowledged that the text of the February 15, 2012 Final Regulations only extended the safe harbor against enforcement by one year from enactment, less than nine months from the date the complaint was filed. *See* Slip. Op. at 8. In addition, the opinion acknowledged that the planned extension of that safe harbor beyond that date relied on agency guidance, *see id.* at 9, which could have been withdrawn on little or no notice. Moreover, the opinion acknowledged that March 21, 2012 Advanced Notice of Proposed Rulemaking only announced "the Department's intention 'to propose amendments to'" the existing February 15, 2012 Final Regulations, *id.* at 9, which hardly amounted to the kind of certainty in an ameliorative policy change upon which the plaintiffs could rely to plan their future healthcare coverage offerings. Nevertheless, the opinion does not even devote cursory attention to the plaintiffs' asserted need to plan future healthcare coverage and associated financial and strategic planning up to sixteen months ahead of time.

3. Why did the opinion fail to contend with the plaintiffs' asserted harm that could have occurred well before the finalization of amendments to February 15, 2012 Final Regulations?

**Response:**

This matter was resolved on grounds of ripeness, not standing (which would have considered whether the plaintiffs had suffered an injury in fact). I did not reach the issue of standing because the undisputed facts and controlling Supreme Court and Fifth Circuit precedent meant that the claims were not ripe for review, thereby depriving me of federal jurisdiction over the case. As an inferior court, I was bound to follow controlling Supreme Court and Fifth Circuit

precedent, which commands that a claim is not ripe if it rests upon contingent future events. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation omitted). In light of the government's publishing in the Federal Register an Advance Notice of Proposed Rulemaking to propose changes to the specific regulations being challenged by the plaintiffs, controlling precedent dictated that the plaintiffs' claims were not ripe. In addition, the government represented in its filings that the rule as it existed at the time would be changed before the expiration of the safe harbor, such that the rule as it existed would never be enforced against plaintiffs.

Every case that I have been able to locate which dealt with similarly situated plaintiffs with plans similar to the ones in the *Catholic Diocese* case before me reached a similar conclusion. See *Priests for Life v. Sebelius*, No. 1:12CV753-FB-RER, 2013 WL 1563390 (E.D.N.Y. Apr. 12, 2013); *The Criswell College v. Sebelius*, No. 3:12cv4409-N, 2013 WL 12363620 (N.D. Tex. Apr. 9, 2013); *Ave Maria Univ. v. Sebelius*, No. 2:12-CV-88-FTM-SPC, 2013 WL 1326638 (M.D. Fla. Mar. 29, 2013); *Eternal Word Television Network, Inc. v. Sebelius*, 935 F. Supp. 2d 1196 (N.D. Ala. Mar. 25, 2013); *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Wenski v. Sebelius*, No. 1:12cv23820-DLG (S.D. Fla. Mar. 5, 2013); *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406 (N.D. Tex. Feb. 26, 2013); *Conlon v. Sebelius*, 923 F. Supp. 2d 1126 (N.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis v. Sebelius*, 920 F. Supp. 2d 1018 (E.D. Mo. Jan. 29, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, 920 F. Supp. 2d 8 (D.D.C. Jan. 25, 2013); *Persico v. Sebelius*, 919 F. Supp. 2d 622 (W.D. Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, No. 1:11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 1:12cv1276-JES-BGC, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253-RLM-CAN, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Zubik v. Sebelius*, 911 F. Supp. 2d 314 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Wheaton College v. Sebelius*, 887 F. Supp. 2d 102 (D.D.C. Aug. 24, 2012); *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. July 18, 2012); *Nebraska ex rel. Bruning v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777 (D. Neb. July 17, 2012); *Louisiana College v. Sebelius*, No. 1:12-cv-463 (W.D. La. Jan. 4, 2013); *E. Texas Baptist Univ. v. Sebelius*, No. 4:12cv3009 (S.D. Tex. Dec. 20, 2012); *Wheaton College v. Sebelius*, No. 12-5273, 703 F.3d 551 (D.C. Cir. Dec. 18, 2012).

Similarly, in *Roman Catholic Archdiocese of New York v. Sebelius*, 907 F. Supp. 2d 310 (E.D.N.Y. 2012), the United States District Court for the Eastern District of New York in fact granted the government's motion to dismiss as to some of the plaintiffs because those plaintiffs had not shown that their plans were not grandfathered. This deprived the court of subject-matter jurisdiction over their claims. The plaintiffs in the *Catholic Diocese* case before me likewise had plans that were grandfathered, and they were also subject to the safe harbor provision. The Eastern District of New York did not dismiss as to certain other plaintiffs, but those plaintiffs' claims were ripe because their plans were not grandfathered and were not similarly situated to the plans in the *Catholic Diocese* case. Thus, this case was not inconsistent with my ruling.

Also, in a separate case in the Eastern District of New York, *Priests for Life v. Sebelius*, No. 1:12CV753-FB-RER, 2013 WL 1563390 (E.D.N.Y. Apr. 12, 2013), which also involved

similarly situated plaintiffs and plans to those in the *Catholic Diocese* case before me, the district court found that the defendants had repeatedly indicated their intent to amend the regulations, which was substantiated through the ANPRM, and that government agencies are presumed to act in good faith. This was the same premise for which I had cited *Sossamon*, and the Eastern District of New York in that case reached the same conclusion that I had reached, finding that the plaintiff's claims were not ripe for adjudication.

The plaintiffs in the *Catholic Diocese* case did not appeal my decision, which only dismissed without prejudice. They were able to refile their case a few months later and seek relief after the government did in fact amend the rule, before the safe harbor expired. Binding precedent dictated the outcome I reached.

**End of response.**

**Senator Josh Hawley**  
**Questions for the Record**

**Halil Suleyman Ozerden**  
**Nominee, U.S. Court of Appeals for the Fifth Circuit**

**1. What role should the original public meaning of the Constitution’s text play in courts’ interpretation of its provisions?**

The Supreme Court has looked to the original public meaning of words at the time they were adopted when interpreting constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). Thus, it is appropriate to consider the original public meaning of words at the time they were adopted when interpreting the Constitution or its amendments. As a lower court judge, where the Supreme Court has previously interpreted constitutional provisions by discerning their original public meaning, I am bound to and will follow those precedents.

**2. As a judge, how would you approach a case involving an issue of first impression?**

If there is no controlling Supreme Court or Fifth Circuit precedent on the issue, and the question of first impression arises from a statute or constitutional provision, I would first look to the text of the statute or provision. If the words of the statute or provision are plain and unambiguous, the inquiry ends. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the text of the statute or provision is ambiguous, I would apply the traditional canons of interpretation. I would also look to Supreme Court or Fifth Circuit precedent addressing similar issues or similarly structured statutes for persuasive guidance. Precedent from other circuit courts of appeal may also be considered as persuasive authority. However, as a lower court judge I must always be mindful that it is the function of the Supreme Court or the legislative branch, not the lower courts, to recognize or create new rights, *see Washington v. Glucksberg*, 521 U.S. 702 (1997), and that for me to do so would “place the matter outside the arena of public debate and legislative action,” *id.* at 720, and run the risk of transforming the liberty protected by the Due Process Clause into the personal policy preferences of unelected judges, *id.* This would violate the separation of powers.

**3. Why is it important for Article III judges to be set apart from the other branches of government and to stay out of politics?**

It is important because the independence of the judiciary is a fundamental principle of the separation of powers enshrined in our Constitution and is essential to securing our liberty as citizens. Article III guarantees lifetime appointment in order to ensure the independence and thus the impartiality of judges, and its “case” or “controversy” requirement serves to prevent the judicial process from being used to usurp the powers of other political branches, ensuring that judges exercise judgment, not will or personal preferences, in rendering decisions. Finally, Canon 5 of the Code of Conduct for United States Judges provides that a judge should refrain from political activity.

**4. How do you as a judge to maintain your independence and avoid any appearance of bias or partiality?**

As a sitting federal judge, for the past twelve years I have complied with, and I will continue to comply with, the Canons of the Code of Conduct for United States Judges in order to maintain independence and avoid any appearance of bias or partiality. The Canons direct that a judge “should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 2(A), Code of Conduct for United States Judges. This applies to both professional and personal conduct, as the “duties of judicial office take precedence over all other activities.” Canon 3, Code of Conduct for United States Judges. In addition, pursuant to Canon 3(C)(1) of the Code of Conduct for United States Judges, I must disqualify myself in a proceeding in which my impartiality might reasonably be questioned.

**5. Are there circumstances when you believe judges should consider the policy results of their decisions when deciding a case? When might those circumstances arise?**

A judge’s ruling must be based upon the fair and impartial application of the law. Considering practical consequences that might follow a decision implicates questions not for the judiciary, but for the political branches, and is generally inappropriate. Under certain limited circumstances, however, precedent does instruct a judge to consider practical consequences when making a ruling. For example, when deciding whether to issue a preliminary injunction, a judge should take into consideration the consequences, such as whether the movant will suffer irreparable harm in the absence of preliminary relief.

**6. Dissenting in *Lochner v. New York*, 198 U.S. 45 (1905), Justice Oliver Wendell Holmes Jr. wrote that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Do you agree with that statement? What, if anything, does it correctly imply about the proper role of a judge?**

As a judge, I am bound to and will follow Supreme Court precedent regardless of my personal beliefs. However, I do agree the statement correctly implies that a court must apply the law as written and avoid turning its personal preferences into constitutional mandates. It further correctly implies that courts should not substitute their own beliefs for the judgment of the elected legislative bodies, who are elected to address social and economic issues. To do so substitutes the court’s will for that of the legislature and violates the separation of powers.