

Responses of Robin S. Rosenbaum
Nominee to be United States Circuit Judge for the Eleventh Circuit
To the Written Questions of Senator Chuck Grassley

- 1. What is your understanding of the constitutionality of states to provide “conscience rights” to pharmacists and health care providers who refuse to facilitate abortions or fill prescriptions for contraceptives if they are personally opposed to such practices?**

Response: Neither the Supreme Court nor the Eleventh Circuit has considered this exact issue. Although some of the federal circuit courts have addressed this specific issue, their approaches to it have not been uniform. Under these circumstances, assuming that no Supreme Court or Eleventh Circuit precedent exists by the time that such a case might come before me, any opinion that I might develop on the issue would arise after thorough consideration of the parties’ briefs, the analyses contained in other courts’ opinions, and any Supreme Court or Eleventh Circuit precedent that might bear in a more general way on the matter. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, ___ U.S. ___, 132 S. Ct. 694 (2012) (holding that Free Exercise Clause and Establishment Clause both operate to create a ministerial exception to an otherwise-neutral law of general applicability); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (upholding neutral law of general applicability in face of challenge based on Free Exercise Clause); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (adopting the undue-burden test to evaluate abortion restrictions before viability). If confirmed to serve on the Eleventh Circuit, I would consider and follow all applicable Supreme Court and Eleventh Circuit precedent.

- 2. The Supreme Court has held that there is a general right to abortion. What is your understanding of the constitutionality of sex-selective abortion?**

Response: I have been unable to find any reported cases analyzing the constitutionality of sex-selective abortion. Thus, the law in this area is currently not well developed. In the absence of a concrete case or controversy, it is difficult to anticipate how the issue might arise and what concerns might bear on the analysis. Under these circumstances, assuming that no Supreme Court or Eleventh Circuit precedent exists by the time that such a case might come before me, any opinion that I might develop on the issue would arise after thorough consideration of the parties’ briefs, the analyses contained in any other courts’ opinions, and any Supreme Court or Eleventh Circuit precedent that might bear in a more general way on the matter.

- 3. If confirmed, what would be your judicial philosophy or approach in applying the Constitution to modern statutes and regulations?**

Response: If confirmed to serve on the Eleventh Circuit, I would continue to employ the same approach that I have used as a district judge and as a magistrate judge. First, I would consider any applicable Supreme Court and Eleventh Circuit precedent and would look to the language of the statute or regulation and any applicable constitutional provisions to determine whether the question could be resolved by the plain language. If a question continued to exist, I would consider persuasive, non-binding precedent from other courts, as well as opinions involving analogous issues. In conducting this analysis, I would take care to avoid unnecessarily determining any constitutional questions and would ensure that any constitutional analysis required would be limited to resolving the narrowest possible question.

4. What weight or consideration should a judge give to evolving norms and traditions of our society in interpreting the written Constitution?

Response: The only circumstance of which I am aware where the Supreme Court has evaluated “evolving standards of decency” is in determining whether a penalty violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2463 (2012). If confirmed to serve on the Eleventh Circuit, I would continue to follow all relevant precedent of the Supreme Court and the Eleventh Circuit.

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

Response: Since at least 1970, in *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970), the Supreme Court has explained that “there is room for play in the joints” between the First Amendment’s Free Exercise Clause and the First Amendment’s Establishment Clause. The Court has repeated this description several times since issuing *Walz*, most recently in *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (citation omitted), where the Supreme Court again confirmed that “legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause” may constitutionally exist. If confirmed and the issue came before me, I would apply *Walz*, *Cutter*, and other relevant Supreme Court and Eleventh Circuit precedent.

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

Response: In *Gregg v. Georgia*, 428 U.S. 153 (1976), and in several subsequent cases, the Supreme Court has held that the death penalty, when applied with required procedural safeguards, is constitutional. If confirmed to serve on the Eleventh Circuit and the issue

came before me, I would follow *Gregg* and other relevant Supreme Court and Eleventh Circuit precedent.

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

Response: Although the Supreme Court has not identified a specific right to privacy in the Constitution, it has nonetheless characterized certain protections within the Bill of Rights and the Fourteenth Amendment as relating to privacy. For example, in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), the Supreme Court described the First Amendment as protecting “privacy of association and belief”

Similarly, in *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967), the Supreme Court again opined that the First Amendment regards “privacy in one’s association.” The Court further stated that the Third Amendment also protects an “aspect of privacy from governmental intrusion” in that it prohibits peacetime quartering of soldiers where the property owner does not consent. *Id.* (citation omitted). The *Katz* footnote likewise characterized the Fifth Amendment as “reflect[ing] the Constitution’s concern for . . . the right of each individual ‘to a private enclave where he may lead a private life.’” *Id.* (citation omitted).

In *Johnson v. United States*, 333 U.S. 10, 14 (1948), the Supreme Court referred to the Fourth Amendment’s protections as conferring a “right of privacy” and protecting privacy in the home. *See also Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 1862 (2011) (describing the Fourth Amendment as protecting certain “privacy rights”); *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558 (2013) (stating that obtaining a blood sample “implicates an individual’s ‘most personal and deep-rooted expectations of privacy’”) (citation and quotation marks omitted).

As for the Fourteenth Amendment’s Due Process Clause, the Supreme Court has recognized that “marital privacy” is a part of the “liberty” that it protects. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted).

a. Where is it located?

Response: Please see response to Question 7 above.

b. From what does it derive?

Response: Please see response to Question 7 above.

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

Response: Please see response to Question 7 above.

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

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the Supreme Court explained that, in order to determine whether a right that is not explicitly stated in the Constitution is nonetheless constitutionally protected, a court must examine whether the claimed right is “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty” (citations and internal quotation marks omitted). In addition, the proponent of the right must provide a “careful description” of the asserted fundamental liberty interest. *Id.* (citations omitted).

- b. Is it appropriate for a judge to search for “penumbras” and “emanations” in the Constitution?**

Response: As a district judge and, previously, as a magistrate judge, I have not searched for penumbras and emanations in the Constitution. Likewise, if confirmed to the Eleventh Circuit, I would not search for penumbras and emanations in the Constitution. Instead, I would apply *Glucksberg* and all other relevant Supreme Court and Eleventh Circuit precedent.

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

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020 (2010), the Supreme Court did not specifically establish the appropriate standard of scrutiny to apply in a Second Amendment challenge against a federal or state gun law, but it did clarify that some heightened form of scrutiny applies. In *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n. 34 (11th Cir. 2012), the Eleventh Circuit opined that a two-step inquiry adopted by several other circuits was appropriate for evaluating the constitutionality of a challenged provision. First, the court considers whether the restricted activity is protected by the Second Amendment, and, if so, the court then determines the appropriate level of scrutiny. *Id.* Because the Eleventh Circuit determined that the restricted activity in *GeorgiaCarry.Org, Inc.*, was not protected by the

Second Amendment, the court did not explain the methodology that it would employ to determine the appropriate level of scrutiny. But the cases that the Eleventh Circuit approvingly cited have generally determined that the appropriate level of scrutiny depends on the “nature of the conduct being regulated and the degree to which the challenged conduct burdens the right,” so that a law that “imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a [law] that imposes a less substantial burden should be proportionately easier to justify.” *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011); *see also Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

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

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

Response: As a general rule, judges should not consider matters outside the record of the case. But, where appropriate under Federal Rules of Appellate Procedure 10 or 16 or under Federal Rule of Evidence 201, the record may be supplemented by materials outside the record. If confirmed, I would not consider materials outside the record of the case unless doing so was consistent with the law and with precedent of the Supreme Court and the Eleventh Circuit.

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

Response: If, for example, a case involves expert testimony that complies with the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702, a court may be required to render a decision that accounts for expert psychological or sociological scientific studies that are a part of the case record. If confirmed, I would follow all precedent of the Supreme Court and the Eleventh Circuit in considering any such evidence.

11. What would be your definition of an “activist judge”?

Response: In my opinion, an activist judge decides the preferred outcome of the case and then attempts to craft reasoning to justify it. An activist judge may alternatively or additionally be one who has a personal agenda and seeks to use the judicial position to advance it. In my more than six years on the bench, I have not engaged in such conduct, and

I would not engage in such conduct in the future, either in my current position or, if confirmed to serve on the Eleventh Circuit, as a judge of that court.

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

Response: I believe that the most important attribute of a judge is integrity. Integrity includes fairness, intellectual honesty, and diligence. I believe that I have integrity and that I have demonstrated it during my time on the bench as a magistrate judge and as a district judge.

13. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work on the court, if confirmed?

Response: Yes, I believe that collegiality is an important element of the work of a Circuit Court. If I were confirmed, I would approach my work with diligence and an open mind, and I would be respectful to all involved in the process, including the other judges, the court staff, the attorneys, and the litigants.

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

Response: A judge should be fair, even-tempered, and patient, treating with dignity and respect all who come before the judge. I consider all of these aspects of the appropriate judicial temperament of a judge to be essential. I believe that I meet this standard.

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

Response: I am entirely committed to following faithfully the precedents of the Supreme Court and the Eleventh Circuit Court of Appeals and giving them full force and effect, even if I personally disagree with such precedents. If I were confirmed to serve on the Eleventh Circuit, the only conditions under which it might be appropriate to reconsider Eleventh Circuit precedent would be during *en banc* review in the extremely limited circumstances discussed below in response to Question 23. Under no circumstances, however, would I decide a case based on my personal agreement or disagreement with precedents.

16. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what

sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In a case of first impression involving a statute, I would examine the language of the provision. If the language were clear, my analysis would begin and end with the language. If an ambiguity in the language existed, however, I would look to the structure and framework of the statute as a whole to interpret the provision at issue. In so doing, I would be careful to avoid a construction that would result in the redundancy or meaninglessness of any portion of the statute. If the answer were still not clear, I would consider whether precedents involving any analogous statutes were instructive. Finally, if ambiguity continued to exist, as a last resort, I would consider plainly ascertainable legislative intent, such as a statement of purpose enacted as part of the governing statute or the fact that a statute was clearly enacted in response to the issuance of judicial interpretation of an earlier statute.

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

Response: My opinion about the correctness of Supreme Court and Eleventh Circuit precedent would be irrelevant to my rendering of decisions. Regardless of my personal views, I would faithfully follow the precedents of the Supreme Court and the Eleventh Circuit Court of Appeals, giving them full force and effect -- even if I personally disagreed with them.

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

Response: A statute should be declared unconstitutional only in rare circumstances where no possible fair constitutional interpretation can be discerned and only where the statute plainly violates a provision of the Constitution. Constitutional questions should be determined only if absolutely necessary and then, only in the narrowest possible way.

19. What weight should a judge give legislative intent in statutory analysis?

Response: A court should first consider the language of the statute at issue. If the language is clear, the court should conclude its analysis there. If an ambiguity in the language exists, the court should look to the structure and framework of the statute as a whole to interpret the provision at issue. In so doing, the court must be careful to avoid a construction that would result in the redundancy or meaninglessness of any portion of the statute. If the answer is still not clear, the court should consider whether precedents involving any analogous statutes

are instructive. Finally, if ambiguity continues to exist, as a last resort, the court may consider plainly ascertainable legislative intent, such as a statement of purpose enacted as part of the governing statute or the fact that a statute was clearly enacted in response to the issuance of judicial interpretation of an earlier statute.

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

Response: I do not believe that a judge's gender, ethnicity, or other demographic factor should have any influence in the outcome of a case. Cases should be decided solely on the basis of the law.

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

Response: The Constitution is a uniquely American document. Consequently, except where Supreme Court or Eleventh Circuit precedent requires, *see, e.g., Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (reviewing and considering 18th-century English common law in determining whether the Seventh Amendment guarantees a right to a jury trial in certain types of civil cases), I would not rely on foreign law or the views of the world community in determining the meaning of the Constitution.

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

Response: I can give my complete and unqualified assurances that I will put aside any personal views and be fair to all who appear before me, if confirmed, as I believe I have in my service as a federal judge.

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

Response: The circumstances in which a circuit may overrule precedent are extremely limited and may occur only when the court sits *en banc*. Rule 35 of the Federal Rules of Appellate Procedure provides that *en banc* hearings and rehearings are disfavored and ordinarily will not be ordered except where they are "necessary to secure or maintain uniformity of the court's decisions" or the matter "involves a question of exceptional importance." In order to resolve conflicts among circuit precedent, abrogation of at least some circuit precedent is likely in the first situation. As for the second, however, reversal of circuit precedent may or may not be required. An example of a situation where abrogation

by the court sitting *en banc* may be appropriate may occur where earlier circuit precedent conflicts with the reasoning — but not the holding — of a subsequent Supreme Court decision. *See Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007) (“[W]ithout a clearly contrary opinion of the Supreme Court or of this court sitting *en banc*, we cannot overrule a decision of a prior panel of this court.”) (citation and quotation marks omitted). Similarly, where a case may present an “issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue,” the court sitting *en banc* may determine that reversal of the panel’s decision is appropriate. *See* Fed. R. App. 35(b)(1)(B).

24. It appears that you have spent most of your legal career doing trial level work and have limited experience with appellate courts. Please describe how you will prepare to transition to the appellate level. What do you expect to be most difficult part of this transition for you?

Response: Although I have spent much of my career doing trial-level work, I was fortunate to have had the opportunity to clerk for the Honorable Stanley Marcus while he was serving on the Eleventh Circuit. In addition, I have engaged in some limited federal appellate practice, having handled approximately eight appeals before various federal circuit courts, including the Eleventh Circuit. Besides this appellate experience, as a district judge, I regularly decide certain types of cases that are effectively appeals. These include Social Security cases, habeas matters, and bankruptcy appeals, among others. Finally, I have reviewed the Federal Rules of Appellate Procedure and the Eleventh Circuit’s Rules and Internal Operating Procedures. While I fully expect that I would experience a transition period if I were fortunate enough to be confirmed to serve on the Eleventh Circuit, I would work exceptionally hard to hit the ground running, and I believe that, as a result of my experience and of my nearly twenty-three years of varied federal practice, I would be well equipped to serve as a circuit judge.

25. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the nature of the communications.**

Response: I have had no such contact.

- b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: I am not aware of any endorsements or promised endorsements by the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ.

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

Response: On February 18, 2014, I received these questions from the Office of Legal Policy at the Department of Justice. I then conducted research, prepared my answers, and reviewed my answers with an attorney in the Office of Legal Policy. Thereafter, I made revisions and finalized my answers for submission to the Committee.

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

Response: Yes.