

**Senator Grassley
Questions for the Record**

**Victor Allen Bolden,
Nominee, U.S. District Judge for the District of Connecticut**

1. **Following the Supreme Court’s decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), you said that the Court “ignored Congress” and that the Court’s “distorted sense of what makes a community prompted [it] to declare that [the] Title VII [rights] of whites had been violated after the City...for the first time in decades took steps *without* a court order to ensure that a hiring process for the Fire Department did not leave African-Americans out in the cold” (emphasis in original).**

a. Given your comment, please explain your understanding of what Congress intended to do in Title VII with respect to when employees can intentionally discriminate.

Response: I became involved in this case after the Supreme Court granted certiorari and made these comments in my professional capacity as the City of New Haven’s lawyer, knowing that my client had for several decades been a party to successful disparate impact litigation brought by African-Americans regarding the hiring practices of the New Haven Department of Fire Services.

On the issue of when Congress intended to permit employers to discriminate intentionally, in *Ricci v. DeStefano*, the Supreme Court held that “under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.” *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

b. Do you believe Congress intended to set a standard making it easier for employers to intentionally discriminate than the standard the Supreme Court announced in *Ricci*?

Response: No. I believe Congress intended to ensure that both the disparate treatment and disparate impact elements of Title VII were properly enforced. As the Supreme Court recognized in *Ricci v. DeStefano*, 557 U.S. 557 (2009): “Our task is to provide guidance to employers and courts for situations when these two prohibitions [against disparate treatment and disparate impact] could be in conflict absent a rule to reconcile them. In providing this guidance our decision must be consistent with the important purpose of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.” 557 U.S. at 580.

2. **You contributed to a 1990 UCLA Law Review Article entitled “Racial Reflections: Dialogues in the Direction of Liberation.” Your subsection, “Salvaging Black Males,” argues that black men “have been disturbingly irresponsible” and are**

driven to violence and criminality because of a “pervasively white patriarchal society.”

a. Please explain what you meant by “pervasively white patriarchal society.”

Response: My contribution to that law review article was based on a writing assignment from a law school class more than twenty-five years ago. The phrase “pervasively white patriarchal society” referred to a society where white males were substantially more likely to be in positions of power than others in society. This phrase is not one I use now or have used in more than twenty-five years.

b. In the same article, you wrote that “[b]lack men must take on the awesome task of saying to this society, which is dominated by a white patriarchy, that it must change drastically and that they will not cooperate in the continued oppression of women.” Please explain what you meant by this statement.

Response: The statement referred to my opinion that African-American men must take responsibility for their lives and their actions, regardless of what the larger society does. The statement challenges African-American men to be concerned about society being fair for and to women, ensuring that women are treated with dignity and respect.

3. In a 2013 editorial for the *Connecticut Law Tribune*, you criticized the majority’s decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and wrote that “states have too much power when it comes to deciding how and whether Americans will vote. With its undue emphasis on state sovereignty, the Supreme Court’s opinion in *Shelby County* will only serve to embolden those states determined to place barriers on those seeking to vote.”

a. Please explain the basis for your claim that “states have too much power when it comes to decision how and whether Americans will vote.” If you no longer believe this, please explain when and why you changed your mind.

Response: As with any editorial published by the Connecticut Law Tribune, this editorial reflected the opinions of a majority of the paper’s editorial board. A majority of the editorial board had concerns with the long lines many voters experienced and the delays in counting votes during the 2012 elections. The editorial I authored on behalf of the editorial board was written with this context in mind. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent in this area of the law, as I would all areas of the law, without regard to my personal views or the viewpoints I expressed on behalf of the editorial board.

b. Please explain the basis for your belief that the Supreme Court placed “undue emphasis on state sovereignty” in the *Shelby County* decision. If you no longer believe this, please explain when and why you changed your mind.

Response: Please see response to Question 3a.

- c. **Please explain the basis for your belief, as you argue in the article, that Justice Ginsburg’s dissent, and not the majority opinion, provides the correct legal analysis. If you no longer believe that Justice Ginsburg’s dissent provides the correct legal analysis, please explain when and why you changed your mind.**

Response: I appreciate the fact that the role of a writer on behalf of an editorial board is far different than that of a judge. As a judge, only the majority opinion is binding precedent and, if confirmed, I would have no problem faithfully following Supreme Court and Second Circuit precedent, regardless of any personal views I might have.

4. **At a speech before the NAACP in 2006, you said in the context of affirmative action: “Under the guise of seeking racial neutrality, those who do not want race to be considered in addressing racial isolation and economic deprivation are leaving fewer options for those of us trying to bring about racial equality.”**

- a. **Do you believe that opponents of affirmative action use “racial neutrality” as a “guise” to mask their true beliefs? If not, please explain to whom you were referring when you referred to “those” people who use “racial neutrality” as a “guise.”**

Response: No. Earlier, the speech specifically refers only to those “targeting for elimination *all* programs designed to end racial inequality,” including “scholarship programs, minority recruiting programs and summer enrichment programs.” (emphasis in original). I made this speech in my capacity as General Counsel for the NAACP Legal Defense & Educational Fund, Inc.

- b. **Do you believe that “racial isolation and economic deprivation” cannot be addressed except by race-conscious means? If not, please explain how race-neutral means can address “racial isolation and economic deprivation.”**

Response: No. In that same speech, just a few paragraphs later, I stated the following: “Let me be clear. I am not saying that race-targeted programs are the *only* way to address racial inequality. My point is that we cannot and must not eliminate [scholarship programs, minority recruiting programs and summer enrichment programs] as part of the broader solution to racial inequality in this nation.” (emphasis in original).

5. **In 1990, the *Harvard BlackLetter Law Journal* published your article entitled “Judge Not, That Ye Be Not Judged: A Dramatic Call for a More Enlightened Approach to Judicial Decision-Making in Race Discrimination Cases.” You noted that this article, which you wrote in the style of a script for a three-act play, “is intended to be a visionary statement on how judges ought to look at themselves and how they consider deciding cases.” The article concludes with “God” expounding the four principles that define proper judicial decisionmaking. I asked you about this article at your confirmation hearing last week and want to follow-up on your answers. To each question, you testified that you would apply the facts to the law, but you did not answer my questions concerning whether you still believed the principles that**

you expounded upon in your article. Accordingly, please answer, with specificity, each subpart of this question.

- a. The first principle you wrote states: “[I]f the decision before [the judge] affects society’s dispossessed and oppressed, the decision must be made in a way that eases their burden and does not add to their woes.” Do you still believe that a judge should decide cases in this manner? If not, please explain why you believed so in 1990 and what has subsequently changed your perspective.**

Response: Thank you for the opportunity to provide clarity on this unusual law review article and I apologize for any confusion this work of fiction has caused nearly a quarter-century later. I do not believe a judge should base his or her decisions on the principles discussed in the article. Instead, I wrote this play many years ago as a law student and it has not informed my professional work as a lawyer nor would it inform my work as a judge, if I were confirmed. My years of practice as a lawyer have instilled in me an appreciation of the importance of judges being fair and impartial and deciding matters based on the relevant facts and applicable law.

- b. The second principle you wrote states: “[T]he judge must consider how she or he would want to be treated if they [sic] were in the same circumstance as the person they [sic] are about to affect with their [sic] decision.” Do you still believe that a judge should decide cases in this manner? If not, please explain why you believed so in 1990 and what has subsequently changed your perspective.**

Response: Please see response to Question 5a.

- c. The third principle you wrote states: “A judge has to be held accountable when their [sic] talent is not used to re-structure a legal system gone awry, if that is what needs to be done.” Do you still believe that it is a judge’s role is “to re-structure a legal system gone awry”? If not, please explain why you did believe so in 1990 and what has subsequently changed your perspective.**

Response: Please see response to Question 5a.

- d. Please explain what you meant by the phrase “legal system gone awry.”**

Response: Please see response to Question 5a.

- e. The fourth principle you wrote states: “[J]udges must be mindful of the ‘fruits’ or consequences of their decisions.” If not, please explain why you believed so in 1990 and what has subsequently changed your perspective.**

Response: Please see response to Question 5a.

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

Response: It is essential for a judge to be fair and impartial and to decide matters based on the relevant facts and applicable law. I do possess this attribute and have

demonstrated a commitment to being fair and impartial throughout my professional career. For example, as the Corporation Counsel for the City of New Haven, Connecticut, I have issued formal legal opinions for the City of New Haven on a variety of issues fairly, impartially and based on the relevant facts and applicable law.

- 7. 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, open-minded and capable of deciding every matter based on the relevant facts and applicable law. A judge also should be diligent in ascertaining all relevant precedent before making a decision, and treat litigants, fellow judges and court personnel in a respectful and professional manner. If I am fortunate enough to be confirmed, I believe my professional record demonstrates that I meet this standard.

- 8. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment 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 fully committed to following the precedents of higher courts faithfully and giving them full force and effect, regardless of any personal feelings I might have.

- 9. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedents and give them full force and effect, regardless of whether he or she personally agrees or disagrees with those precedents. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.**

- a. In the penultimate sentence of the Court’s opinion, Justice Kennedy wrote, “This opinion and its holding are confined to those lawful marriages.”¹**

- i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.**

Response: Yes.

- ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes “lawful marriages”?**

Response: It is my understanding that the Court’s opinion is referring to same-sex marriages made lawful by state law.

¹ *United States v. Windsor*, 133 S. Ct. 2675 at 2696.

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Yes.

iv. Are you committed to upholding this precedent?

Response: Yes. If confirmed, I would be committed to upholding faithfully and fully the precedent in *Windsor* as well as all other precedent of the Supreme Court and the Second Circuit.

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, “By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”²

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court’s decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

c. Justice Kennedy also wrote, “The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”³

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

² *Id.* at 2689-2690.

³ *Id.* at 2691.

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court’s decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

d. Justice Kennedy wrote, “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”⁴

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court’s decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

e. Justice Kennedy wrote, “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”⁵

i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes.

ii. Will you commit to give this portion of the Court’s opinion full force and effect?

Response: Yes. If confirmed, I would apply faithfully this portion and all portions of the Supreme Court’s decision in *Windsor* as well as all other decisions of the Supreme Court and the Second Circuit.

10. 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?

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

Response: If confirmed and faced with a case of first impression, I would begin with the text and structure of the constitutional, statutory or regulatory provision at issue, to the extent that the case involved such a provision, and look for its plain meaning. To the extent that the plain meaning of the relevant text did not yield a clear answer, I would apply the means of statutory construction adopted by the Supreme Court and the Second Circuit. I also would review and apply, to the extent applicable, closely related or analogous Supreme Court and Second Circuit decisions as well as such decisions of other circuits.

- 11. 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: If confirmed, I would apply that decision regardless of my personal beliefs.

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

Response: A statute enacted by Congress is presumed to be constitutional. A federal court should declare a statute enacted by Congress unconstitutional only where the constitutional question cannot be avoided and the statute is clearly inconsistent with the Constitution.

- 13. 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: If confirmed, I would interpret the meaning of the Constitution consistent with the Supreme Court and Second Circuit precedent applicable to the specific provision at issue. As a result, unless a specific Supreme Court or Second Circuit decision requires that a district judge rely on foreign law or the views of the “world community” in determining the meaning of the Constitution, there is no basis for doing so.

- 14. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: I believe unequivocally in the rule of law. It is essential to this nation’s success and I am committed to maintaining it. If confirmed, I would only issue decisions grounded in precedent and the text of the law, rather than any ideology or other motivation. In my professional career, I have presented arguments to courts grounded in precedent and the text of the law. Also, as the City of New Haven’s Corporation Counsel, I have issued formal legal opinions to various public officials and these legal opinions have been grounded in precedent and the text of the law.

- 15. 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: If confirmed, I would set aside any personal views and treat all litigants fairly, regardless of their background or circumstances. I would decide cases solely based on the relevant facts and the applicable law. As my professional record demonstrates, I would fulfill my professional obligations without regard to my personal views, if any. For example, as the City of New Haven's Corporation Counsel, I have issued formal legal opinions based on the relevant facts and the applicable law.

16. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I would manage my caseload by establishing reasonable and efficient schedules at the outset of a case's filing and identifying unique issues likely to complicate a case's prompt resolution. I would encourage the parties in complex litigation to engage in periodic status conferences and would use Magistrate Judges to assist with case management, facilitate an efficient discovery process and engage the parties in settlement discussions, if a resolution short of a trial seems possible. I also would try to decide motions, especially dispositive ones, as promptly as possible.

17. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. Judges can and do play a significant role in controlling the pace and conduct of litigation. If confirmed, I would manage my caseload by establishing reasonable and efficient schedules at the outset of a case's filing and identifying unique issues likely to complicate a case's prompt resolution. I would encourage the parties in complex litigation to engage in periodic status conferences and would use Magistrate Judges to assist with case management, facilitate an efficient discovery process and engage the parties in settlement discussions, if a resolution short of a trial seems possible. I also would try to decide motions, especially dispositive ones, as promptly as possible. All of these steps would contribute to controlling the pace and conduct of litigation, ensuring that cases filed are either tried or resolved as quickly as possible to minimize the time and expense of litigation.

18. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed, I would decide cases by considering the relevant facts presented by the parties and applying the binding precedent to those facts. In making decisions, I would consider the submissions of the parties and conduct independent legal research to ensure that I apply binding precedent to the case. The most difficult part of the transition would be developing greater knowledge of criminal law, given that my legal practice has been focused primarily on civil matters.

19. 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 subject matter of the communications.**

Response: No.

- 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: No.

- 20. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on August 5, 2014. After reviewing them, I conducted legal research and drafted my answers. I reviewed my responses with a representative of the Office of Legal Policy of the Department of Justice. I continued reviewing and editing my responses until I authorized the Office of Legal Policy to submit them to the Committee on my behalf.

- 21. Do these answers reflect your true and personal views?**

Response: Yes.

Nominations Hearing
July 29, 2014
Questions from Senator Lee
Questions for Victor Allen Bolden (nominated for D. Conn.)

1. Mr. Bolden, as I understand it you were counsel for the city of New Haven in *Ricci v. DeStefano* (2009). After the Supreme Court decided the case, you criticized the outcome.

a. Can you elaborate on the reasons you were critical of the Court’s decision?

Response: Thank you for the opportunity to clarify. On January 15, 2009, when I became counsel for the City of New Haven, the *Ricci v. DeStefano* litigation had been underway for several years, and the Supreme Court already had granted certiorari. Following the Supreme Court’s decision, in my official capacity as the City of New Haven’s lawyer, I expressed concern about two aspects of the outcome: (1) reconciling the Supreme Court’s decision with the City of New Haven’s decades-long litigation history stemming from racial discrimination with respect to African Americans in the New Haven Department of Fire Services; and (2) implementing the Supreme Court’s decision without entangling the City of New Haven in further litigation, such as follow-on lawsuits regarding disparate impact liability over the same civil service examinations at issue in the *Ricci* case.

Regardless of these concerns, as my record demonstrates, I fulfilled my professional obligations and, following the Supreme Court’s decision in the *Ricci* case, I helped ensure that the City of New Haven complied with the Supreme Court’s order and defended against collateral attacks on the Supreme Court’s decision in *Ricci*. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent, as I would all areas of the law.

b. In what circumstances do you believe a potential disparate impact justifies intentional discrimination?

Response: In *Ricci*, the Supreme Court held that “under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.” *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent in this area of the law, as I would all areas of the law.

c. Is your view of the doctrine of disparate impact at odds with that of the Supreme Court?

Response: No.

2. Mr. Bolden, you filed an amicus brief in the *Heller* case in which you argued that the Second Amendment did not protect an individual right to bear arms.

a. Can you explain your basis for that assertion?

Response: On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), I worked on an *amicus curiae* brief in *District of Columbia v. Heller*. The decision of whether to file the brief ultimately was not made by me. The organization filed the brief to highlight the problem of gun violence facing African-Americans in densely populated urban centers like the District of Columbia. The brief argued that an individual right to bear arms existed within the context of the “well regulated Militia” referenced in the text of the Second Amendment, based on binding precedent prior to the Supreme Court’s decision in *District of Columbia v. Heller*. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939).

I appreciate the difference between the role of an advocate and the role of a judge. If confirmed, I would faithfully apply the Supreme Court’s decision in *District of Columbia v. Heller* and other Second Amendment jurisprudence, as I would all areas of the law, rather than the viewpoints expressed on behalf of any former client.

b. In that same brief, you argued that an individual right to bear arms “would not address racial discrimination of criminal justice.” To which types of racial discrimination were you referring, and in what ways did the Supreme Court’s decision in *Heller*, which found that the Second Amendment protects an individual right to bear arms, not address those types of discrimination?

Response: The brief referred to any issues related to the “discriminatory enforcement of firearm laws” or “the history surrounding the adoption of early gun control laws, or “even the Second Amendment itself,” to the extent such history “is tainted by racial discrimination,” a matter that had been raised by others, but not the NAACP Legal Defense & Educational Fund, Inc. The brief did not suggest that the Second Amendment should be interpreted to address issues of racial discrimination. Instead, the brief recognized that the Supreme Court’s “traditional vehicles” for addressing racial discrimination, “the Equal

Protection Clause of the Fourteenth Amendment, or where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment,” should continue to be interpreted to address any such issues, to the extent warranted and consistent with Supreme Court precedent. If confirmed, I would faithfully apply the Supreme Court’s decision in *District of Columbia v. Heller* and other Second Amendment jurisprudence, as I would all areas of the law.

- 3. Mr. Bolden, in your 1990 *Harvard BlackLetter Law Journal* article entitled, “Judge Not, That Ye Be Not Judged,” you lay out four primary jurisprudential guiding principles. These principles suggest that judges should look beyond the text of statutes or the merits of decisions and incorporate into their decision an analysis of the fruits or consequences of a decision.**

- a. What role does consequentialism have in your jurisprudence?**

Response: If confirmed, consequentialism would have no role in my jurisprudence, unless binding Supreme Court and Second Circuit precedent required a district court to do so.

- b. How could a judge take into account the consequences of his decision?**

Response: Please see response to Question 3a.

- c. In what circumstances could the consequences of a ruling be dispositive—can you provide an example?**

Response: Please see response to Question 3a.

- 4. Mr. Bolden, in *Arizona v. U.S.*, you filed an *amicus* brief in support of the proposition that Arizona’s SB 1070 immigration law infringed on Congress’s enumerated powers, and was preempted by federal law.**

- a. Can you articulate for the Committee your view of the doctrine of enumerated powers?**

Response: For many years prior to my becoming the Corporation Counsel of the City of New Haven, the City of New Haven had been active on the issue of immigration. Consistent with these efforts, the Mayor of the City of New Haven decided that the city should join a number of municipalities and file an *amicus curiae* brief in *Arizona v. U.S.*, regarding Arizona’s S.B. 1070 and, on behalf of my client, I signed on to this brief, which had been drafted by others. The brief therefore represents a position on behalf of my client, the City of New Haven, and

expresses my client's concern that certain enforcement requirements with respect to immigration pose considerable legal challenges for municipalities.

In *Arizona v. U.S.*, on the issue of Congress' power in the area of immigration, the Supreme Court held that: "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization'." *Arizona v. U.S.*, 132 S. Ct. 2492, 2498 (2012) (quoting Article I, Section 8, clause 4 of the U.S. Constitution) (other citations omitted). If confirmed, I would faithfully follow binding Supreme Court and Second Circuit precedent on the issue of Congress' enumerated powers, as I would any other issue, rather than the viewpoint expressed on behalf of any former client.

b. In what circumstances do you believe courts should strike down federal laws as infringing on purely state prerogatives?

Response: In *Arizona v. U.S.*, the Supreme Court recognized that: "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. U.S.*, 132 S. Ct. 2492, 2500 (2012). Indeed, there have been instances where courts have struck down federal laws, infringing on state prerogatives. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 488 U.S. 1041 (1992). If confirmed, I would faithfully follow binding Supreme Court and Second Circuit precedent on the issue of when state sovereignty has been infringed upon by federal law.

c. Can you provide a few examples?

Response: Please see response to Question 4b.

5. Mr. Bolden, you have filed amicus briefs in several cases in which the outcome would largely depend on whether the court found a fundamental right had been infringed.

a. When in your view should federal courts find that a fundamental right has been infringed?

Response: As the Supreme Court has recognized, the Due Process Clause of the Fourteenth Amendment provides for "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v.*

Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted). These “fundamental rights and liberty interests” may not be infringed upon “unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* at 721 (citations and internal marks omitted). As a result, if government interferes with a fundamental right without such interference being narrowly tailored to serve a compelling state interest, then such infringement cannot survive constitutional scrutiny.

**Responses of Victor Allen Bolden
Nominee to the United States District Court for the District of Connecticut
To The Written Questions of Senator Ted Cruz**

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice’s judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: If confirmed, my judicial philosophy would be to be fair and impartial and to decide matters based on the relevant facts and applicable law, consistent with binding Supreme Court and Second Circuit precedent. While I have read numerous Supreme Court opinions from the Warren, Burger and Rehnquist Courts, I have not undertaken the study necessary to identify a specific Supreme Court justice’s philosophy most analogous to my own.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: If confirmed, I would follow binding Supreme Court and Second Circuit precedent on how to interpret the United States Constitution. Binding Supreme Court precedent recognizes originalism as a means of interpreting constitutional provisions. *See District of Columbia v. Heller*, 554 U.S. 570 (2008) (reviewing the original public meaning of the Second Amendment). I would faithfully apply binding Supreme Court precedent on this area of the law.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: District judges must follow precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit. If confirmed, I would not overrule the precedent of these higher authorities.

Explain whether you agree that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: This statement is an excerpt from an opinion by the Supreme Court and reflects binding precedent. If confirmed, I would follow that precedent and any other binding case law, such as *Printz v. United States*, 521 U.S. 899 (1997) and *New York v. United States*, 505 U.S. 14 (1992), to cases involving state sovereign interests and judicially enforceable limitations on federal power.

Do you believe that Congress’ Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has recognized that Congress’ Commerce Clause power, in conjunction with its Necessary and Proper Clause power, cannot be exercised in the absence of a

nexus to economic activity. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (striking down a federal civil remedy for victims of gender-motivated violence because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (striking down legislation regulating firearms in school zones because this is not “an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”). In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court also held that Congress could regulate drug activity even at the local level because “failure to regulate that class of activity would undercut” other broader interests affecting economic activity. See 545 U.S. at 18, 26; *id.* at 37 (Justice Scalia, concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”). If confirmed, I would faithfully follow Supreme Court and Second Circuit precedent in this area of the law.

What are the judicially enforceable limits on the President’s ability to issue executive orders or executive actions?

Response: The Supreme Court has recognized that presidential authority to issue executive orders or actions “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Justice Jackson’s concurrence in that case established the tripartite scheme for evaluating the legitimacy of the executive action at issue. See *Medellin v. Texas*, 552 U.S. 491, 637-638 (2008). If confirmed, I would faithfully apply Supreme Court precedent in this area of the law.

When do you believe a right is “fundamental” for purposes of the substantive due process doctrine?

Response: The Supreme Court has recognized that there are “fundamental rights and liberties which are objectively, deeply rooted in this Nation’s history and tradition,” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotations omitted), and which are “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]” *Id.* If confirmed, I would faithfully apply Supreme Court precedent in this area of the law.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has recognized two levels of heightened scrutiny above rational basis review under the Equal Protection Clause: strict scrutiny and intermediate scrutiny. Strict scrutiny is applied to classifications, such as race, which are “so seldom relevant to the achievement of any legitimate state purpose,” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Intermediate scrutiny is applied to classifications including gender, which “frequently bear[] no relation to ability to perform or contribute to society.” *Id.* at 440-41. If confirmed, I would faithfully apply Supreme Court precedent in this area of the law.

Do you “expect that [15] years from now, the use of racial preferences will no longer be necessary” in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: If confirmed, I would faithfully apply Supreme Court precedent in this area of the law, such as *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). Any personal expectations would have no bearing on my judicial decision-making.