

**Nomination of Andrew Lynn Brasher  
to the U.S. Court of Appeals for the Eleventh Circuit  
Questions for the Record  
Submitted December 11, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. During your hearing on December 4, Senator Blumenthal asked you about your role in defending an Alabama law that would have required doctors who perform abortions to have admitting privileges at local hospitals. The law was struck down as unconstitutional. (*Planned Parenthood Southeast v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala., Aug. 4, 2014)) During this lawsuit, Alabama employed a litigation consultant named Vincent Rue who has a long history of making discredited claims about the impacts of abortion on women's mental health, a condition he refers to as "post-abortion syndrome." Alabama reportedly paid Mr. Rue approximately \$80,000 in taxpayer funds to help prepare the state's expert witnesses. (Molly Redden, *GOP Governors Paying Big Bucks to Controversial Marriage Therapist to Defend New Abortion Laws*, MOTHER JONES (June 12, 2014)) In response to Senator Blumenthal, you stated, "I addressed this issue the last time I was here in responses to written questions from Senator Feinstein." You did not answer a number of my previous written questions about this issue. Please do so now below.

**Did you have any role in the decision to retain Mr. Rue as a litigation consultant? I'm not asking whether you were the "primary contact" in the office for Mr. Rue, or whether the ultimate decision on these types of contracts was the Attorney General's or someone else's. Did you play any role? Please provide a yes or no response.**

RESPONSE: I was working on the case when he was retained. Because these events happened about seven years ago, I do not recall exactly how Mr. Rue was retained or what, if anything, I did to effectuate that.

2. In relation to your previous nomination, I asked you whether you became aware—at any time—that a court had found Mr. Rue's testimony "not credible" with respect to a supposed mental illness he called "post-abortion syndrome." (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990)) You did not answer that question. Specifically, the district court in *Casey* wrote:

"Dr. Rue submitted a study he co-authored with others, *The Psychological Aftermath of Abortion*, to Surgeon General C. Everett Koop and the House of Representatives Committee on Government Operations as a part of a federal investigation of the medical and psychological effects of abortion which purports to establish the existence of a psychological disorder denominated 'post abortion syndrome.' After submission for peer review by scientists with the Center for Disease Control, the National Center for Health Statistics and other scientific institutions, his study was found to have 'no value' and to be 'based upon a priori beliefs rather than an objective review of the evidence.' The Board of Directors of the American Psychological Association, after review of all of the scientific literature, has determined that there are no scientific studies which support the existence of a 'post abortion syndrome' as suggested by Dr.

Rue. Because Dr. Rue lacks the academic qualifications and scientific credentials possessed by plaintiffs' witnesses, I conclude that his testimony, which is based primarily, if not solely, upon his limited clinical experience, is not credible.” (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1333 (E.D. Pa. 1990) (internal citations omitted))

**When did you first become aware that a federal court had concluded that Mr. Rue was “not credible”?**

RESPONSE: I do not recall when I became aware of the district court’s 1990 decision.

**3. Do you believe that abortion causes mental illness? Please provide a yes or no response.**

RESPONSE: With respect, these comments were apparently made by someone else in litigation in Pennsylvania that took place thirty years ago. I am not aware of any basis to dispute or contest the Pennsylvania district court’s 1990 ruling about these issues. This was not an issue that has been raised or a position that has been asserted in any litigation in which I have been a lawyer, and I have never written or spoken about it. The Supreme Court has held that a woman has the right to decide to have an abortion and that the government cannot impose an undue burden on that right. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992). In my current role as a district court judge and as a judge on the court of appeals if I am confirmed, I will fully, fairly, and impartially apply those precedents.

4. In *Planned Parenthood Southeast v. Strange*, the plaintiffs asked the court to exclude the opinions of Alabama’s “expert witnesses” in part because of Mr. Rue’s role as a litigation consultant. You signed an opposition to this motion in which you argued that Mr. Rue had a limited support role in the case that was “no different than the involvement of the attorneys or the attorneys’ in-house paralegal staff.” You asserted that Mr. Rue’s role in the case involved administrative tasks such as “assisting testifying experts with word-processing, drafting, and technological issues.” (Defendants’ Opposition to Plaintiffs’ Brief Regarding Anderson and Hayes, *Planned Parenthood Southeast v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala., Aug. 4, 2014)) The court ultimately found that Mr. Rue’s involvement in the case “reached beyond the typical involvement of an attorney or litigation consultant.” In fact, one of your expert witnesses, Dr. James Anderson, submitted a report to the court that was drafted “in its entirety” by Mr. Rue. The judge was so troubled by Mr. Rue’s role, he concluded that Dr. Anderson either had “extremely impaired judgment; he lied to the court . . .; or he is so biased against abortion that he would endorse any opinion that supports increased regulation on abortion providers. Any of these explanations severely undermines Anderson’s credibility as an expert witness.” (*Planned Parenthood Southeast v. Strange*, 33 F.Supp.3d 1381, 1388 (M.D. Ala., Oct. 20, 2014))

**a. In relation to your previous nomination, I asked when you learned that Dr. Anderson had submitted a report that was drafted in its entirety by Mr. Rue. You did not answer this question. Please do so now. When did you learn that Dr. Anderson had submitted a report that was drafted in its entirety by Mr. Rue?**

RESPONSE: I have no personal knowledge about how this document was drafted. To the best of my recollection, these matters came to my attention when the plaintiffs filed a motion at some point during the trial.

**b. In relation to your previous nomination, I asked what steps you took to verify Mr. Rue’s role in the case before you made assertions to the court on the subject. You did not answer that question. Please do so now. What steps did you take to verify that Mr. Rue’s involvement was “no different than the involvement of the attorneys or the attorneys’ in-house paralegal staff” and that it consisted of such tasks as “assisting testifying experts with word-processing, drafting, and technological issues”? (Defendants’ Opposition to Plaintiffs’ Brief Regarding Anderson and Hayes, *Planned Parenthood Southeast v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala., Aug. 4, 2014))**

RESPONSE: With respect, internal communications, discussions, and litigation strategies are privileged. The Alabama Rules of Professional Conduct require that an attorney “not reveal information relating to representation of a client unless the client consents after consultation.” Ala. R. Prof’l Conduct 1.6(a). Moreover, litigation strategies and other similar decisions made by counsel in the course of representation (including the decision to retain experts or similar persons, and internal deliberation by and amongst counsel regarding proposed courses of action and the merits of claims) are generally viewed as confidential. As a consequence, it would be inappropriate for me, particularly to advance my own interests, to reveal client confidences or provide insight into the deliberations made by counsel representing the State of Alabama in this or any other litigation. *Cf.* Ala. R. Prof’l Conduct 1.8(b).

5. In addition to the approximately \$80,000 in taxpayer money that Alabama paid to Rue, the state reportedly paid Dr. Anderson around \$76,000. (Molly Redden, *Judge Rips Alabama for Hiring a Discredited Abortion Foe*, MOTHER JONES (Oct. 21, 2014)) In relation to your previous nomination, I asked whether you were aware of Dr. Anderson’s plan to coordinate his work with Mr. Rue. You did not answer that question. Please do so now.

**a. Were you or anyone in your office aware of Dr. Anderson’s plan to submit a report drafted in its entirety by Mr. Rue?**

RESPONSE: As I said earlier, to the best of my recollection, I learned about these matters when the plaintiffs filed a motion addressed to Dr. Anderson’s testimony at some point during the trial.

**b. Did Mr. Rue or Dr. Anderson lie to or otherwise mislead you or anyone in your office about the process of drafting the report at issue?**

RESPONSE: As I said in response to your questions last year, I do not recall speaking to these people about this issue.

**i. If not, why did you make an assertion to the court about Mr. Rue's role that was not true?**

RESPONSE: With respect, the district court judge did not find that any lawyer made an untrue factual assertion. The district court addressed this issue in an omnibus opinion that ruled on various evidentiary issues that were raised and litigated over the course of a 10-day bench trial. *See Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014). The district court expressly found several of the state's witnesses to be credible. *Id.* at 1389 (Hayes), 1391(Duggar), 1384 (Keyes), 1395 (Williamson). As to Dr. Anderson, the district court disagreed with the State's position and found his testimony not to be credible based in part on the district judge's own questions that he posed to Dr. Anderson at trial. Because the district judge was the fact-finder in that case, it was within the court's purview to make credibility determinations based on contested testimony.

**c. Does it bother you that you made an assertion to the court in this case that was false?**

RESPONSE: See response to 5.b.i above.

6. In relation to your previous nomination, I asked you whether you took any action in response to the court's finding that Alabama's expert witnesses lacked credibility. You did not answer those questions. Please do so now.

**a. Did you take any action in reaction to the court's finding that Alabama's expert witnesses lacked credibility?**

RESPONSE: *See* Response to 5.b.i. To the best of my recollection, the district court issued this order after the case was already over. The litigation was about a law that required abortion doctors to have admitting privileges at a local hospital. After the Supreme Court held Texas's admitting privileges law unconstitutional in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Attorney General and I applied that decision to Alabama's admitting privileges law, determined that there were no longer any good faith defenses to the law, withdrew the State's appeal defending the law agreeing to a permanent injunction against the law.

**b. Did you recommend that Dr. Anderson be barred from future work with Alabama?**

**i. If not, why not?**

RESPONSE: Decisions about which experts to hire are made on a case-by-case basis. I have no information regarding Dr. Anderson's eligibility to provide services to the State Alabama.

**c. Did you recommend that Mr. Rue be barred from future work with Alabama?**

**i. If not, why not?**

RESPONSE: Decisions about which experts to hire are made on a case-by-case basis. I have no information regarding Mr. Rue's eligibility to provide services to the State Alabama.

7. As Solicitor General, you defended Alabama's parental consent law. Alabama amended the law in 2014 to require the minor to go through a trial-like process to determine if she could qualify for a judicial bypass. The judicial bypass process, in turn, included the appointment of an advocate to represent "the interests of the unborn child." A district court ruled that the law was unconstitutional. (*Reproductive Health Services v. Marshall*, 268 F.Supp.3d 1261 (M.D. Ala. 2017)). In defending the law, you argued that the appointment of an advocate to represent "the interests of the unborn child" made the judicial bypass process more effective and that the advocate was "functionally no different from the court reporter, the bailiff, and the petitioner's state-provided lawyer." (Appellants' Brief, *Reproductive Health Services v. Marshall* (11<sup>th</sup> Cir. Oct. 31, 2007))

**Please explain how appointing an advocate to represent "the interests of the unborn child" would make the judicial bypass process more effective.**

RESPONSE: This question seeks a comment on a pending litigation matter, and it would be inappropriate for me to comment under the Canons of Judicial Conduct

8. The 2014 amendments to Alabama's parental consent law allowed a minor girl's parents to join the judicial bypass proceedings as a party. You defended this provision, arguing that "it seems common sense that a judge . . . would want to know why her parents withheld their consent." (Appellants' Brief, (11<sup>th</sup> Cir. Oct. 31, 2007)) The U.S. Supreme Court has upheld judicial bypass procedures, citing "the distressingly large number of cases in which family violence is a serious problem." The Court has noted that many minors "live in fear of violence by family members and are, in fact, victims of rape, incest, neglect and violence." (*Hodgson v. Minnesota*, 110 S.Ct. 2926, 2939 (1990) (Internal punctuation omitted))

**a. Did you conduct any research into the prevalence of rape, incest, and violence in relation to minors seeking abortions before making the argument that it was "common sense" to include a minor's parents?**

**b. Considering the "the distressingly large number of cases in which family violence is a serious problem," would you still make the argument that it is "common sense" to include a minor girl's parents as parties to a judicial bypass proceeding?**

RESPONSE: This question seeks a comment on a pending litigation matter, and it would be inappropriate for me to comment under the Canons of Judicial Conduct

9. During your hearing on December 4, you compared your role as Alabama Solicitor General to a college football player. You stated that “as a government lawyer, you’re like a player on the field. And it’s up to the coaches to call the plays, and you work for elected officials.” In questions for the record in relation to your previous nomination, you wrote, “I sometimes do have discretion as to which arguments to make in the course of litigation.” (Sen. Feinstein QFR No. 9.c.) For example, with respect to the amicus brief you worked on in *Obergefell v. Hodges*, you acknowledged, “I had a role in choosing and approving the arguments to make in the State’s brief.” (Feinstein QFR No. 9.d.)

**Did you choose any of the arguments made in the brief you submitted in *Planned Reproductive Health Services v. Marshall*?**

RESPONSE: To the best of my recollection, the arguments made in the brief on appeal were the same arguments that were raised by another lawyer in the trial court below.

10. In relation to your previous nomination, I asked you about your work on then-President Elect Trump’s Transition Team from December 2016 to January 2017. According to your Questionnaire, you consulted with “members of the Department of Justice ‘beachhead’ team about criminal law issues with which they should familiarize themselves before the transition.” In written questions for the record, I asked you which criminal law issues you consulted on. You responded that you discussed “various criminal law issues” with member of the beachhead team. Since you did not identify the specific criminal law issues, please do so now.

**a. Which specific criminal law issues did you discuss with members of the Justice Department “beachhead” team?**

RESPONSE: To the best of my recollection, we discussed Fourth Amendment and Sixth Amendment issues that were actively being litigated in state and federal courts of appeals. The point was to apprise members of the beachhead team about currently pending criminal-law issues that they might confront in the Department of Justice.

**b. If you are unwilling to name the specific criminal law issues on which you consulted, please provide an explanation for why you cannot disclose that information.**

RESPONSE: See Response to 10.a

11. During your hearing on December 4, you stated that the brief you worked on in *Shelby County v. Holder* “argued exclusively that Section 4 of the Voting Rights Act”—which provides the coverage formula for Section 5—“needed to be updated.” In reality, Alabama’s brief challenged Section 5 itself. The brief argued that “[t]he preclearance mechanism allows DOJ to discriminate between covered States.” The brief also asserted that “[p]reclearance inhibits States’ attempts to comply with federal law” and that “Section 5 undermines state sovereignty in unanticipated ways.”

**a. Why did you assert that the brief you worked on *Shelby County v. Holder* “argued exclusively” that the coverage formula in Section 4 of the Voting Rights Act needed to be updated when that is clearly not the case?**

RESPONSE: I was not the primary author of the brief. That was my understanding of the State’s legal position.

**b. Would the preclearance provision in Section 5 of the Voting Rights Act be lawful if Congress updated the coverage formula in Section 4?**

RESPONSE: The Supreme Court has held that “Congress may draft another formula [to determine which States are covered by Section 5 of the Voting Rights Act] based on current conditions . . . while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.” *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

**12. Have you ever communicated with, worked with, or coordinated with Stephen Miller—directly or indirectly—in relation to any matter? If yes, please provide details.**

RESPONSE: No.

**13. Have you ever communicated with, worked with, or coordinated with Jeff Sessions or his subordinates—directly or indirectly—in relation to any matter? If yes, please provide details.**

RESPONSE: When Attorney General Sessions was a United States Senator, his staff contacted the Alabama Attorney General’s Office for information about a letter that the Alabama Attorney General had sent to the National Indian Gaming Commission. I provided then-Senator Sessions’ staff with information about that letter.

When then-Senator Sessions was nominated to be United States Attorney General, people working on his nomination asked the Alabama Attorney General’s Office for information about litigation that took place in the 1990s while then-Senator Sessions was Attorney General of Alabama. Along with other employees of the Alabama Attorney General’s Office, I helped provide information in response to those requests.

During the time that Attorney General Sessions was the United States Attorney General, I recall corresponding with lawyers at the Department of Justice about cases in which Alabama was a party. Specifically, the United States Supreme Court called for the views of the United States Solicitor General in *CSX Transportation Inc. v. Alabama Department of Revenue*, 18-612, which led to communications between our two offices, although most of those communications occurred after Attorney General Sessions was no longer at the Department of Justice. Also during that time period, I met with lawyers for the Department of Justice about a case pending in the Eleventh Circuit in which an Alabama state prisoner sought to be transferred to federal custody. At some point while Attorney General Sessions was United States Attorney General, I also attended a meeting between the Alabama Attorney General and lawyers from the

Department of Justice about a lawsuit that the State of Alabama had filed against the United States Fish and Wildlife Services. I also attended two or three meetings between the Alabama Attorney General and local U.S. Attorneys that addressed a variety of topics, such as prison violence, drug distribution, and human trafficking.

I had frequent communications with lawyers at the Department of Justice in relation to my nomination to the district court while Attorney General Sessions was United States Attorney General.

14. As Alabama Solicitor General, you submitted an amicus brief in the Second Circuit arguing that New York's assault weapons ban was unconstitutional. The brief stated, "[s]tudies show that the federal 'assault weapons' ban had no measurable effect on gun violence." (Brief of Alabama et al. as Amici Curiae in Support of Plaintiffs-Appellants, *Nojay v. Cuomo*, 2014 WL 2039060; consolidated in *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015))

**Please identify the specific studies that you personally reviewed to reach the conclusion that the 1994 Assault Weapons Ban, which I introduced, "had no measurable effect on gun violence."**

RESPONSE: I have never been a member of the Second Circuit's bar. Another attorney drafted and filed the brief in *Nojay v. Cuomo* on behalf of approximately 20 States, although I did review and edit it in my role as a supervisor in the Alabama Attorney General's Office. Because I was not the primary drafter of the brief, I did not personally review any studies in relation to the filing of that brief.

15. Multiple studies have shown that there were fewer mass shootings while the Assault Weapons Ban was in effect and significantly more after it expired. One study found that gun massacres where six or more people were killed decreased by 37 percent for the decade the ban was active, then increased 183 percent during the decade that followed. (See Professor Louis Klarevas, University of Massachusetts, "Rampage Nation" (2016))

**In light of this more recent data, do you agree that the Assault Weapons Ban did, in fact, have a measurable effect on gun violence?**

RESPONSE: Please see response to Question 14. This is not an issue that I have personally studied or evaluated.

16. On your Questionnaire, you indicated that you have remained a member of the Federalist Society as a sitting judge. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." ("AO 116") AO 116 states that a judge should not "attend any event sponsored by a political organization," and it defines a "political organization" as "a group affiliated with a political party or candidate." It has been widely reported that the



Federalist Society played a key role in President Trump’s 2016 campaign by preparing a list of potential judicial nominees. Then candidate-Trump routinely cited the Federalist Society’s role in numerous campaign stump speeches. Leonard Leo—Co-Chairman and Executive Vice President of the Federalist Society—has cited the importance of this list of potential judicial nominees in helping President Trump win the 2016 election. Mr. Leo has said, “What people need to remember is the president came up with the idea of doing the list and wanted to make the Supreme Court a very big issue in the presidential campaign. . . . He took ownership of the list, and it helped propel him to victory and hold the Senate.” (Ashley Parker and Robert Costa, *All a Little Misdirection’: Inside Trump’s Sometimes Wavering Decision on Kavanaugh*, WASHINGTON POST (July 10, 2018))

**a. Given that the Federalist Society is clearly “affiliated with . . . a candidate,” will you commit to ending your membership in the organization?**

RESPONSE: Canon 4 of the Code of Conduct for United States Judges states that “[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.” The Commentary to Canon 4 states “[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law.” Canon 4 also states that “a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.” Moreover, Advisory Opinion No. 116 sets forth a non-exhaustive list of numerous factors that a judge should consider “on a case-by-case basis” in deciding whether it is proper to participate in an educational seminar or conference, such as “whether it engages in education, lobbying, or outreach to members of Congress, key congressional staffers, or policymakers in the executive branch” and “whether it is actively involved in litigation in the state or federal courts, including the filing of amicus briefs, participating in moot courts or boards to prepare candidates or advocates” and “whether it advocates for specific outcomes on legal or political issues.” I will continue to consider and apply these standards when evaluating appearances at conferences or similar extrajudicial conduct.

**b. As a sitting judge, why have you chosen to remain a member of an organization that will so clearly call your impartiality into question whenever litigants come before you on any politically sensitive matter?**

RESPONSE: See response to 16.a above.

17. In 2017, you wrote a letter in support of the confirmation of Brett Talley to be a district court judge in Alabama. It later came out that Mr. Talley had written a number of blog posts that

he had not disclosed to the committee. In one of these blog posts, Talley defended the “first KKK.” (Julia Manchester, *Trump Judicial Nominee Defended ‘First KKK’ in Online Arguments*, THE HILL (Nov. 16, 2017)) Mr. Talley also wrote that his solution to the Sandy Hook shooting massacre “would be to stop being a society of pansies and man up.” He elaborated, “[e]veryone should know that part of their social responsibility is to learn how to use a firearm effectively and carry one with them at all times.” (Zoe Tillman, *A Trump Judicial Nominee Appears To Have Written About Politics On A Sports Website And Didn’t Disclose It*, BUZZFEED (Nov. 13, 2017))

**Do you share Mr. Talley’s views on these points?**

RESPONSE: As I have said previously, I was not aware of Mr. Talley’s non-legal writings when I wrote a letter of support for his nomination. It is my understanding that the KKK is, and always has been, a terrorist organization. I do not carry a firearm.

18. 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?**

RESPONSE: Never.

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

RESPONSE: It is generally not proper for inferior court judges to criticize or question Supreme Court precedent. In limited circumstances, however, a circuit court judge may properly note potential conflicts or inconsistencies in a particular legal doctrine so as to invite clarification or explanation from the Supreme Court.

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

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

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

RESPONSE: The Supreme Court has announced some factors it may consider in determining whether to overturn its own precedent. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). But it has also made clear that it is the Supreme Court’s “prerogative alone to overrule one of its precedents.” *State Oil Co. v. Khan*, 522 U.S. 3 (1997). It would be

inappropriate for me as a lower court nominee to opine on when the Supreme Court should or should not overturn its own precedent.

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

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

RESPONSE: Yes. All Supreme Court decisions are superprecedent to lower courts

b. **Is it settled law?**

RESPONSE: Yes.

20. 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?**

RESPONSE: Yes.

21. 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?**

RESPONSE: It is generally not appropriate for a federal judge to provide personal opinions about particular Supreme Court decisions or dissents from those decisions. In my current role, I endeavor to faithfully apply all Supreme Court precedent and I will do the same if I am confirmed to the court of appeals.

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

RESPONSE: The Supreme Court in *Heller* stated that “the right secured by the Second Amendment is not unlimited,” adding, “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the

mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court “also recognize[d] another important limitation on the right to keep and carry arms,” namely, “that the sorts of weapons protected were those in common use at the time.” *Id.* at 627 (internal quotation marks omitted).

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

RESPONSE: The Supreme Court in *Heller* stated that “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.” *Heller*, 554 U.S. at 625.

22. 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?**

RESPONSE: The Supreme Court held that “the First Amendment protection extends to corporations.” *Citizen United v. Fed. Elections Comm’n*, 558 U.S. 310, 342 (2010). *Citizens United* is binding precedent that I must apply in my current role as a district judge and will apply if I am confirmed to be a judge on the court of appeals.

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

See response to Question 22(a).

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

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

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

RESPONSE: The relevant provision of the Fourteen Amendment provides “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” These provisions of the Fourteenth amendment restrict the power of states, localities, and the federal government, *see Bolling v. Sharpes*, 347 U.S. 497 (1954), from legislating in such a way that persons would be denied due process or the equal protection of the law. Like the Fourteenth Amendment, the First Amendment also restricts the power of the government to legislate in certain respects. It provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” In other words, the Constitution requires both that the government not deny a person the equal protection of the laws and that the government not prohibit a person’s free exercise of religion. Both of these constitutional amendments enshrine important constitutional values and reflect longstanding liberties that we enjoy in this country. If confirmed, I would faithfully apply the Constitution and all applicable Supreme Court precedent.

24. 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?

RESPONSE: The Supreme Court ruled that state laws prohibiting interracial marriage violate the Equal Protection Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See also the Response to Question 23.

25. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

RESPONSE: The Supreme Court ruled that state laws prohibiting interracial marriage violate Equal Protection Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See also the Response to Question 23.

26. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2003 (from 2003 to 2006 and from 2008 to present). You also indicated that you were the Montgomery Chapter Vice President from 2013 to 2019. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

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

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

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

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

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

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

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

RESPONSE: During the 13 months that my nomination was pending to the current position I hold as a district court judge, I frequently talked with friends and colleagues about that experience. I have also talked with lawyers at the Department of Justice and White House Counsel’s Office in relation to my nominations. Some of those people are members of the Federalist Society.

**e. What did your role as the Montgomery Chapter Vice President entail?**

RESPONSE: Mostly requesting continuing legal education (CLE) credit from the Alabama State Bar for lectures and debates at local chapter events. Occasionally, trying to find a speaker for an event.

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

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

RESPONSE: No.

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

RESPONSE: No.

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

RESPONSE: Administrative law is a large field, and I do not consider myself to be a specialist in that area of law. Accordingly, I do not have any generalized views about that area of the law.

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

RESPONSE: As a current federal judge and a judicial nominee, it is inappropriate for me to comment on this political issue, which could also come before the court in pending or impending litigation.

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

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

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

RESPONSE: No.

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

RESPONSE: I received these questions from the Office of Legal Policy. I reviewed some of the material cited in the questions, such as briefs and judicial opinions. I drafted responses to the questions, which I submitted to the Office of Legal Policy. The Office of Legal Policy made some formatting edits to the responses, which I reviewed and approved.

Senate Judiciary Committee  
“Nominations”  
Questions for the Record  
December 4, 2019  
Senator Amy Klobuchar

Questions for Andrew Brasher, Nominee to the Eleventh Circuit Court of Appeals

As Alabama’s Deputy Solicitor General, you were counsel of record on an amicus brief in *Arizona v. Inter Tribal Council of Arizona*, which defended an Arizona law requiring proof of citizenship to register to vote. The Supreme Court, in a 7-2 decision authored by Justice Scalia, struck down the Arizona law as a violation of the National Voter Registration Act.

- In light of your involvement in that case, what do you believe is the proper role of the judiciary in protecting citizens’ constitutional right to vote?
- Do you agree that not all voter ID laws have neutral justifications?

**Response:**

**Voting is a fundamental right protected by the United States Constitution, and it is the role of the federal courts to apply and enforce the United States Constitution and other federal laws, such as the National Voter Registration Act and the Voting Rights Act. The Supreme Court has held that, when confronted with a challenge to a voting law, “a court must identify and evaluate the interests put forward by the State as justifications for the burden [on voting] imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008). This process requires a court to “weigh the asserted injury to the right to vote against the ““precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).**

**Some courts have held that certain state photo ID laws lack a neutral justification. *E.g.*, *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016). The Supreme Court has recognized that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). “Subjects of proper inquiry in determining whether racially discriminatory intent existed” include: the racial “impact of the official action;” the “historical background of the decision;” the “specific sequence of events leading up” to the challenged law; departures from substantive and procedural norms; and “legislative or administrative history.” *Id.* at 266–68.**

You authored an amicus brief on behalf of Alabama in *Nojay, et al. v. Cuomo*, in which the Second Circuit considered a challenge to semi-automatic assault weapons bans passed by New York and Connecticut. The brief argued that the ban would have “little effect on gun violence



and public safety” and should be subject to strict scrutiny. The Second Circuit applied intermediate scrutiny and upheld portions of both bans. The Supreme Court declined to review the case.

- Is it your view that the majority opinion authored by Justice Scalia in *D.C. v. Heller* makes clear that “the right secured by the Second Amendment is not unlimited”—and that there are a number of firearm regulations that are permissible under the Constitution?
- Is it your view that all firearm regulations should be subject to strict scrutiny?

**Response:**

**Another attorney drafted and filed the brief in *Nojay v. Cuomo* on behalf of approximately 20 States, although I did review and edit it in my role as a supervisor in the Alabama Attorney General’s Office. I make this point of clarification because I have never been a member of the Second Circuit’s bar.**

**The law is clear that “the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court in *Heller* added that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626. The Court “also recognize[d] another important limitation on the right to keep and carry arms,” namely, “that the sorts of weapons protected were those in common use at the time.” *Id.* at 627 (internal quotation marks omitted).**

**It is my understanding that the level of scrutiny that should be applied to firearm regulations is actively being litigated. Accordingly, as a sitting federal judge, I cannot comment on that issue under Canon 3(A)(6) of the Code of Conduct for United States Judges.**

**Nomination of Andrew Lynn Brasher, to be United States Circuit Judge  
for the Eleventh Circuit  
Questions for the Record  
Submitted December 11, 2019**

**QUESTIONS FROM SENATOR COONS**

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

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

**RESPONSE: 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?

**RESPONSE: Yes. The Supreme Court has relied on treatises, common law sources, state constitutions, among other sources.**

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

**RESPONSE: If the right had been previously recognized by binding precedent from the Supreme Court or the Eleventh Circuit, then there would be no need for further inquiry. If there were not binding precedent, I would also consider out of circuit precedent.**

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

**RESPONSE: Yes, and 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*).

**RESPONSE: Yes.**

f. What other factors would you consider?

**RESPONSE: I would look to other relevant cases from the Supreme Court for guidance on other factors that should be considered. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).**

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

**RESPONSE: The Supreme Court has held that the Fourteenth Amendment applies to both race and gender. See *United States v. Virginia*, 518 U.S. 515 (1996).**

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

**RESPONSE: Please see Answer 2 above.**

- 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?

**RESPONSE: This appears to be an academic question with which I am not familiar. As a district court judge and as a judge on the court of appeals if I were confirmed, I would follow *United States v. Virginia*.**

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

**RESPONSE: Yes. The Supreme Court held that the Fourteenth Amendment requires same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).**

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

**RESPONSE: It is my understanding that this issue is presently being litigated. Because it is a matter pending before a court, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from answering.**

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

**RESPONSE: Yes. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).**

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

**RESPONSE: Yes. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).**

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?

**RESPONSE: Yes. See *Lawrence v. Texas*, 539 U.S. 558 (2003).**

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.

**RESPONSE: See responses above.**

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

a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

**RESPONSE: The Supreme Court has held that societal changes can be relevant to a court's analysis in numerous contexts. When the Supreme Court has directed lower courts “to consider evidence that sheds light on our changing understanding of society,” the lower courts should do so. If confirmed, I will follow the Supreme Court's holdings on this issue, including *Virginia* and *Obergefell*.**

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

**RESPONSE: Scientific evidence presented in the form of expert opinions is an important part of most trials. The role of the evidence varies depending on how it is used and the nature of the legal dispute at issue. As one example, the Supreme Court**

has generally indicated that district judges act in a “gatekeeping role” for this type of evidence when considering a relevant fact under Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (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.” During the hearing on your nomination, you testified that in determining whether a right is protected by substantive due process, a court should look at the history of the right, whether it is rooted in the common law, and whether it is necessary for the purposes of ordered liberty.

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

**RESPONSE:** The Supreme Court has clearly held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and that the Supreme Court has instructed 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, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018).

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

**RESPONSE:** Please see the response to Question 1.

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

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

**RESPONSE:** This is an academic question that I have not examined in great detail. However, after my 2018 hearing before this Committee, I read a law review article that asserts that *Brown*’s holding is consistent with the original meaning of the

**Equal Protection Clause 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 Dec. 6, 2019).

**RESPONSE: This is also an academic question with which I am not familiar. As a district judge, I am bound to apply the Supreme Court’s precedents, regardless of academic debates.**

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?

**RESPONSE: The Supreme Court has recognized the importance of the Constitution’s text, structure, and original understanding in interpreting a constitutional provision. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008). But, for a lower court judge such as myself, the Supreme Court’s prevailing view of the Constitution is always dispositive. I endeavor everyday to faithfully apply the Supreme Court’s precedents, and I will do the same if I am confirmed to the court of appeals.**

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

**RESPONSE: Please see my response to 6(c).**

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

**RESPONSE: Please see my response to 6(c).**

7. During the hearing on your nomination, I asked you to estimate the number of laws restricting reproductive rights that you have defended in your career that were ultimately held to be unconstitutional. However, you did not provide an estimate.

a. How many laws that restrict reproductive rights have you defended in your career?

b. How many of those laws were ultimately held to be unconstitutional?

**RESPONSE: As a supervisor at the Attorney General’s Office, my level of involvement varied from one litigated matter to another. I recall working on the**

following three cases that raised issues about the application of *Casey v. Planned Parenthood*, 505 U.S. 833 (1992); *Reproductive Health Services v. Baily*, 17-13561 (11th Cir. pending); *West Alabama Women's Center v. Williamson*, 900 F.3d 1310 (11th Cir. 2018); *Planned Parenthood v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014).

8. During the hearing on your nomination, I asked you to identify an Eleventh Circuit case that you consider to be an important voting rights decision. In response, you highlighted Judge Johnson's ruling in *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958). However, in that case, Judge Johnson actually dismissed a complaint that alleged that the Alabama legislature engaged in unconstitutional gerrymandering based on race. Judge Johnson's decision was ultimately reversed by the Supreme Court. Please explain why you consider Judge Johnson's ruling in this case to be an important voting rights decision.

**RESPONSE:** I recently attended a luncheon with one of Judge Johnson's former law clerks and several of his former judicial colleagues who discussed how *Gomillion* was one of his most significant cases. Although your written question focuses exclusively on Judge Johnson's 1958 opinion, the case was remanded from the United States Supreme Court for further proceedings in light of that Court's 1960 opinion.

In 1961, Judge Johnson ruled that the City of Tuskegee's boundaries would have to be redrawn, which I believe was the first time a federal judge had declared state-apportioned boundaries to be an unconstitutional gerrymander and set an important precedent for future appointment, zoning, and redistricting cases. One biography of Judge Johnson explains as follows:

Johnson's most significant civil rights case in 1958 involved Act No. 140 of the 1957 Alabama legislature, which had been introduced by Macon County Senator Sam Engelhardt, Jr., the executive secretary of the Alabama Association of White Citizens Councils. The case would become known as *Gomillion v. Lightfoot* and serve as the precursor of the Warren Court's monumental reapportionment decisions of the 1960s . . .

With [precedent from the Supreme Court] staring him in the face, Johnson ruled that his court lacked 'authority or jurisdiction' to declare the act void. . . .

But Johnson starkly noted the removal of black voters and acknowledged that the new municipality of Tuskegee 'resembles a "sea dragon."' The facts clearly showed the act's discriminatory effect in preventing blacks from voting in municipal elections. His opinion seemed to invite higher courts to consider whether the Fifteenth Amendment claim, which he did not address in his opinion, would grant him authority to void the act as a violation of the Constitution. . . .

The Supreme Court sent the case back to Judge Johnson, who, early in 1961,

found the allegations factually correct and decreed the act void, thus returning Tuskegee to its original boundaries. . . .

As a precursor of the reapportionment cases, *Gomillion v. Lightfoot* would become a pivotal point in the history of constitutional law.

**Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson Jr and the South's Fight over Civil Rights, 145-149 (1993).***

9. Do you believe that in order for a plaintiff to prevail on an allegation of an illegal racial gerrymander, the plaintiff should have to propose an alternate plan that achieves the legislature's political ends with greater racial balance? If yes, please explain why a plaintiff's Fourteenth Amendment claim should be contingent on that plaintiff's ability to propose the remedy to fix an unconstitutional government action.

**RESPONSE: No. The Supreme Court rejected this position in *Cooper v. Harris*, 137 S. Ct. 1455 (2017).**

10. In *North Carolina State Conference of the NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016), the Fourth Circuit struck down changes to North Carolina's voting laws that the court held "target[ed] African Americans with almost surgical precision."

a. Do you believe that facially neutral voting restrictions can be unlawful?

**RESPONSE: Yes. The Supreme Court has held that, when confronted with a challenge to a facially neutral voting law, "a court must identify and evaluate the interests put forward by the State as justifications for the burden [on voting] imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008). This process requires a court to "weigh the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Moreover, even a facially neutral voting restriction may be enacted for racist reasons.**

b. Do you believe that facially neutral voting restrictions can have a disproportionate impact on minorities?

**RESPONSE: Yes, that is possible.**

c. Do you believe that laws passed with the stated purpose of protecting "voter integrity" can suppress the votes of minorities?

**RESPONSE: Yes, that is possible.**

11. During the hearing on your nomination, you testified that Alabama's brief in *Shelby*



*County v. Holder* “exclusively” argued that the coverage formula in Section 4 of the Voting Rights Act needed to be updated. However, in reality, that brief extensively argued that the 25-year reauthorization of Section 5 preclearance enacted by Congress in 2006 was unconstitutional. The Supreme Court ultimately did not strike down Section 5, but the Court did hold that the coverage formula in Section 4 was unconstitutional. The Court recognized Congress’s power to “draft another [coverage] formula based on current conditions.” *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). Do you agree that Congress could craft a constitutionally permissible coverage formula based on current conditions?

**RESPONSE:** The Supreme Court has held that “Congress may draft another formula [to determine which States are covered by Section 5 of the Voting Rights Act] based on current conditions . . . while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.” *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

12. During the hearing on your nomination, you testified that you were not involved in retaining Vincent Rue as a litigation consultant in a case regarding Alabama’s admitting privileges law. You stated that your role in that case was to conduct depositions and fact discovery, brief and argue summary judgment, and give a closing argument. Did your closing argument rely on, directly or indirectly, the expert report submitted by Dr. Anderson and prepared by Vincent Rue in that case?

**RESPONSE:** The closing arguments were approximately five hours long. They focused on the most significant legal issues presented by the case and specific legal questions that the district judge had identified in writing beforehand. Each side would take a turn arguing a legal question, then everyone would move to the next question, and so on. These arguments were several years ago and were many hours long. Accordingly, I do not recall with any confidence all of the issues that were addressed. But, because of the nature of the arguments, I would be surprised if Dr. Anderson’s testimony came up.

13. Alabama has filed a lawsuit arguing that it is unconstitutional to count non-citizens in the census. You acknowledged in your written answers that you have discussed this case with the Alabama Attorney General’s office. During the hearing on your nomination, you further testified that you reviewed the complaint in this case before it was filed.

a. What was the extent of your review of the complaint? Did you provide any comments or suggest any revisions?

**RESPONSE:** To the best of my recollection, I reviewed the complaint, suggested edits to the complaint in a tracked-changes document, and discussed those edits with the author of the complaint.

b. Are you aware of any court that has accepted the argument that it is unconstitutional to count non-citizens in the census?

**RESPONSE:** No, I have not researched this issue.

14. Recently, the Southern Poverty Law Center uncovered hundreds of emails that White House advisor Stephen Miller wrote while he was an aide to then-Alabama Senator Jeff Sessions. These emails advanced white nationalist and anti-immigrant conspiracy theories. *See* <https://www.splcenter.org/stephen-miller-breitbart-emails> (last visited Dec. 10, 2019).

- a. Do you know Stephen Miller? If so, please explain the nature of your relationship.
- b. Have you worked with Stephen Miller on any matters during his tenure as a White House advisor? If so, please provide a list of any such matters.
- c. Did you work with Stephen Miller on any matters during his tenure as a staffer for then-Senator Sessions? If so, please provide a list of any such matters.
- d. In your view, do the emails that were released reflect views that are acceptable for a White House advisor to hold?

**RESPONSE: I do not know Stephen Miller and have never met or worked with him. I also do not know anything about the emails that are the subject of this question.**

**Questions for Andrew Brasher  
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

**a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

RESPONSE: No.

**b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

RESPONSE: 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?**

RESPONSE: Yes.

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

RESPONSE: Yes. Implicit bias training is part of the course for new federal judges at the Federal Judicial Center. I attended that course in June of 2019.

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

RESPONSE: See Response to 2.b. I would like to take another course on the issue, especially if it is available through the FJC or a similar judicial education organization.

3. As Alabama's Solicitor General, you defended a state law requiring doctors who perform abortions to have admitting privileges at local hospitals. This law was struck down as unconstitutional. When you were nominated last year to become a district court judge, I and other Senators asked you about a controversial consultant that you and your litigation team used to defend this law. But you failed to answer our questions. The consultant, Vincent Rue, was so controversial, the district court judge wrote a separate opinion that was critical of him and two witnesses you presented as experts. Yet you defended the use of this consultant.

**a. When I previously asked you whether you stand by your defense of Mr. Rue and the key role he played in your litigation, you ignored my question and simply stated that Alabama's position is set for in the court pleadings. Do you have any**

**regrets for using a consultant that has been repeatedly found not credible by several courts, even as far back as 1990?**

RESPONSE: I have been fortunate to have worked on many significant and consequential cases in my career as a government lawyer. As I have explained previously, my role in this case included fact discovery, TRO and summary judgment briefing, and making evidentiary and legal arguments at trial. I do not regret my public service as a government lawyer. Instead, I believe this significant litigation experience is the reason why the ABA rated me unanimously well-qualified to be a judge on the court of appeals.

**b. When did you become aware that Mr. Rue promoted the long-discredited claim that “post-abortion syndrome” exists? A federal district court already recognized in 1990 that there were “no scientific studies which support the existence of a ‘post abortion syndrome’ as suggested by Dr. Rue.” [See *Planned Parenthood of Se. Pennsylvania v. Casey*, 744 F. Supp. 1323, 1333 (E.D. Pa. 1990)]**

RESPONSE: I do not recall when I became aware of the district court’s 1990 ruling.

**c. When did you become aware that Mr. Rue has made baseless claims such as “[a]bortion increases bitterness toward men” and the “stress from previous abortions can delay preparation for subsequent childbearing and retard mother child bond formation”?**

RESPONSE: I do not recall when I became aware of the district court’s 1990 ruling.

4. At the hearing Senator Blumenthal asked you whether you believe the theory that “post-abortion syndrome” is a mental illness resulting from abortions. You failed to answer his question and referred him to your prior responses to questions for the record from Senator Feinstein, which are actually not responsive to this question. When he asked you this question again, you stated you were unfamiliar with that comment.

**a. Please answer the question with a yes or no response: Do you believe the theory that “post-abortion syndrome” is a mental illness resulting from abortions is a credible claim?**

RESPONSE: With respect, these comments were apparently made by someone else in litigation in Pennsylvania that took place thirty years ago. I am not aware of any basis to dispute or contest the Pennsylvania district court’s 1990 ruling about these issues. This was not an issue that has been raised or a position that has been asserted in any litigation in which I have been a lawyer, and I have never written or spoken about it. The Supreme Court has held that a woman has the right to decide to have an abortion and that the government cannot impose an undue burden on that right. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992). In my current role as a district court judge and as a judge on the court of appeals if I am confirmed, I will fully, fairly, and impartially apply those precedents.

**b. Please answer the question with a yes or no response: Do you believe the theory that “[a]bortion increases bitterness toward men” is a credible claim?**

RESPONSE: See Response to 4.a.

5. In defending the Alabama law requiring doctors who perform abortions to have admitting privileges at local hospitals, you used witnesses you presented as experts who were sharply criticized by the district court judge – James Anderson and John Thorp. The court found them not to be credible. In fact, the court observed that “Thorp displayed a disturbing apathy toward the accuracy of his testimony” and he “seemed to be driven more by a bias against abortion and a desire to inflate complication rates than by a true desire to reach an accurate estimate of the dangerousness of abortion procedures.”

**a. Did you raise any concerns with using James Anderson and John Thorp as expert witnesses during your defense of the admitting privileges law?**

RESPONSE: With respect, internal communications, discussions, and litigation strategies are privileged. The Alabama Rules of Professional Conduct require that an attorney “not reveal information relating to representation of a client unless the client consents after consultation.” Ala. R. Prof'l Conduct 1.6(a). Moreover, litigation strategies and other similar decisions made by counsel in the course of representation (including the decision to retain experts or similar persons, and internal deliberation by and amongst counsel regarding proposed courses of action and the merits of claims) are generally viewed as confidential. As a consequence, it would be inappropriate for me, particularly to advance my own interests, to reveal client confidences or provide insight into the deliberations made by counsel representing the State of Alabama in this or any other litigation. *Cf.* Ala. R. Prof'l Conduct 1.8(b).

**b. Do you agree with Judge Myron Thompson's findings that James Anderson and John Thorp lacked credibility as expert witnesses or is it still your view that Mr. Anderson and Mr. Thorp were appropriate expert witnesses?**

RESPONSE: The district court addressed this issue in an omnibus opinion that ruled on various evidentiary issues that were raised and litigated over the course of a 10-day bench trial. *See Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014). The district court expressly found some of the state's witnesses to be credible. *Id.* at 1389 (Hayes), 1391 (Duggar), 1384 (Keyes), 1395 (Williamson). The district court also found some state witnesses not to be credible. Because the district judge was the fact-finder in that case, it was within the court's purview to make credibility determinations based on contested testimony. The litigation was about a law that required abortion doctors to have admitting privileges at a local hospital. After the Supreme Court held Texas's admitting privileges law unconstitutional in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Attorney General and I applied that decision to Alabama's admitting privileges law, determined that there were no longer any

good faith defenses to the law, withdrew the State's appeal defending the law agreeing to a permanent injunction against the law.

6. Alabama requires minors to get parental consent before having an abortion but allows minors to obtain a judicial bypass to waive the parental consent requirement through a court, if it is in the best interests of the minor or she is mature enough to make the decision herself. As Alabama's Solicitor General, you defended a law that imposed onerous restrictions on minors seeking to qualify for a judicial bypass. In defending one of the new restrictions, which allowed the minor's parents to join as parties to the bypass proceedings, you claimed that parents have a "fundamental liberty interest in the 'care, custody, and control of their children'" and that a bypass judge "would want to know why her parents withheld their consent."

**a. Do you recognize that if a minor is a victim of family violence, such as rape, incest, neglect or abuse, and her parents are allowed to join the bypass proceeding as parties, this could subject the minor to serious harm?**

RESPONSE: As this question notes, these issues are actively being litigated and I am precluded by the Canons of Judicial Ethics from opining on issues in active litigation.

**b. In your view, what purpose does a judicial bypass procedure serve if the parents are allowed to participate in the process in furtherance of their fundamental interest in having "control" of their child?**

RESPONSE: As this question notes, these issues are actively being litigated and I am precluded by the Canons of Judicial Ethics from opining on issues in active litigation.

7. The Supreme Court's decision in *Shelby County v. Holder*, which gutted Section 5 of the Voting Rights Act, opened the floodgates to state laws restricting voting, particularly that of minorities. In fact, after *Shelby County*, Alabama began enforcing a voter ID law that had previously been barred under Section 5's preclearance regime. You filed an amicus brief on behalf of Alabama in *Shelby County* opposing preclearance. One of the arguments you made was that the preclearance process allowed the Justice Department to treat covered states differently with respect to the same voting laws.

**a. Is it your view that, if two states had the same voting law restricting early voting, but one was intended to target African-American voters with surgical precision to make it more difficult for them to vote, these laws should not warrant different treatment under Section 5's preclearance regime?**

RESPONSE: If a law is enacted with a racist purpose and effect, it is unconstitutional. If a voting law is enacted with that purpose and effect, it violates both the Constitution and Section Two of the Voting Rights Act.

**b. Voting laws that appear neutral on their face but are intended to discriminate against minority voters are difficult to prove in court without any smoking gun evidence, which is rare. In your view, how should minority voters be**

**protected from such discriminatory voting laws if you oppose the preclearance regime?**

RESPONSE: The right to vote is a fundamental right that is protected by the United States Constitution, many state constitutions, and many state and federal statutes. It is the role of the federal courts to apply and enforce the United States Constitution and other federal laws, such as the National Voter Registration Act and the Voting Rights Act. The Supreme Court has held that, when confronted with a constitutional challenge to a facial neutral voting law, “a court must identify and evaluate the interests put forward by the State as justifications for the burden [on voting] imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008). This process requires a court to “weigh the asserted injury to the right to vote against the “‘precise interests put forward by the State as justifications for the burden imposed by its rule.’” *Id.* at 190 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Moreover, the Supreme Court has recognized that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). “Subjects of proper inquiry in determining whether racially discriminatory intent existed” include: the racial “impact of the official action;” the “historical background of the decision;” the “specific sequence of events leading up” to the challenged law; departures from substantive and procedural norms; and “legislative or administrative history.” *Id.* at 266-68.

8. In addition to your involvement in *Shelby County v. Holder*, you have participated in other significant voting cases. You even filed an amicus brief on behalf of Alabama to defend an Arizona law requiring documentary proof of citizenship in order to register to vote – a law that the Supreme Court struck down.

**a. Do you believe there is a widespread problem of noncitizens registering to vote?**

RESPONSE: This brief was filed on behalf of my client, the State of Alabama, which (as noted in the brief) had a law that was materially identical to the Arizona law at issue in that case. The brief did not argue that there was a widespread problem of noncitizens registering to vote. Nonetheless, the Rules of Professional Conduct expressly provide that a “lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Ala. R. Prof. Conduct 1.2. In addition to defending the law mentioned above, I have also defended the State’s campaign finance laws, advanced the State’s ability to collect sales tax from large corporations and internet retailers, and prosecuted the Republican Speaker of the House and former Executive Director of the Alabama Republican Party. Moreover, when I was in private practice, I was regularly appointed by federal judges to defend indigent criminal defendants in trial and appellate litigation. In all these cases, the positions that I have advocated in litigation were those of my clients, as opposed to my personal positions.

**b. If so, what evidence do you have to support that belief?**

RESPONSE: See response to question 8.b

**c. In your view, when a law makes it harder for minorities to vote, but there is no evidence showing the existence of the problem the law is purportedly fixing, does this create an inference that the law *may* be discriminatory?**

RESPONSE: This would be part of the evidence that a court should consider in applying Supreme Court caselaw. The Supreme Court has recognized that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). “Subjects of proper inquiry in determining whether racially discriminatory intent existed” include: the racial “impact of the official action;” the “historical background of the decision;” the “specific sequence of events leading up” to the challenged law; departures from substantive and procedural norms; and “legislative or administrative history.” *Id.* at 266-68.

9. The 2016 election was the first presidential election in 50 years without the full protections of the Voting Rights Act. Fourteen states, including Alabama, had new voting restrictions in place for the first time in a presidential election.

**Is it your view that it is merely a coincidence that so many states had new voting restrictions in place after the Voting Rights Act was gutted?**

RESPONSE: I have not researched this issue, and the question does not provide enough information to evaluate it. For example, after the 2006 reauthorization of Section Five of the Voting Rights Act, the law required preclearance of statewide voting changes in nine states. I do not know what how many of the fourteen states referenced in the question were previously covered or what those new laws required.



**Nomination of Andrew Lynn Brasher**  
**United States Court of Appeals for the Eleventh Circuit**  
**Questions for the Record**  
**Submitted December 11, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. Senator Jones has not returned a blue slip on your nomination to the Eleventh Circuit. If you're confirmed, you would be part of a major break from the longstanding Senate tradition—prior to the Trump Administration—of respect for the views of home-state Senators through the blue slip process.

a. Do you think the Trump Administration meaningfully consulted with Senator Jones about your nomination?

b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over Senator Jones's objection to your nomination?

**RESPONSE: I was honored that Senator Jones returned his blue slip for my previous nomination to the district court. I have no information about the Administration's consultation with Senator Jones or about his position on my current nomination. As I said during the hearing, I respect and appreciate Senator Jones' service to the people of our State.**

2. In its 2013 decision in *Shelby County v. Holder*, the Supreme Court gutted Section 5 of the Voting Rights Act.<sup>1</sup> As you know, the case originated in Alabama. As the state's Deputy Solicitor General at the time, you were on an amicus brief for Alabama arguing that that "Congress violated the Constitution" when it reauthorized the Voting Rights Act, and supporting the decision the Court ultimately made on Section 5.<sup>2</sup> One of the brief's main arguments was that "[t]he Alabama of 2013 is not the Alabama of 1965—or of 1970, 1975, or 1982."<sup>3</sup>

a. In her dissent in *Shelby County*, Justice Ginsburg wrote: "Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. In other words, even while subject to the restraining effect of § 5, Alabama was found to have 'deni[ed] or abridge[d]' voting rights 'on account of race or color' more frequently than nearly all other States in the Union."<sup>4</sup> Do you dispute any part of Justice Ginsburg's account of the record of proven voting rights violations in

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<sup>1</sup> 570 U.S. 529 (2013).

<sup>2</sup> Brief of the State of Alabama as Amicus Curiae Supporting Petitioner, *Shelby County*, 570 U.S. 529 (No. 12-96), 2013 WL 98691, at \*5.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> 570 U.S. at 582 (Ginsburg, J., dissenting) (citation omitted) (quoting 42 U.S.C. § 1973(a)).

Alabama during this period?

**RESPONSE:** As you note in the question, I was not the author of the State of Alabama’s brief in *Shelby County v. Holder*, although I did review and edit the brief under the direction of Alabama’s then-solicitor general. The brief makes the following points that are responsive to your questions. “In every year since 1990, African-Americans had registered and voted in larger percentages in Alabama than in States outside the South.” “Alabama’s black voters out-participated white Alabamians in both the 2004 and 2008 general elections.” “[I]n the 10 years preceding the 2006 reauthorization, DOJ had lodged objections to only 0.06% of preclearance submissions from all levels of government in Alabama: state, county, and municipal.” “African Americans hold seats in the legislature at percentages that are roughly commensurate with Alabama’s 26% African-American population.” “[A]s of 2003, African Americans constituted 39% of Alabama’s government workforce.” I have no basis to dispute the factual statements in Justice Ginsberg’s dissent in *Shelby County v. Holder*.

b. Justice Ginsburg also wrote in her dissent: “Volumes of evidence supported Congress’ determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>5</sup> Do you agree with that umbrella analogy as applied to the Voting Rights Act?

**RESPONSE:** The Supreme Court rejected Justice Ginsberg’s position and held that “Congress may draft another formula [to determine which States are covered by Section 5 of the Voting Rights Act] based on current conditions . . . while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.” *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

c. In 2002, you wrote an opinion piece in your college newspaper in which you stated, “Birmingham is still a segregated city and the United States is still a segregated nation.”<sup>6</sup> Do you stand by that statement? If so, how do you reconcile it with the argument in this brief, concerning Congress’s reauthorization of the Voting Rights Act in 2006, that “[t]he Alabama of 2013 is not the Alabama of 1965—or of 1970, 1975, or 1982”?

**RESPONSE:** I continue to believe that racial inequality and racial segregation are serious problems in my state and this country. As a sitting federal judge, it is my role and privilege to enforce the Equal Protection Clause of the United States Constitution and important civil rights legislation like the Fair Housing Act and Title VII of the Civil Rights Act. The State’s brief in *Shelby County v. Holder*

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<sup>5</sup> *Id.* at 590.

<sup>6</sup> Andrew Brasher, *Birmingham Pledge Means Well, but Empty, Without Firm Commitment*, SAMFORD CRIMSON, at 4 (Sept. 25, 2002), in SJQ Attachments to Question 12(a), at 1262.

**expressly recognized that “Alabama is not suggesting that it has somehow eliminated all of the race-relations issues within its borders. The State is no doubt still grappling with these issues in 2013.”**

3. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>7</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>8</sup>

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

**RESPONSE: I have not studied whether there is widespread voter fraud.**

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

**RESPONSE: It is my understanding that the effect of voter ID laws on poor and minority voters is actively being litigated. Accordingly, Canon 3(A)(6) of the Code of Conduct for United States Judges precludes me from commenting.**

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

**RESPONSE: It is my understanding that the effect of voter ID laws is actively being litigated. Accordingly, Canon 3(A)(6) of the Code of Conduct for United States Judges precludes me from commenting.**

4. 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?

**RESPONSE: Yes. Judges have a limited role in our system of government, and the principle of judicial restraint recognizes that Congress, the President, and state officers, not the federal courts, make policy decisions and enact laws. Based on this principle, the Supreme Court has held, for example, that courts should “avoid reaching constitutional questions in advance of the necessity of deciding them,” *Camreta v. Greene*, 563 U.S. 692, 705 (2011), and should consider non-constitutional arguments challenging a statute before reaching constitutional arguments, *Jean v. Nelson*, 472 U.S. 846, 854 (1985). The Supreme**

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<sup>7</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

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

Court has also recognized the “political question doctrine,” which precludes judicial resolution of an issue “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

a. As noted above, the Supreme Court’s decision in *Shelby County* gutted Section 5 of the Voting Rights Act. Was that decision guided by the principle of judicial restraint?

**RESPONSE:** As I explained at my hearing, it is generally inappropriate for a lower court judge to opine about whether any particular Supreme Court precedent was rightly decided. *Shelby County* is binding precedent in my current position as a United States District Court Judge and will remain binding precedent if I am confirmed to the court of appeals.

b. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.<sup>9</sup> Was that decision guided by the principle of judicial restraint?

**RESPONSE:** As I explained at my hearing, it is generally inappropriate for a lower court judge to opine about whether any particular Supreme Court precedent was rightly decided. *Heller* is binding precedent in my current position as a United States District Court Judge and will remain binding precedent if I am confirmed to the court of appeals.

c. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>10</sup> Was that decision guided by the principle of judicial restraint?

**RESPONSE:** As I explained at my hearing, it is generally inappropriate for a lower court judge to opine about whether any particular Supreme Court precedent was rightly decided. *Citizens United* is binding precedent in my current position as a United States District Court Judge and will remain binding precedent if I am confirmed to the court of appeals.

5. In 2015, when you were Alabama’s Solicitor General, you were the counsel of record on an amicus brief to the Supreme Court in *Obergefell v. Hodges*, the landmark case in which the Court would soon hold that the Constitution guarantees same-sex couples the right to marry.<sup>11</sup> Your brief opposed marriage equality, and it made a number of arguments about the capacity of same-sex couples to raise children.

a. Your brief argued, for example: “Sexual relationships between men and women—

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<sup>9</sup> 554 U.S. 570 (2008).

<sup>10</sup> 558 U.S. 310 (2010).

<sup>11</sup> 135 S. Ct. 2584 (2015).

and only such relationships—have the ability to provide children with both their biological mother and their biological father in a stable family unit. By contrast, sexual relationships between individuals of the same sex do not. Children raised in those settings are *necessarily* disconnected from one or both of their biological parents. Thus, as a matter of irreducible biology, same-sex couples cannot advance the States’ legitimate interest to encourage childrearing by both biological parents.”<sup>12</sup> What sources did you rely on for these claims about the parenting benefits that “only” “[s]exual relationships between men and women” can provide, “as a matter of irreducible biology”?

**RESPONSE:** The State’s brief argued that the challenged law satisfied the lowest form of constitutional scrutiny, the rational-basis test. This was also the litigating position of the United States Department of Justice in defending the federal Defense of Marriage Act under President Obama. *See, e.g.,* Brief of the United States Department of Health and Human Services, *Massachusetts v. United States Department of Health and Human Services, et al.*, No. 10-2207, (1st Cir. Jan. 13, 2011). The Supreme Court has explained that, under rational basis review, “[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. [T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). The Eleventh Circuit Court of Appeals has similarly explained that “[a] law need not be sensible to pass rational basis review” and “survives rational basis review even if it seems unwise or if the rationale for it seems tenuous.” *Cook v. Bennett*, 792 F.3d 1294, 1300 (11th Cir. 2015) (internal quotation marked and citation omitted). The State’s arguments, therefore, did not turn on empirical evidence, and no empirical evidence was offered in support. The State’s brief did not meaningfully address the fundamental rights analysis upon which the Supreme Court ultimately ruled in *Obergefell*. As I told the Alabama Association of Probate Judges when I was invited to speak about *Obergefell* shortly after the decision was issued, *Obergefell* is the “law of the land.” *Obergefell* is binding precedent in my current position as a United States District Court Judge and will remain binding precedent if I am confirmed to the court of appeals. I will faithfully apply and follow that decision just like any other decision of the United States Supreme Court.

b. The brief also claimed: “Every child ‘has an inborn nature that joins together the natures of two adults,’ and the child’s biological parents are uniquely positioned to show the child ‘how to recognize and reconcile . . . the[se] qualities within [her]self.’”<sup>13</sup> What was the empirical basis for this statement?

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<sup>12</sup> Brief of Amicus Curiae State of Alabama in Support of Respondents, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1534344, at \*8.

<sup>13</sup> *Id.* at \*6 (quoting J. David Velleman, *Family History*, 34 PHILOSOPHICAL PAPERS 357, 370-71 (Nov. 2005)) (alterations in original).

**RESPONSE: Please see Response to Question 5.a above. The State’s arguments did not turn on empirical evidence, and no empirical evidence was offered in support.**

c. Are you aware of the “overwhelming” scientific consensus—supported by many studies conducted over many years, and highlighted in other *Obergefell* briefs—that there are no significant differences in outcomes for children raised by parents of the same sex versus parents of the opposite sex?<sup>14</sup>

**RESPONSE: Please see Response to Question 5.a above. The State’s arguments did not turn on empirical evidence, and no empirical evidence was offered in support.**

d. In drafting this brief, how did you go about evaluating empirical claims in studies about the parenting abilities of same-sex couples?

**RESPONSE: Please see Response to Question 5.a above. The State’s arguments did not turn on empirical evidence, and no empirical evidence was offered in support.**

e. Do you stand by the claims in your brief about same-sex couples and their children?

**RESPONSE: This brief was filed on behalf of my client, the State of Alabama, which (as noted in the brief) had a law that was materially identical to the law at issue in that case. Approximately 80% of the electorate voted to adopt that law, the Alabama Supreme Court had issued an opinion finding it to be constitutional, and it was my job as a government lawyer to make arguments in support of those decisions. The Rules of Professional Conduct expressly provide that a “lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Ala. R. Prof. Conduct 1.2. In addition to defending the law mentioned above, I also defended the State’s campaign finance laws, advanced the State’s ability to collect sales tax from large corporations and internet retailers, and prosecuted the Republican Speaker of the House and former Executive Director of the Alabama Republican Party. Moreover, when I was in private practice, I was regularly appointed by federal judges to defend indigent criminal defendants in trial and appellate litigation. In all these cases, the positions that I advocated in litigation were those of my clients, as opposed to my personal positions.**

6. In 2014, you spoke at a rally in front of the Alabama State House. A local newspaper recounted the event and your remarks as follows:

Over 130 Pro-Life activists rallied in front of the Alabama State House on Tuesday with numerous state legislators making appearances. . . . Andrew Brasher with the Alabama Attorney General’s office addressed the crowd. “I am

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<sup>14</sup> See, e.g., Shelby Sebens, *No Difference in Kids with Same-Sex, Opposite-Sex Parents: Study*, REUTERS (June 23, 2015), <https://www.reuters.com/article/us-usa-gaymarriage-study/no-difference-in-kids-with-same-sex-opposite-sex-parents-study-idUSKBN0P32AM20150623>.

a lawyer and I work for the attorney general.” Brasher said that he spent the last 8 months in court working to defend Alabama Pro-Life legislation. Brasher said that Attorneys for the ACLU and Planned Parenthood are working in their offices in New York to find ways to attack Pro-Life legislation in Alabama. Brasher said that Alabama Attorney General Luther Strange will be on the right side of that fight. “Children are a gift from God.” “The ACLU and Planned Parenthood want a fight and we will give them one.”<sup>15</sup>

If you are confirmed to the Eleventh Circuit, why should groups such as the ACLU or Planned Parenthood arguing their case before you expect to have a fair and impartial judge, in light of your statement at this rally that “[t]he ACLU and Planned Parenthood want a fight and we will give them one”?

**RESPONSE: This account was reported on a blog, not a newspaper. This statement was not made in my personal capacity. Instead, I was clear that I was speaking in my official capacity as an advocate in the context of specific litigation on behalf of the Attorney General who was being sued as a defendant in that litigation. I take very seriously oaths, ethics, and standards of professional conduct. I believe that is why I was appointed to serve on the Alabama State Bar’s Character and Fitness Committee and the Alabama Legislature’s Code of Ethics Reform and Clarification Commission. When I was an advocate, I strongly defended and vigorously advanced my client’s interests as required by the Rules of Professional Conduct. As a judge, I vigorously comply with the oath of office to “administer justice without respect to persons, and do equal right to the poor and to the rich,” 28 U.S.C. § 453, and will continue do so if I am confirmed to the court of appeals.**

7. In 2015, you wrote a post for SCOTUSblog on the Supreme Court’s decision in *Glossip v. Gross*.<sup>16</sup> In that case, Justice Breyer wrote a dissent identifying “three fundamental constitutional defects” in the administration of the death penalty: “(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.”<sup>17</sup> In your post, you wrote: “I disagree with almost everything Justice Breyer says in his dissent.”<sup>18</sup>

a. Do you dispute any of the empirical studies cited in Justice Breyer’s dissent concerning the serious unreliability, arbitrariness in application, unconscionably long delays, or geographic isolation in the use of the death penalty? If not, what exactly did you “disagree with”?

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<sup>15</sup> Brandon Moseley, *Lawmakers Addresses Pro-Life Rally*, ALA. POL. REP. (Feb. 26, 2014), <http://www.alreporter.com/2014/02/26/lawmakers-addresses-pro-life-rally>.

<sup>16</sup> 135 S. Ct. 2726 (2015).

<sup>17</sup> *Id.* at 2755-56 (Breyer, J., dissenting).

<sup>18</sup> Andrew Brasher, *The Death Penalty Lives to Fight Another Day*, SCOTUSBLOG (June 29, 2015), <http://www.scotusblog.com/2015/06/symposium-the-death-penalty-lives-to-fight-another-day>.

**RESPONSE: I do not dispute the empirical studies cited in Justice Breyer’s dissenting opinion. When confronting a constitutional question, a court must “examine[] the Constitution’s text and structure, as well as precedent and history bearing on the question.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015). Respectfully, Justice Breyer’s opinion in *Glossip* does not meaningfully address the text, structure, history, or the original understanding of any provision of the Constitution. In fact, as noted in Justice Thomas’s separate opinion in *Glossip*, certain of Justice Breyer’s concerns are inconsistent with express textual commitments in the Constitution. Nonetheless, as I wrote in the article you are quoting, “I think [Justice Breyer’s] broader point is well taken.”**

b. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of all executions since 1976 and 55 percent of those currently awaiting the death penalty.<sup>19</sup> Do those statistics alarm you?

**RESPONSE: Any racial disparity in the criminal justice system is concerning, whether the disparity concerns the death penalty, life-without-parole sentences, or sentences for a term of years.**

c. Is it cruel and unusual to apply the death penalty disproportionately against people of color?

**RESPONSE: It is unconstitutional for a judge or jury to impose the death penalty or any other criminal sentence because of a person’s race. It is my understanding that the question whether a statistical racial disparity in the application of the death penalty renders a death sentence unconstitutional is presently pending in litigation, and it would be inappropriate for me to comment on that pending litigation under Canon 3(A)(6) of the Code of Conduct for United States Judges.**

8. You have been a member of the Federalist Society from 2003 to 2006 and from 2008 to present.<sup>20</sup>

a. Why did you join the Federalist Society in 2003?

**RESPONSE: I joined the Federalist Society in law school because I enjoyed listening to speakers that the local chapter brought to campus for debates and similar events.**

b. Your membership in the Federalist Society evidently lapsed in 2006, the year in which you graduated from law school and began a federal clerkship. Why did you temporarily cease your membership at that time?

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<sup>19</sup> *Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/race-and-death-penalty> (last visited Dec. 11, 2019).

<sup>20</sup> SJQ at 4.



**RESPONSE:** When I was in law school, I did not know that there were local lawyers' chapters of the Federalist Society. At some point between 2006 and 2008, I learned that there was a local lawyer's chapter in the city where I lived that also hosted speakers and debates, and I began attending those lunch meetings when my schedule allowed.

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

**RESPONSE.** The term "originalism" has different meanings to different people. I think the most common usage refers to interpreting a text based on its original public meaning. That is, the term "originalism" does not mean relying on the subjective intent of the people who wrote the text, but one how a reasonable person in the public would have understood the text at the time it was enacted. In this respect, originalism is akin to textualism. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). Lower court judges must follow the precedents of the Supreme Court without regard to whether they were decided with an originalist approach or not. That is what I do as a federal judge.

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

**RESPONSE:** As noted above, textualism is akin to originalism. The main difference is that people tend to use the term "textualism" when talking about statutes and "originalism" when talking about the Constitution. I agree with Justice Kagan that "we're all textualists now."

11. 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?

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?

**RESPONSE:** As a United States District Judge, I have considered a statute's legislative history as a relevant factor in determining how to apply that statute to a particular set of facts. *See, e.g., Alegion, Inc. v. Cent. States, Se. & Sw. Areas Pension*

*Fund*, 2019 WL 4145525, at \*4 (M.D. Ala. Aug. 30, 2019) (briefly discussing the history of ERISA); *In re McIntyre Bldg. Co. Inc.*, 2019 WL 4984822, at \*10 (M.D. Ala. Oct. 8, 2019) (noting that “Section 1823(e) was enacted by Congress to codify the Supreme Court’s decision in *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)”). The Supreme Court has explained that legislative history, if clear, may be used to assist in determining the meaning of an ambiguous statutory text. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011); *see also, e.g., Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018).

12. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>21</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>22</sup> These shocking statistics are reflected in our nation’s prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>23</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>24</sup>

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

**RESPONSE: Racism exists in our society, but I have not researched the question of implicit racial bias in the criminal justice system. If confirmed, I will be conscious of the potential for implicit racial bias and work to exclude it from the courtroom.**

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

**RESPONSE: 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.

**RESPONSE: Implicit bias training is part of the course for new federal judges at the Federal Judicial Center. I attended that course in June of 2019. I am also familiar with the idea of implicit racial bias generally from reading popular works**

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<sup>21</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

<sup>22</sup> *Id.*

<sup>23</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

<sup>24</sup> *Id.*

such as *Blink*.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.<sup>25</sup> Why do you think that is the case?

**RESPONSE: I recently attended training for district court judges through the United States Sentencing Commission at which these kinds of disparities were discussed. But there was no consensus as to the cause, and I do not know enough about the issue myself to offer an informed judgment.**

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.<sup>26</sup> Why do you think that is the case?

**RESPONSE: Please see my response to 12.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?

**RESPONSE: All judges must be mindful of the potential for implicit biases to affect their decisions, and that is especially important at sentencing. There are several things that I have done as a district court judge to address this issue in specific criminal cases. For every sentencing, I take very seriously the requirement in 18 U.S.C. § 3553(a)(6) that a sentence should “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” To that end, I have required the parties to file briefs in particularly challenging cases that address how other judges in my district have sentenced similarly situated persons for comparable crimes. I have also varied from the Guidelines where I concluded it was necessary to equalize a sentence as between defendants based on the government’s decision to charge the defendants differently even though they committed similar offenses.**

13. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.<sup>27</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>28</sup>

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<sup>25</sup> U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>26</sup> Sonja B. Starr & M. Marit Rehaavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>27</sup> Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

<sup>28</sup> *Id.*

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.

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.

**RESPONSE: I am not familiar with these studies and have not otherwise examined this issue. Accordingly, I cannot offer an informed view.**

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

**RESPONSE: Yes.**

15. 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?

**RESPONSE: Yes.**

16. Do you believe that *Brown v. Board of Education*<sup>29</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

a. When you appeared before this Committee for your district court nomination on June 6, 2018, Senator Blumenthal asked you whether *Brown* was correctly decided. You responded: "I think that commenting on whether Supreme Court decisions were correctly decided, that might be an interesting academic question, but in the context of a nominee for a judicial position, I think that would be inappropriate." If your answer has changed in any way, please explain why.

**RESPONSE: I addressed this issue in response to Senator Blumenthal's question at the hearing on December 4, 2019. I would refer you to that exchange.**

17. Do you believe that *Plessy v. Ferguson*<sup>30</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

**RESPONSE: No, *Plessy* was wrongly decided.**

18. 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?

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<sup>29</sup> 347 U.S. 483 (1954).

<sup>30</sup> 163 U.S. 537 (1896).

**RESPONSE: Not that I recall. The Department of Justice recommended that I review other nominees' answers to Senators' common questions, and I did so.**

19. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”<sup>31</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

**RESPONSE: A judge’s race or ethnicity is not a basis for recusal. See 28 U.S.C. § 455.**

20. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”<sup>32</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

**RESPONSE: Due process protections apply to all “persons” in the United States, including aliens regardless of their status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).**

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<sup>31</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

<sup>32</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted December 11, 2019**  
**For the Nomination of**  
**Andrew Lynn Brasher, to be United States Circuit Judge for the Eleventh Circuit**

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

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

RESPONSE: Absolutely. In many respects, that is the essential role of a judge.

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

RESPONSE: As a federal district judge, I believe very strongly in the idea of procedural fairness—that is, making sure that the same rules apply to everyone in the same way. If I am confirmed to be an appellate judge, I will work hard to make sure that the law is applied consistently, fairly, and uniformly throughout the circuit so that like cases are treated alike.

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

RESPONSE: Yes. It is my general understanding that racial minorities are disproportionately represented in prisons. It is my understanding that disparities in sentencing have been established by various studies, including by the United States Sentencing Commission.

2. In 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that the right to marry is fundamental and must be guaranteed to all same-sex couples.

a. **In your view, does the right to marry carry an implicit guarantee that everyone should be able to exercise that right equally?**

RESPONSE: I would say that the right to marry recognized by the Supreme Court in *Obergefell* is an explicit guarantee of equality, not an implicit one. In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples must be afforded the right to marry “on the terms as accorded to couples of the opposite sex.” 135 S. Ct. 2584, 2607 (2015).

b. **If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

RESPONSE: As noted in my response to question 2.a above, the Supreme Court has held that same-sex couples must be afforded the right to marry “on the terms as accorded to couples of the opposite sex.” The principle of equality is patent on the face of the Court’s opinion in *Obergefell*. Without reviewing the facts of a particular case, I cannot determine whether a particular government action violates that principle. As a current federal judge, I am also precluded by the Canons of Judicial Conduct from opining on pending litigation.

**c. If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

RESPONSE: Please see my response to Question 2.b.