

**Nomination of Charles Atchley Jr. to the United States District Court for the
Eastern District of Tennessee
Questions for the Record
Submitted November 25, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1) According to news reports, during the 2002 and 2006 elections you served as the point person in the U.S. Attorney's Office for the Eastern District of Tennessee on the Justice Department's "Voter Integrity Initiative," which had the stated purpose of combatting voter fraud. This initiative was criticized by some at the time as intended to intimidate voters from participating in elections. Then-Attorney General John Ashcroft responded, "The only people intimidated are the people who were going to cast fraudulent ballots, and that's the point here." (Jim Drinkard, *Dems Blast GOP Efforts on Voter Fraud*, USA TODAY (Oct. 24, 2002))

a) During your time as a federal prosecutor, have you ever seen any evidence of widespread, large-scale voter fraud?

No.

2) Among the top ten most significant cases that you listed on your Senate Judiciary Questionnaire was *United States v. Joseph Armstrong*, a criminal case in which the defendant was a prominent African American member of the Tennessee House of Representatives. On your Questionnaire, you noted that you served as "lead counsel and oversaw the investigation and indictment of this case and conducted the pre-trial litigation." During jury selection, you struck the only African-American in the jury pool. When this action was challenged by defense counsel, your response to the judge was that the potential juror "gave me the impression that she did not want to be here." You also mentioned her education level — she had a GED — as being one of the reasons that you did not want her to serve on the jury.

a) In your experience, do most people who are selected for jury duty want to be there?

In this case, the government was able to articulate several factors, including disinterest, as legitimate, race neutral reasons to exercise a peremptory challenge, as found by the district court. The truth-seeking exercise of the criminal justice system requires all jurors to be willing and engaged participants and is necessary for all parties to receive a fair and unbiased hearing.

b) As a general matter, do you think that prosecuting African American defendants with all-white juries decreases public confidence in the criminal justice system?

Mr. Armstrong received a fair and impartial trial before a fair and impartial jury of his peers that acquitted him of two of the three counts alleged against him in the indictment. His race, or that of anyone else, was never a factor in the trial.

3) Please respond with your views on the proper application of precedent by judges.

a) When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

It is not appropriate for a lower court to depart from Supreme Court precedent.

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

No. A district court is required to follow all Supreme Court precedent.

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

A district court decision is not binding and does not create precedent. *See Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011).

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

Only the Supreme Court may overturn one of its prior decisions using factors that it considers appropriate in making that decision. As a district court nominee, it would be inappropriate for me to offer an opinion when this should occur. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

4) When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a) Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?

All Supreme Court decisions are binding on all district courts and, if I am confirmed, I will faithfully apply *Roe v. Wade* and all Supreme Court precedent.

b) Is it settled law?

Yes.

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

Yes.

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

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

As a district court nominee, I am not permitted to express a comment, or offer an opinion, on Supreme Court decisions or dissenting opinions. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply *Heller* and all Supreme Court precedent.

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

In *District of Columbia v. Heller*, the Supreme Court acknowledged that rights secured by the Second Amendment are not unlimited and referenced "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008). If I am confirmed, I will faithfully apply *Heller* and all Supreme Court precedent.

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

Please see my response to Question 6(a).

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

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

In *Citizens United*, the Supreme Court found that the First Amendment protected a corporation's right to engage in political speech. As a district court nominee, I am not permitted to comment further on this decision. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply all Supreme Court precedent.

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

Please see my response to Question 7(a).

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

In *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. As a district court nominee, I am not permitted to comment further on this decision. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply all Supreme Court precedent.

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

As a district court nominee, I am not permitted to offer an opinion on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed I will faithfully apply the United States Constitution, and all Supreme Court and Sixth Circuit precedent.

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

The Supreme Court ruled in *Loving v. Virginia*, 388 U.S. 1 (1967), that state laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. Please see my response to Question 8.

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

Federal civil rights statutes prohibit discrimination on the basis of race in commercial transactions. If confirmed, I will faithfully apply *Loving*, all other controlling precedent, and any applicable federal statutes. As a district court nominee, I am not permitted to comment

further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

No, not to my knowledge.

- 12) On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

- a) Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

No, not that I can recall.

- 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"?**

I am aware of several relevant Supreme Court decisions that relate to administrative law and I will fully and faithfully apply all binding precedents.

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

Because this is an issue about which litigation is currently pending in numerous courts around the country, and is likely to arise in the future, it would be improper for me to comment on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

The Supreme Court has held that the text of a statute is the starting place for construing it and

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

- 15) At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received the questions on Wednesday, November 25, 2020. I read the questions and prepared responses after conducting some legal research and reviewing my previous litigation, if it related to a question. I submitted by responses to the Department of Justice, Office of Legal Policy. I reviewed their feedback but all responses are my own.

**Nomination of Charles Edward Atchley, Jr.
to the United States District Court for the Eastern District of Tennessee
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QUESTIONS FROM SENATOR WHITEHOUSE

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

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

Yes, in response to your 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? Please explain your answer.

If confirmed, I will follow all binding precedent, work to uphold the rule of law, and preserve the integrity and independence of the federal judiciary. It would be inappropriate for me as a district court nominee to comment further on political or legal issues that may be the subject of litigation. *See* Canons 3 and 5 of the 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?

Canon 5 of the Code of Conduct for United States Judges cautions judges to refrain from pursuing political activities. Further, Canon 2 instructs judges to avoid the appearance of impropriety and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. If confirmed, I would follow these and the remaining Canons of Judicial Conduct, without inserting my personal views into the decision making process.

- 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?

It would be inappropriate for me as a district court nominee to comment on political matters. *See* Canon 5 of the Code of Conduct of United States Judges.

2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Yes, to the extent that I understand the Chief Justice’s metaphor was intended to emphasize the importance of a fair and impartial judiciary. If confirmed, I am very mindful that my role in the justice system will shift from advocate to impartial decision maker. I will decide issues fairly and impartially based upon the law and the facts without regard to my personal beliefs.

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

Practical consequences should only be considered when required by the law.

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

When granting summary judgment, the court must find there is “no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” *See* Fed. R. Civ. P. 56(a). The Supreme Court has held that the summary judgment standard must be construed “with due regard ... for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury,” as well as “for the rights of persons opposing such claims and defenses ...” *Celotex Corp. v. Catrett*, 477 US 317, 327 (1986). A judge is not to “weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial ... Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions ...” *Anderson v. Liberty Lobby, Inc.*, 477 US at 249-255.

4. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”
 - a. What role, if any, should empathy play in a judge’s decision-making process?

A judge must follow the law, without emotion or bias, regardless of personal opinions. That being said, it is important for a judge to never lose sight of the fact that the justice system is comprised of people that must be treated with dignity and respect at all times.

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

Personal viewpoints and preferences do not play a role in judicial decision making. The role of a judge is to faithfully apply the law to all matters that come before the court.

5. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

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

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

Trial by jury is a fundamental part of our justice system and juries play a crucial fact-finding role in it.

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

Because issues relating to pre-dispute arbitration clauses are and may be litigated in federal court, it would be inappropriate for me to comment. *See* Canon 3(A)(6) of the Code of Conduct for 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 response to Question 6(b).

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

When interpreting any legislation, judges should first look to the ordinary meaning of the statutory text. Only if the statute is ambiguous should the analysis continue. If the meaning of the statute cannot be determined by its text, a judge should use the canons of construction to ascertain the legislature’s intent, including by looking to the broader statutory context. Reviewing legislative history and Congressional fact-finding may be appropriate in certain cases as dictated by the law.

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

- a. Have you read Advisory Opinion #116?

Yes.

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

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.
- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

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

Yes. If confirmed I will comply will all of the Canons of the Code of Judicial Conduct, carefully consider the factors listed in Advisory Opinion #116, and always thoughtfully evaluate my participation in any activity.

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

Please see my response to Question 8(b).

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

I am not, nor have I ever been, a member of the Federalist Society.

- b. In the draft of Advisory Opinion #117, the Committee concluded that official affiliation with ACS or the Federalist Society “could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge’s impartiality on subjects as to which the organization has taken a position; and generally frustrates the public’s trust in the integrity and independence of the judiciary.”
 - i. Do you think the Federalist Society is an organization “that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency”? Why or why not?
 - ii. Do you think the Federalist Society “is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations”? Why or why not?
 - iii. Do you believe that a judge’s membership in the Federalist Society may reasonably be seen by the public as engendering indirect advocacy of the organization’s political, social, or civic objectives? Why or why not?
 - iv. Do you believe that reasonable members of the public would perceive a judge who has membership in the Federalist Society, a self-described group of conservatives and libertarians, to be partial or impartial? Why?
 - v. The draft opinion notes “the Federalist Society’s funding comes substantially from sources that support conservative political causes.” Do you believe that

membership in an organization tied to such funding could give rise to the appearance of impropriety or partiality? Why or why not?

Please see my response to Question 9(a).

**Nomination of Charles Edward Atchley, Jr., to be United States District Court Judge for
the Eastern District of Tennessee
Questions for the Record
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QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

The Supreme Court has evaluated whether a right is fundamental in a series of cases. If confirmed, I will follow all Supreme Court precedents as well as any applicable Sixth Circuit precedent.

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

Yes.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. I will faithfully apply Supreme Court precedents and look to sources approved by the Court to help make that determination. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes. If the right is recognized by the Supreme Court or the Sixth Circuit, I will apply the appropriate precedent. I would consider precedent from other courts of appeal.

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

Yes.

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

Yes. I would faithfully apply the binding precedents of *Casey* and *Lawrence*.

f. What other factors would you consider?

I would consider all factors articulated by Supreme Court or Sixth Circuit precedents.

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

The Supreme Court has held in *United States v. Virginia*, 518 U.S. 515 (1996), that the Equal Protection Clause applies to both race and gender. If confirmed, I would faithfully follow this and all applicable, binding precedent.

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

Please see my response to Question 2.

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

I do not know why the litigation in *Virginia* did not begin until the 1990's. If confirmed, I will follow *Virginia*, and all Supreme Court precedent.

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 held in *Obergefell v. Hodges*, 576 U.S. 644 (2015), that same-sex couples have the right to marry just as opposite sex couples. If confirmed, I will faithfully follow *Obergefell*.

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

It would be inappropriate for me as a district court nominee to comment on legal issues that may be the subject of litigation. See Canon 3(A)(6) of the 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 has recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will faithfully follow this precedent.

- a. Do you agree that there is a constitutional right to privacy that protects a woman’s right to obtain an abortion?

The Supreme Court has held that such a right exists in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I will faithfully follow this precedent.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully follow this precedent.

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

Please see my responses to Questions 3, 3(a) and (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*, 576 U.S. 644, 668 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
 - a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The Supreme Court found in *Virginia* and *Obergefell* that current views or societal changes can be relevant. If confirmed, I would faithfully follow those and all Supreme Court precedent.

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

Consideration of such evidence has a role when it is relevant to a disputed issue and is reliable. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

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

lesbians.”

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

The Supreme Court has stated that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719, 1727 (2018). If confirmed, I will faithfully follow this and other relevant, binding Supreme Court and Sixth Circuit precedent.

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

Please see my responses to Question 1 and its subparts.

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I believe that *Brown* was correctly decided. If confirmed, I would faithfully follow *Brown* and all Supreme Court precedent. I have not analyzed this academic issue. However, I am aware that some legal scholars have argued that *Brown* is consistent with the original meaning of the Fourteenth Amendment. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Nov. 25, 2020).

I have not studied this academic issue. If confirmed, I will follow the binding precedent that the Supreme Court has held applies to all constitutional provisions.

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

The Supreme Court has looked to the text, structure, and history of a constitutional

provision, including how the provision was originally understood, in interpreting it. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would faithfully follow all precedents of the Supreme Court and the Sixth Circuit.

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

Please see my response to Question 6(c).

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

Please see my response to Question 6(c).

**Questions for the Record for Charles Edward Atchley, Jr.
From Senator Mazie Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.
 - b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

No.
2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.
 - a. **Do you agree that training on implicit bias is important for judges to have?**

Yes.
 - b. **Have you ever taken such training?**

Yes. As a Supervisory Assistant U.S. Attorney, I have participated in diversity training sessions provided by the Department of Justice that included discussions of implicit bias.
 - c. **If confirmed, do you commit to taking training on implicit bias?**

Yes.
3. In 2002, you were involved in a Department of Justice (DOJ) voter fraud initiative under the George W. Bush administration that civil rights groups criticized as a voter intimidation effort.
 - a. **Are you aware of studies showing that voter fraud is actually incredibly rare? For example, a 2014 study found a total of 31 credible cases in 14 years, out of more than 1 billion ballots cast.**

I have not reviewed these studies.
 - b. **Do you have any evidence showing that voter fraud is a widespread problem in the United States?**

No.

c. Do you believe that voter suppression or discrimination in voting currently exists?

I have not encountered voter suppression or discrimination during my time as a federal prosecutor.

i. If so, in addressing this problem, do you believe the Voting Rights Act should be read robustly or narrowly?

Please see my response to Question 3(c).

4. On November 9, 2020, after the major news networks called the presidential election for Joe Biden, Attorney General Barr issued a memo to U.S. Attorneys authorizing them to pursue allegations of voting irregularities in the 2020 Election, despite no evidence of widespread voter fraud. Richard Pilger, a longtime DOJ attorney who oversees election fraud crimes, stepped down from his position in protest over this memo.

Sixteen federal prosecutors assigned to monitor election misconduct in their districts reportedly sent Attorney General Barr a letter urging him to rescind his memo, saying the “policy change was not based in fact.”

a. Do you agree with these sixteen federal prosecutors that the Barr memo should be rescinded?

I have not reviewed the letter sent to Attorney General Barr.

b. Do you agree with these sixteen federal prosecutors who found no evidence of substantial irregularities in the 2020 Election?

Please see my response to Question 4(a).

5. You joined the Cherokee Country Club in 2013 and have been a member since then. News reports have commented on its 95-year history of excluding non-white members. The country club did not admit its first Black member until 2002.

a. Why did you join a country club with a long history of racial exclusion?

From the time I joined Cherokee Country Club in December 2013, and throughout my membership, it has not discriminated against anyone on the basis of race, religion, national origin, sex, sexual orientation, or any other status.

b. Since joining the country club, have you taken any actions to push the country club to increase diversity among its membership?

I have encouraged many individuals of diverse backgrounds to join if they have expressed an interest.

6. In 2016, while prosecuting a long-serving African-American member of the Tennessee House of Representatives, Joseph Armstrong, you excluded the only Black potential juror from the jury.

a. In trying to exclude the lone Black potential juror, you argued that she “just gave me the impression she did not want to be here” and that she “gave me the impression she was just disinterested in the issues.” And yet when the judge brought the potential juror in for additional questioning, she reportedly “responded with enthusiasm” to additional questions. What was your basis for arguing that she was ‘disinterested’ in the issues?

In this case, the district court found that the government had legitimate, race neutral reasons for the exclusion of the potential juror and that the defendant’s *Batson* challenge was without merit.

b. Do you believe that implicit bias in jury selection is an ongoing problem in jury selection?

Regrettably, racism still exists in America. I am committed to issues of diversity and inclusion and, if confirmed, racism will have no place in my courtroom.

c. In your view, how should a judge determine whether a reason given for excluding a juror is pretextual and the party has improperly excluded a juror based on race?

If confirmed, I will follow the standard established by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), and all other controlling precedent.

Nomination of Charles Edward Atchley, Jr.
United States District Court for the Eastern District of Tennessee
Questions for the Record
Submitted November 25, 2020

QUESTIONS FROM SENATOR BOOKER

1. In 2016, you prosecuted Joe Armstrong, an African-American member of the Tennessee House of Representatives, for failure to pay taxes.¹ In that case, you sought to remove the lone Black candidate in the jury pool. According to a news report, you claimed she appeared “disengaged” and “just gave [you] the impression she did not want to be [there].”² Later, when pressed further on your rationale for removing her from the jury pool, you cited to her lack of formal education as a reason for requesting her removal because, as you said to the judge, it was a “complicated case.”³ The juror in question was a 60-year-old African American woman who had served as a home health caregiver and while she did not attend high school, she had earned a GED.⁴ When the judge brought the jury candidate in for additional questioning, you claimed you struck her because of minor discrepancies in her questionnaire and because she was slow to understand your line of questioning designed to remove her from the pool.⁵

- a. Do you think it is unreasonable for a person of color to see this sequence play out in court and feel that the stated reason the lone Black candidate was removed from the jury pool was in fact pretextual?

Race is never a legitimate factor for moving to exclude a potential juror. The reasons advanced by the government were found by the district court not to be pretextual, that the government had legitimate, race neutral reasons for the exclusion of the potential juror and that the defendant’s *Batson* challenge was without merit.

- b. According to the article, you initially gave a pretty vague justification for her removal (i.e., citing her “disinterest”). Did the article correctly report that “disinterest” was your initial reason for striking this juror?

The article referenced does not accurately represent the record of the hearing before the district court. The government was able to articulate several factors as legitimate reasons to exercise a preemptory challenge in this case. Race is never a legitimate factor for moving to exclude a potential juror.

- c. When further pressed, you then cited her lack of formal education. Is it your position that a person with a GED does not have sufficient educational background to serve on a jury?

¹ Jamie Satterfield, *Lone black candidate in jury pool tossed from Tennessee Rep. Joe Armstrong’s trial*, TENNESSEAN (Aug. 2, 2016), <https://www.tennessean.com/story/news/crime/2016/08/02/lone-black-candidate-jury-pool-tossed-tennessee-rep-joe-armstrongs-trial/87965890/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

There are many factors, including educational background, that may demonstrate, to either party, that a potential juror is not suitable for a particular trial. However, race is never a legitimate factor.

- d. Finally, you zeroed in on a discrepancy in her questionnaire as justification for removing her from the pool and the article indicated you described her as “slow” to follow your questions. Is that true? Did you call the 60-year-old Black woman “slow” on the record?

The government was able to articulate several factors as legitimate reasons to exercise a peremptory challenge in this case. Race is never a legitimate factor for moving to exclude a potential juror. I do not recall citing “slow” as among the factors cited.

- i. If so, looking back, do you regret that characterization?

Please see my response to Question 1(d).

- e. In hindsight, do you stand by your decision to remove the sole Black candidate in the jury pool in this case about the prosecution of a Black public official?

Please see my response to Question 1(a).

- f. Were you at all worried about the appearance of impropriety in removing the lone Black candidate in the jury pool when trying a Black defendant?

Please see my response to Question 1(a).

- g. We are an incredibly diverse country, and confidence in our criminal justice system is bolstered when that diversity is reflected in those who serve in our justice system—whether it is a judge, police officer, or member of a jury. Do you agree with that statement?

Yes.

- i. In this instance, do you think the public’s confidence in Mr. Johnson’s case was undermined by the fact that it was decided by an all-white jury, with the one Black potential juror having been removed? If not, please explain.

Please see my response to Question 1(a). Mr. Armstrong received a fair and impartial trial before a fair and impartial jury of his peers that acquitted him of two of the three counts alleged against him in the indictment.

- 2. During the course of your career at the United States Attorney’s Office, have you ever been accused of displaying bias based on race, gender, or sexual orientation? If so, please detail for the Committee the allegations, whether they were investigated, and any disciplinary action taken in light of the allegations.

No.

3. Since 2013, you have been a member of the Cherokee Country Club.⁶ According to your Judiciary Committee Questionnaire, you wrote that you are “aware that, regrettably, there was a time more than a decade before I became a member when the Club lacked diversity and, either formally or informally, enforced discriminatory membership policies.”⁷ The club’s history of discrimination is well known. For instance, the University of Tennessee’s first Black basketball coach, Wade Houston, was denied membership to the Cherokee Country Club in 1989 even though membership customarily came with the head basketball coach position.⁸

In response to this incident, the University of Tennessee president at the time, Lamar Alexander, urged the school’s football coach and athletic director to resign the university-paid membership.⁹ As now-Senator Alexander said then, “The university cannot be a party to any membership of any organization that even raises the possibility that a white coach can be treated one way and a black coach another.”¹⁰

- a. In your Questionnaire, you said, “By the time I became a member in 2013, however, the Club’s diverse membership fully reflected the Club’s formal policies against discrimination on the basis of race, sex, religion, and national origin.” If that is the case, what percentage of the club’s membership was Black when you joined? What percentage of the club’s membership was non-white when you joined?

I do not know what percentage of the membership identifies with a particular race. When I joined, race was not part of the application process.

- b. Did you ever attend any events at the club prior to joining in 2013? Please provide a list of the events and the date of attendance to the committee.

Prior to my joining in December 2013, the only events I recall attending at Cherokee Country Club were fundraising dinners hosted by the Friends of the Great Smoky Mountains National Park to raise money for the national park. This event, known as the Evergreen Ball, is not always held at Cherokee Country Club and has been held at other venues in the past.

- c. When do you believe the Cherokee Country Club ceased discriminating against people on the basis of race?

Cherokee Country Club has not engaged in any discriminatory practices since I have been a member and, to my knowledge, had not done so for more than a decade prior to my becoming a member.

⁶ SJQ at p. 5.

⁷ *Id.* at 6.

⁸ Erik Schelzig, *AG Herbert Slatery’s inclusion in past all-white club shrugged off*, TENNESSEAN (Sept. 30, 2014), <https://www.tennessean.com/story/news/politics/2014/09/30/ag-herbert-slaterys-inclusion-in-past-all-white-club-shrugged-off/16486271/>.

⁹ *Id.*

¹⁰ *Id.*

- d. Former Senate Majority Leader Bill Frist resigned from the Cherokee Country Club in 1994, before running for office because, he said, it left a negative impression on voters. Do you think a judge should be a member of a club with a discriminatory past because of the impression it may leave on litigants?

It has been reported in the media that Senator Frist resigned from Belle Meade Country Club, located in Nashville, in 1994. I am not, nor have I ever been, affiliated with Belle Meade Country Club. I am unaware of Senator Bill Frist ever being a member of Cherokee Country Club.

Regrettably, many institutions, including private organizations, businesses, colleges and universities, government departments, and even our own armed services have a discriminatory past. Cherokee Country Club does not discriminate against anyone on the basis of race, religion, national origin, sex, sexual orientation, or any other status and I would not be a member of any club or organization that did.

- e. In 2011, a panel of federal judges said that a bankruptcy judge's membership in the Cherokee Country Club violated the judiciary's code of ethics because it never had a woman or a Black person with membership privileges. Do you think those same concerns are not present today? If not, please explain why.

In 2011, the media reported this occurring regarding the membership in Belle Meade Country Club of a bankruptcy judge in Nashville. I am unaware of a panel of federal judges ever issuing any statement regarding membership in Cherokee Country Club. Cherokee Country Club does not discriminate against anyone on the basis of race, religion, national origin, sex, sexual orientation, or any other status.

4. In 2002, the Department of Justice announced the creation of the "Voter Integrity Initiative," to combat supposed voter fraud. Harry Mattice, then the U.S. Attorney for the Eastern District of Tennessee, appointed you to lead the Voter Integrity Initiative in the district.¹¹ And, in 2006, you were again tapped to lead the Department of Justice's efforts in the Eastern District of Tennessee to combat voter fraud.¹²

- a. In 2002, how many cases of voter fraud did your team prosecute in the Eastern District of Tennessee?

I do not recall any prosecutions.

- b. In 2006, how many cases of voter fraud did your team prosecute in the Eastern District of Tennessee?

I do not recall any prosecutions.

¹¹ Georgiana Vines, *Official Will Hear Charges of Suspected Election Fraud*, KNOXVILLE NEWS (Nov. 4, 2002) (SJQ Attachment 12(e) at pp. 299-301)

¹² Ray Snader, *Atchley Receives Few Election Complaints*, CITIZEN TRIBUNE (Aug. 8, 2006) (SJQ Attachment 12(e) at p. 285).

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

I do not have knowledge of what is occurring in other districts or other parts of the country regarding this issue.

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

I am reluctant to label myself an originalist or a textualist because these terms mean different things to different people. If confirmed, I would follow all Supreme Court and Sixth Circuit precedent and apply the original public meaning in interpreting text. I believe this approach is consistent with the Constitution and the judiciary's role.

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

Please see my response to Question 5.

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

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

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

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

Please see my response to Question 7(a) above.

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

I believe that judicial restraint is an important component of judging. I understand judicial restraint to mean that a judge will adhere to the limited nature of the judicial role, deciding cases by applying the law and facts to the parties before the court, and refrain from reaching unnecessary issues or imposing the judge's own viewpoints inappropriately.

- a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.¹³ Was that decision guided by the principle of judicial restraint?

As a district court nominee, I am not permitted to express a view, or offer an opinion, on Supreme Court decisions or dissenting opinions. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply *Heller* and all Supreme Court precedent.

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.¹⁴ Was that decision guided by the principle of judicial restraint?

Please see my response to Question 8(a).

- c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹⁵ Was that decision guided by the principle of judicial restraint?

Please see my response to Question 8(a).

9. 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.¹⁶ 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.¹⁷

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

As a district court nominee, I am not permitted to offer an opinion on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply the United States Constitution, and all Supreme Court and Sixth Circuit precedent to any matter before me.

- b. 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 9(a).

10. According to a Brookings Institution study, African Americans and whites use drugs at

¹³ 554 U.S. 570 (2008).

¹⁴ 558 U.S. 310 (2010).

¹⁵ 570 U.S. 529 (2013).

¹⁶ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁷ *Id.*

similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹⁸ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁹ 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.²⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²¹

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

I am unfamiliar with the Brookings Institution study, however, I believe there are instances where participants in the criminal justice system have acted with implicit racial bias. Any racial bias has no place in the criminal justice system.

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

Yes.

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

I have not studied the issue but, as a Supervisory Assistant U.S. Attorney, I have participated in diversity training sessions provided by the Department of Justice that included discussions of implicit bias.

- 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.²² Why do you think that is the case?

As a judicial nominee, it would not be appropriate for me to comment on matters that could be the subject of litigation in any court. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges. As a general matter, avoiding unwarranted sentencing disparities between similarly situated defendants is mandated by 18 U.S.C. § 3553(a). If confirmed, I will faithfully apply the factors from this statute—including Congress's mandate to avoid unwarranted sentencing disparities—to fashion sentences that are sufficient, but not greater than necessary to comply with the purposes of the statute.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory

¹⁸ 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>.

¹⁹ *Id.*

²⁰ 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>.

²¹ *Id.*

²² 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>.

minimum sentences.²³ Why do you think that is the case?

Please see my response to Question 10(d).

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

Judges have the responsibility of ensuring that bias of any kind will not be found in their courtrooms and that every defendant is treated fairly, respectfully, and with dignity.

11. 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.²⁴ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁵

- 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 and am unable to offer an informed opinion 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 response to Question 11(a).

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?

Yes.

13. Do you believe that *Brown v. Board of Education*²⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

14. Do you believe that *Plessy v. Ferguson*²⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

²³ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

²⁴ 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>.

²⁵ *Id.*

²⁶ 347 U.S. 483 (1954).

²⁷ 163 U.S. 537 (1896).

No, and the Supreme Court in *Brown* made clear that *Plessy* was wrongly 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.”²⁸ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

The Code of Conduct for United States Judges precludes me, in my role as a judicial nominee, from commenting on the statements of political leaders. *See* Canon 5 of the Code of Conduct for United States Judges. The standards for recusal and disqualification are governed by 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and binding precedent. They do not refer to the judge’s race or ethnicity as a basis for recusal.

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.”²⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

It is well established 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).

²⁸ 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>.

²⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.