

**Nomination of Andrew Brasher to the United States District Court for the Middle District  
of Alabama  
Questions for the Record June 13, 2018**

**QUESTIONS FROM SENATOR FEINSTEIN**

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

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

Never.

**b. Do you believe it is proper for a district court judge to question Supreme Court precedent in an opinion?**

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

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

A district court's opinions are not precedential. *See, e.g., Matheny v. United States*, 469 F.3d 1093, 1097 (7th Cir. 2006) ("district court opinions do not have precedential authority"); *Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co.*, 240 F.3d 956, 965 n. 14 (11th Cir. 2001) ("In the case of [a district court], the only courts it must be obedient to are this Circuit and the Supreme Court of the United States.").

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

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.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as "super-stare decisis." One text book on the law of judicial precedent, co-authored by Justice Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, THOMAS WEST, p. 802 (2016)) The book explains that

“superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, THOMAS WEST, p. 802 (2016))

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

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

**b. Is it settled law?**

Yes.

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

Yes. As I told the Alabama Association of Probate Judges when I was invited to speak on this topic shortly after *Obergefell* was decided, that decision is “the law of the land.”

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

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

As a federal judicial nominee, it would be unfitting for me to provide personal opinions about particular Supreme Court decisions or dissents from those decisions. If confirmed, I would faithfully apply all Supreme Court precedent.

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

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?**

I have not studied the issue. But the Supreme Court in *Heller* stated that “[w]e conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.” *Heller*, 554 U.S. at 625.

5. As Alabama’s Solicitor General, you defended a state law requiring doctors who perform abortions to have admitting privileges at local hospitals. That 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))

**a. What was your role with respect to retaining Mr. Rue as a litigation consultant? Did you approve or sign off on hiring Mr. Rue?**

I was not the primary contact in the office for any retained consultant or expert in that case. The experts and consultant hired by the State were hired in 2013 before I became Solicitor General. I was a deputy solicitor general in the office at that time, and one of ten attorneys who filed notices of appearance in the case and were working under the direction of my predecessor as Solicitor General. The Attorney General or the Chief Deputy Attorney General must approve all contracts of this type.

**b. At the time Mr. Rue was hired as a litigation consultant, were you aware that earlier, a court had found that Mr. Rue’s testimony about “post-abortion syndrome” was “not credible”?** (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990))

Please see answer to 5.a.

**c. At any time, did you become aware of how his arguments had been discredited? If not, what due diligence did your office perform before retaining him?**

Please see answer to 5.a.

6. You told the court in a legal filing 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.” (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)) But the court 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 entirely by Mr. Rue. The judge was so troubled by Mr. Rue's role, he concluded that Dr. Anderson either has "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." (*Planned Parenthood Southeast v. Strange*, 33 F.Supp.3d 1381 (M.D. Ala., Oct. 20, 2014))

**a. What steps did you or your office take to verify that Mr. Rue's involvement was "no different than the involvement of the attorneys or the attorneys' in-house paralegal staff"?**

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. What was the scope of the retainer for Mr. Rue?**

The role of a non-testifying litigation consultant is to assist with discovery, deposition preparation, trial preparation, and the like. *See* American Society of Trial Consultants, Areas of Consulting, at <https://www.astcweb.org/areas-of-consulting>.

**c. When did you learn that Dr. Anderson had submitted a report that was drafted entirely by Mr. Rue?**

Please see Answer to 6a. I do not recall speaking to Dr. Anderson about this or any other matter.

**d. What did Mr. Rue report to you or your office about his role in drafting Dr. Anderson's submission?**

Please see Answer to 5a and 6a. I do not recall speaking to Mr. Rue about this or any other matter.

**e. Did you or your office ever ask Mr. Rue about his role in drafting Dr. Anderson's submission?**

*See* Answer to 5.a, 6.a, and 6.d.

**f. What did Dr. Anderson say to you or your office about Mr. Rue's role in drafting his submission?**

See Answer to 6.c.

**g. Did you or your office ever ask Dr. Anderson about Mr. Rue's role in drafting the submission?**

See Answer to 6.c.

7. 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))

**a. At the time that the State of Alabama agreed to pay Dr. Anderson \$76,000 in taxpayer funds, what was the scope of his retainer?**

Dr. Anderson's expert testimony is set out in his declaration attached to the State's pleadings. See *Parenthood Se., Inc. v. Strange*, 2:13-cv-405-MHT-TFM (M.D. Ala.) (Dkt. 42-3).

**b. What work did you believe he would perform?**

See Answer 7.a.

**c. Were you or your office aware of his plan to coordinate or work with Mr. Rue?**

Please see Answer to 6.a.

**d. What did you do after receiving the court's admonishment?**

Please see Answer to 6.a.

**e. Was Mr. Rue barred from future work?**

I have no information regarding Mr. Rue's eligibility to provide services to the State Alabama.

8. 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." In defending the law, you argued that this advocate made the judicial bypass process more effective and is "functionally no different from the court reporter, the bailiff, and the petitioner's state-provided lawyer." (Appellate Brief, *Reproductive Health Services v. Marshall* (M.D. Ala. Oct. 31, 2007))

**a. Do you believe a bailiff, a court reporter, and a state-provided lawyer have**

**similar roles?**

**i. If not, what are the differences?**

**ii. If so, is it your belief that lawyers do not have a unique role under the act?**

Because this is a currently pending litigation matter, it would be inappropriate for me to comment under the Canons of Judicial Conduct.

9. As Alabama’s Solicitor General, you defended the state’s ban on same-sex marriage. You submitted a brief in *Obergefell v. Hodges* in which you argued that Alabama had an interest in prohibiting same-sex marriage because “biological parents have a natural inclination to care for their children.” (Brief of Amicus Curiae State of Alabama in Support of Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015))

**a. On what evidence did you base this conclusion?**

The State’s brief argued that the challenged law satisfied the lowest form of constitutional scrutiny, the rational-basis test. 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, 113 S. Ct. 2637 (1993). The argument, therefore, did not turn on evidence, and no evidence was submitted in support. Nonetheless, the Supreme Court has recognized that biological parents have natural bonds with their children. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (presuming that the “natural bonds of affection lead parents to act in the best interests of their children”) (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)); *see also Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting) (noting that “the biological bond between a parent and a child is a strong foundation” for “a stable and caring relationship”).

**b. Did you have any evidence demonstrating that same-sex parents do not have a “natural inclination to care for their children”?**

**i. If so, what was it?**

**ii. If not, what was this statement based on?**

The brief did not argue that same-sex parents lack a “natural inclination to care for their children.” The brief expressly recognized that same-sex relationships “have societal value.” With respect to evidence, see Answer 9.a above.

**c. As Alabama’s Solicitor General, do you generally choose arguments that are made in cases where you are representing the state?**

Although it varies from case to case, I sometimes do have discretion as to which arguments to make in the course of litigation.

**d. Did you choose the arguments made in the amicus brief you submitted in *Obergefell*?**

In consultation with the Attorney General and other attorneys, I had a role in choosing and approving the arguments to make in the State's brief. The brief argued solely that Alabama's marriage laws satisfied the lowest form of constitutional scrutiny, rational basis review. 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).

**e. Did you approve the arguments made in the amicus brief you submitted in *Obergefell*?**

Please see answer 9.d. above.

10. According to your Senate Questionnaire, you volunteered on then-President Elect Trump's Transition Team from December 2016 to January 2017. You wrote in your Questionnaire that you consulted with "members of the Department of Justice 'beachhead' team about criminal law issues with which they should familiarize themselves before the transition."

**a. On which criminal law issues did you consult with the Justice Department "beachhead" team?**

I discussed with members of the beachhead team various criminal law issues that they should study before transitioning into the Department, including providing my perspectives on important issues that were not yet settled law or may need further development as matters of policy.

**b. Did you make recommendations on which issues they should familiarize themselves with? If so, please explain which you identified and why.**

*See* Answer 10.a

11. In 2015, you wrote a blog post in which you criticized Justice Breyer's dissent in a case dealing with capital punishment called *Glossip v. Gross*. You wrote that you "disagree with almost everything Justice Breyer says in his dissent." (Andrew Brasher, *The Death Penalty Lives to Fight Another Day*, SCOTUSblog (June 29, 2015)) In his dissent, Justice Breyer said numerous studies have concluded that "individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty." (*Glossip v. Gross*, 135 S.Ct. 2726 (2015))

**a. Do you challenge the studies Justice Breyer cited?**

No.

**b. If so, on what basis?**

**c. Do you believe that the race of either the victim or the defendant affects the likelihood that a defendant will receive the death penalty?**

This is not an issue that I have studied in depth, although I am aware of studies that suggest race plays a role in whether a defendant receives the death penalty.

12. According to a May 22 article on *AL.com*, Alabama Attorney General Steve Marshall has filed a lawsuit in the Northern District of Alabama arguing that it is unconstitutional for the Census Bureau to count non-citizens as part of the decennial census. The lawsuit is captioned *State of Alabama v. United States Department of Commerce*. Your name does not appear on the complaint, though the complaint is signed by an Assistant Solicitor General, Eric Palmer, suggesting that the Solicitor General's office was involved in drafting the complaint. (Mike Cason, *AG Steve Marshall, Rep. Mo Brooks sue Census Bureau over immigrant rule*, AL.COM (May 22, 2018))

**a. To date, have you had any involvement with the case or the complaint filed by the State of Alabama in *State of Alabama v. United States Department of Commerce*? If so, what is—or has been—the nature of your involvement?**

Although I am limited in what I may say in response to this question because of various privileges, including attorney client privilege under Alabama Rule of Professional Conduct 1.8, the Attorney General routinely seeks my advice on significant matters and I regularly review major briefs and pleadings whether or not I am involved in the matter at issue.

**b. Whether or not you were directly involved, did you ever discuss with anyone in the Alabama Solicitor General's Office, Attorney General's Office, or with any other local, state, or federal official, whether to challenge the constitutionality of counting all residents in any given state as part of the decennial census?**

I have discussed the case with employees of the Alabama Attorney General's Office. I was also in a meeting in which the litigation was discussed with the Congressman who is a co-plaintiff in the lawsuit.

**c. What is the constitutional basis for Alabama's assertion that only citizens should be counted as part of the decennial census?**

I am not familiar enough with the legal theories in the complaint to answer this question so I would refer you to the complaint.

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

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

I did not draft this statement and do not know what the Federalist Society means by it.

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

I did not draft this statement and do not know what the Federalist Society means by it

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

I did not draft this statement and do not know what the Federalist Society means by it

14. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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?**

No one ever asked me about administrative law.

**b. Since 2016, has anyone with or affiliated with the Federalist Society, the**

**Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

No one ever asked me about administrative law.

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

I do not have a great deal of experience with administrative law. If fortunate enough to be confirmed, I will faithfully apply all Supreme Court and Eleventh Circuit precedents relating to administrative law.

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

No.

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

I received these questions from the Department of Justice. I consulted with ethics counsel for the Alabama Bar. I then drafted answers to the questions. Then I solicited feedback on my answers from members of the Office of Legal Policy at the United States Department of Justice. Then I revised my answers in light of that feedback. My answers to each question are my own.

**Nomination of Andrew Lynn Brasher United States District Court  
For the Middle District of Alabama Questions for the Record Submitted June 13, 2018**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree with the Chief Justice. I think his metaphor accurately explains that a judge is not supposed to seek a specific outcome in litigation but to resolve disputes between parties who are the primary participants in a litigated matter.

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

There are many areas of the law where it is appropriate for a judge to consider the practical outcome of a particular decision. For example, when resolving a discovery dispute, a judge must determine whether a particular request is “overly burdensome.” Similarly, in resolving a motion for a temporary restraining order, a judge must evaluate whether an alleged injury will be irreparable if the motion is denied.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

a. What role, if any, should empathy play in a judge’s decision-making process?

A judge should strive to fairly apply the law dispassionately, regardless of emotion or the judge’s personal views. Nonetheless, it is often important for a judge to understand the position and motivations of other people – for example, when evaluating a witness’s credibility, determining how to sentence a criminal defendant, or interacting with counsel.

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

A judge should faithfully and impartially apply the law based on the legal authorities and evidence introduced before him or her. The rule of law requires that a judge set aside his or her personal life experiences.

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

No.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

a. In civil litigation, well-resourced parties commonly employ “paper blizzard” tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

I have had experience representing the “little guy.” When I was in private practice, I was frequently appointed by federal judges to represent indigent criminal defendants who must litigate against the significant resources of the federal government.

As to civil litigation, I believe that “paper blizzard” tactics are inappropriate. The Alabama Rules of Professional Conduct provide that a “lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Ala. R. Prof. Conduct 3.2. Moreover, the Federal Rules of Civil Procedure require federal judges to consider whether discovery is “proportional to the needs of the case.” Fed. Civ. P. 26(b)(1). Where appropriate, a federal judge should invoke these and other rules to curtail inappropriate or dilatory litigation tactics.

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

Discrimination against minorities still exists today. If confirmed, I will make every effort to ensure that invidious discrimination has no purchase in my courtroom.

6. At a pro-life rally at the Alabama State House, in your official capacity (i.e., after noting that “I am a lawyer and I work for the attorney general”) you claimed, “[t]he ACLU and Planned Parenthood want a fight and we will give them one.” How would you ensure that the ACLU, Planned Parenthood, and other pro-choice organizations believe that they will receive a fair shake in your courtroom? What steps will you take to treat all parties before you impartially?

As the question notes, this statement was made in my official capacity as an advocate in the context of anticipated litigation and not my personal capacity. 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 have been an advocate, I have strongly defended and vigorously advanced my client’s interests as required by the Rules of Professional Conduct. If I am fortunate enough to be confirmed as a judge, I will just as 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.

7. Last year, in a piece for SCOTUSblog, you noted that the Supreme Court’s racial gerrymandering jurisprudence “give[s] lower courts very little guidance, and an enormous amount of discretion, in determining whether a particular district is based predominantly on race.” Given this discretion, what will inform your judgment in finding a racially discriminatory gerrymander? Do you believe that you should recuse yourself from any litigation on these districts that may come before you? If not, how will you ensure that your previous advocacy (including defending Alabama’s House and Senate districts against claims alleging violations of the Voting Rights Act, and your defense of an Arizona voter identification law) will not impact this determination?

If confirmed and if faced with a case about redistricting, I will fully and faithfully apply the Supreme Court’s guidance on how to evaluate a record to determine whether any district is based predominantly on race. I have already, as a quasi-judicial hearing officer, applied the court’s decision in the redistricting case I litigated to find that a state officer violated federal law. I would not hesitate to do so again if the facts warranted. As explained in my Senate Judicial Questionnaire, if confirmed, I intend to recuse from any challenge to a government law or policy that I previously defended, which would include a challenge to Alabama’s current state legislative districts.

8. You were counsel on an amicus brief in *Obergefell v. Hodges* that argued that “as a matter of irreducible biology, same-sex couples cannot advance the States’ legitimate interest to encourage childrearing by both biological parents.” Is that a position you hold personally? What in your personal experience informs your understanding of this issue? Will you apply *Obergefell* faithfully?

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 Eleventh Circuit Court of Appeals has 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 brief did not meaningfully address the fundamental rights analysis upon which the Supreme Court ultimately ruled in *Obergefell*. As I have said previously, I believe that *Obergefell* is the “law of the land.” If I were fortunate enough to be confirmed, I would apply *Obergefell* without reservation or hesitation in the same way that I would apply all of the Supreme Court’s precedents to the best of my ability.

9. You presented remarks to the Federalist Society about “federal overreach” in the context of the Clean Water Rule. Do you believe that the Clean Water Rule is a manifestation of federal overreach? If yes, explain how environmental agencies could expect a fair shake before you? If no, please elaborate on your comments to the Federalist Society.

In those remarks, I made it clear that the EPA and Army Corps of Engineers have the authority

to promulgate a rule that defines the Waters of the United States as that term is used in the definition of “navigable waters” in the Clean Water Act. I was discussing the narrow question of whether the specific rule at issue there – the 2015 WOTUS rule – was consistent with the Administrative Procedure Act and a trio of United States Supreme Court opinions interpreting the Clean Water Act. Several courts have held that the 2015 WOTUS rule is illegal because it is inconsistent with Supreme Court precedent and the Administrative Procedure Act, including the Sixth Circuit Court of Appeals, the District Court for the District of North Dakota, and the District Court for the Southern District of Georgia. If confirmed and I am presented with a case about administrative agencies, I will faithfully apply Supreme Court precedent, Eleventh Circuit precedent, and any applicable statutes.

10. In a brief in *Elane Photography v. Willock*, you argued that a law prohibiting a photography company from refusing to photograph a same-sex wedding would not meaningfully “protect individuals from humiliation and dignitary harm.” Do you personally believe that dignitary harm and humility can result from the denial of a service or good based on the sexual orientation of the customer? What in your personal experience informs your understanding of this issue?

To be clear, the brief did not argue that dignitary harm does not result from the denial of service on the basis of sexual orientation. Instead, the brief argued that the lower court’s judgment in that particular case could lead to “more, not less, public dignitary harm for same-sex couples.” Because the issue addressed in the State’s brief is still subject to litigation, it would be inappropriate for me to provide further comment under the Canons of Judicial Conduct.

11. In your confirmation hearings, you said “*Casey* is well-established law” in response to a question about an interview you gave in 2014. However, in that interview, you said “[s]o all that to say is that this is an uncertain area of the law. It’s not exactly clear what the standard should be.” Why did your opinion change between 2014 and 2018?

I have never believed or argued that *Casey* is anything but well-established law. In the comments quoted above, I was predicting that lower courts would likely disagree on how to apply *Casey* – a well-established precedent – to admitting privileges laws like the one at issue in the particular lawsuit I was addressing in the interview. I was correct. The Fifth Circuit held that Texas’s admitting privileges law was constitutional, the Seventh Circuit held that Wisconsin’s admitting privileges law was unconstitutional, and the Supreme Court granted certiorari to resolve the split and clarify the law. After the Supreme Court resolved the uncertainty in the law and held Texas’s admitting privileges law unconstitutional in *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), 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.

12. In October 2017, you wrote a letter to the Chairman and Ranking members of this Committee in support of confirming Brett Talley to be a district court judge in Alabama, calling him “thoughtful, hardworking, and fair.” At the time you wrote this letter, were you aware of Mr. Talley’s blog posts defending the “first KKK”? Once you became aware of these posts, did

you take any steps to rescind your endorsement of him?

No. I was not aware of Mr. Talley's writings when I supported his nomination. It is my understanding that the KKK is, and always has been, a terrorist organization. I am not aware of any procedure to rescind a letter of endorsement for a judicial nominee.

13. You previously wrote that "Birmingham is still a segregated city and the United States is still a segregated nation. The problems of interracial relations are much deeper than personal belief and individual equality." Do you still hold these beliefs? What in your personal experience informs your understanding of this issue? As a federal judge, what role would you play in combating existing racial segregation?

I continue to believe that racial inequality and racial segregation are serious problems in my state and this country. I have had countless experiences in my life that have informed my view of this issue, which are too varied and personal in nature to recount here. If I were to be confirmed as a federal judge, my role and privilege would be 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.

**Nomination of Andrew L. Brasher, to be United States District Court Judge for the Middle  
District of Alabama  
Questions for the Record Submitted June 13, 2018**

**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? In determining whether a right is fundamental, the Supreme Court has said that a court should look to whether a right is “objectively, deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Yes.

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

Yes. 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 a court of appeals outside your circuit?

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? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

In both cases, yes.

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

Yes.

f. What other factors would you consider?

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?

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?

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?

This appears to be an academic question with which I am not familiar. If I were fortunate enough to be 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?

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?

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. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

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

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

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

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).

c. 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?

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

d. 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.

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 to consider evidence that sheds light on our changing understanding of society?

Where any precedent from the United States Supreme Court or the Eleventh Circuit Court of Appeals makes it appropriate to consider evidence that sheds light on our changing understanding of society, I would do so.

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

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. If confirmed, I would follow any applicable Supreme Court or Eleventh Circuit precedent to evaluate the import of sociological or scientific evidence.

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

a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At

best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I believe this is a purely academic question that I have not researched or studied. If I were to be confirmed, I would apply *Brown* faithfully as I would all precedents from the Supreme Court and Eleventh Circuit.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited June 13, 2018).

I have never researched or studied these academic questions. If I were fortunate enough to be confirmed, I would rely on Supreme Court and Eleventh Circuit precedents for the meaning of terms like “freedom of speech,” “equal protection,” and “due process.”

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?

If I were fortunate enough to be confirmed, I would treat the Supreme Court’s prevailing understanding of a constitutional provision as dispositive, whether it is based on the public’s understanding at the time of adoption or otherwise.

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

If I were fortunate enough to be confirmed, I would treat the Supreme Court’s prevailing understanding of a constitutional provision as dispositive, whether it is based on the public’s understanding at the time of adoption or otherwise.

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

I would follow the relevant precedents of the Supreme Court and the Eleventh Circuit and would rely on the sources identified in those authorities in applying any constitutional provision in a novel context.

6. In 2015, you were counsel of record on an amicus brief that Alabama submitted in the U.S. Supreme Court in *Obergefell v. Hodges*. You argued that states have an interest in “promoting ties of kinship between children and both of their biological parents” because that is the “optimal environment for childrearing.”

a. Are single or LGBT parents unable to provide an optimal environment for childrearing?

I know from personal experience that single parents and same-sex couples can be excellent and successful parents. The State's brief argued solely that the challenged law satisfied the lowest form of constitutional scrutiny. The Supreme Court has explained that, under that test, "[a] legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637 (1993).

b. In the same brief, you asserted that "biological parents have a natural inclination to care for their children." Do you believe that LGBT and adoptive parents lack a natural inclination to care for their children?

No.

7. In a June 29, 2015 post on SCOTUSblog, you stated that you "disagree[d] with almost everything Justice Breyer [said] in his dissent" in *Glossip v. Gross*, which expressed concerns regarding racial discrimination in the administration of capital punishment. Do you believe that racial bias and discrimination exists within the criminal justice system?

Yes. I believe racial bias and discrimination exists throughout society.

8. In an October 2017 letter to Chairman Grassley and Senator Feinstein in support of confirming Brett Talley to be a district court judge in Alabama, you described Talley as "thoughtful, hardworking, and fair." However, Mr. Talley's nomination was not resubmitted to the Senate this year, after it was discovered that he wrote many offensive blog posts, which he did not provide to the Judiciary Committee, and he did not disclose that his wife works in the White House Counsel's Office.

a. Were you aware of Mr. Talley's blog when you submitted your letter endorsing his nomination?

No. I knew Mr. Talley as a lawyer in the Alabama Attorney General's office and was unaware of most of his non-legal writings, including the blog posts referenced above.

b. Were you aware of Mr. Talley's wife's undisclosed position working in the White House Counsel's Office?

I knew Mr. Talley's wife worked at the White House. I did not, and subsequently have not, reviewed the materials Mr. Talley submitted to the Senate.

c. Knowing what you know now, do you regret your endorsement of Mr. Talley to be a federal judge?

As a nominee myself, I think it would be inappropriate to comment on Mr. Talley's withdrawn nomination.

**Senator Mazie K. Hirono Questions for the Record for Andrew Brasher**

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

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

No.

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

No.

2. As Solicitor General of Alabama, you defended Alabama’s Targeted Regulation of Abortion Providers (TRAP) law, a law requiring that doctors performing abortions have “admitting privileges” at local hospitals. Judge Myron Thompson of the Middle District of Alabama not held that the law you defended was unconstitutional, but he filed a supplemental opinion extremely critical of your use of Vincent Rue, a controversial consultant you paid \$80,000 to help find and prepare expert witnesses in support of the law.

Rue is mainly known for arguing that abortion leads to a mental illness he calls “post-abortive syndrome,” an idea that has long been discredited. Rue has claimed that “abortion increases bitterness toward men.” As far back as 1990, the district court in the landmark case *Planned Parenthood of Southeastern Pennsylvania v. Casey* wrote at length about Rue’s lack of credibility.

**A district court judge needs to weigh facts, credit evidence, and apply the law to those facts. What does your use of a discredited peddler of falsehoods like Vincent Rue say about your ability to make those kinds of judgments?**

If I were fortunate enough to be confirmed as a district court judge, I would weigh the credibility of experts and any other witnesses based on factors identified in controlling precedent.

3. You defended the use of Rue before Judge Thompson, describing him as providing only limited litigation support. Yet, Judge Thompson found your description of Rue’s role to be inaccurate since the drafted the report of one of the controversial “expert witnesses” you hired him to help prepare.

**Do you stand by your defense of the use of Vincent Rue in a key role in this litigation?**

The position of the State of Alabama regarding Vincent Rue’s involvement in *Planned Parenthood Se., Inc. v. Strange* is set forth in pleadings filed by the State. See, e.g. *Planned Parenthood Se., Inc. v. Strange*, 2:13-cv-405-MHT-TFM (M.D. Ala.) (Dkt. 222).

4. Judge Thompson was also harshly critical in his supplemental opinion of your use of two “expert witnesses,” James Anderson and John Thorp, who are known for traveling around the county to testify in favor of abortion restrictions. Judge Thompson wrote of Thorp that he “displayed a disturbing apathy toward the accuracy of his testimony” and noted that his research “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.” Judge Thompson was critical of Anderson’s reliance on Rue’s report, writing: “Whether Anderson lacks judgment, is dishonest, or is profoundly colored by his bias, his decision to adopt Rue’s supplemental report and submit it to the court without verifying the validity of its contents deprives him of credibility.”

**What does your use of so-called “expert witnesses” with such significant credibility problems say about your ability to make the kinds of judgments a district court judge needs to make regarding facts and evidence?**

If I were fortunate enough to be confirmed as a district court judge, I would weigh the credibility of experts and any other witnesses based on factors identified in controlling precedent.

5. In a 2014 interview after the district court ruled against you and found Alabama’s Targeted Regulation of Abortion Providers (TRAP) law unconstitutional, you called into question whether the landmark 1992 case *Planned Parenthood v. Casey* is still good law. You stated, “The [district] judge’s ruling relies on a 1992 decision from the Supreme Court called *Casey*, and the Supreme Court actually has not entered into this area of the law since 1992. The Eleventh Circuit, which is the federal circuit that governs Georgia, Alabama and Florida, also has not talked about this area of the law either. So all that to say is that this is an uncertain area of the law. It’s not exactly clear what the standard should be.”

**How can we believe that you would be able to set aside these views and apply the law from *Roe v. Wade* and *Planned Parenthood v. Casey* that a woman’s right to choose to terminate her pregnancy is protected by the Constitution?**

*Roe v. Wade* and *Planned Parenthood v. Casey* are well-established precedents from the United States Supreme Court that I would apply without reservation if I were to be confirmed as a district court judge. In the comments that you quote above, I was predicting that lower courts would likely disagree on how to apply those well-established precedents to admitting privileges laws like the one at issue in that lawsuit. That is precisely what occurred. The Fifth Circuit held that Texas’s admitting privileges law was constitutional, the Seventh Circuit held that Wisconsin’s admitting privileges law was unconstitutional, and the Supreme Court granted certiorari to resolve the split. After the Supreme Court held Texas’s admitting privileges law unconstitutional in *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), 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, and agreed to a permanent injunction against the law. Accordingly, I have already applied the Supreme Court’s abortion jurisprudence to determine that a state law is unconstitutional in light of a woman’s right to choose to terminate her pregnancy.

6. As Solicitor General, you are currently defending a law in the Eleventh Circuit that drastically alters the state's judicial bypass procedure by creating a trial-like procedure to determine if a minor can qualify for judicial bypass. Alabama requires minors to get parental consent before having an abortion. The law includes a judicial bypass, waiving the parental consent requirement, if it is in the best interests of the minor—or if she is mature enough to make the decision herself. However, in 2014, Alabama added onerous procedures to qualify for this bypass which allow a judge to appoint an attorney for the fetus and allows the district attorney to call witnesses to testify regarding the young woman's maturity. The district court struck down the law as an unconstitutional undue burden on women's right to abortion. You are currently representing the state on appeal.

**Given your aggressive efforts to move the law and push for new limits on a woman's right to choose an abortion, if confirmed, will you recuse in cases involving the application of the precedent from *Roe v. Wade* and *Planned Parenthood v. Casey*?**

A federal judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Subsection 455(b) lists additional grounds for recusal, including a specific provision that applies to government attorneys. If confirmed, I would recuse myself from any case that I have worked on. I would also recuse myself from a challenge to a state law or policy that I have previously defended. With respect to other matters, I would have the same policy of scrupulously applying the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics.

7. You were the counsel of record on an *amicus brief* that Alabama submitted in the U.S. Supreme Court in *Obergefell v. Hodges*. You urged the Court to uphold the constitutionality of laws like Alabama's because "man-woman marriage laws neither infringe on a fundamental right nor rest on a suspect classification," and to further the governmental interest in "promoting ties of kinship between children and both of their biological parents."

However, in *Obergefell* the Supreme Court confirmed the right for people of the same sex to get married. The Court applied the precedent from *Loving v. Virginia* that laws preventing black and white people from getting married violated the Due Process Clause and Equal Protection Clause of the 14th Amendment.

**Do you understand and agree that, as the Supreme Court decided in *Obergefell*, the fundamental right to marry is protected by the Due Process and Equal Protection Clauses of the 14th Amendment, and would you be able to apply that precedent to the facts of cases that come before you if you are confirmed?**

Yes. As I told the Alabama Association of Probate Judges when I was invited to speak shortly after *Obergefell* was decided, *Obergefell* is the "law of the land." If I were fortunate enough to be confirmed, I would apply *Obergefell* without reservation or hesitation in the same way that I would apply all of the Supreme Court's precedents to the best of my ability.

8. On behalf of Alabama, you signed a brief urging the Supreme Court to grant certiorari after the Eleventh Circuit struck down a 2011 Alabama immigration law. Among other provisions, the Alabama law ordered public schools to check the citizenship status of new students, made it illegal to harbor undocumented immigrants and made it a crime for undocumented immigrants to seek work or to not have registration papers. You argued this AFTER the U.S. Supreme Court ruled on Arizona's controversial immigration law, which had some similar provisions.

**Given your role defending such an extreme and anti-American law that dehumanizes immigrants, how can any immigrant appearing before you in court trust that he or she would be treated fairly and in accordance with their rights?**

With respect, this question is conflating the position of my clients with my personal views. The Alabama 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. Over 70 Alabama lawyers, including lawyers who are immigrants and first generation Americans, signed a letter in support of my nomination.

**Nomination of Andrew Lynn Brasher**  
**United States District Court for the Middle District of Alabama**  
**Questions for the Record**  
**Submitted June 13, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. According to a Brookings Institute 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>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</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>3</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>4</sup>

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

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?

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.

Although I am familiar with the idea of implicit racial bias generally from reading popular works such as *Blink*, I have not studied the issue of implicit racial bias in the criminal justice system.

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<sup>1</sup> JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

<sup>2</sup> *Id.*

<sup>3</sup> ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>4</sup> *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.<sup>5</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.<sup>6</sup>

a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I am not familiar with these studies. Because I have not evaluated the issue, I cannot offer an informed opinion on whether there is a causal connection between incarceration rates and crime rates.

b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

Please see Answer 2.a.

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

Yes.

4. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.<sup>7</sup> One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.<sup>8</sup> Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

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<sup>5</sup> THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at [http://www.pewtrusts.org/~media/assets/2016/12/national\\_imprisonment\\_and\\_crime\\_rates\\_continue\\_to\\_fall\\_web.pdf](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

<sup>8</sup> Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at [https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm\\_term=.4da3c22d7dca](https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca).

a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

I have not studied whether there is widespread voter fraud.

b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see Answer 4.b above.

c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

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.

5. 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 total executions since 1976 and 55 percent of those currently awaiting the death penalty.<sup>9</sup>

a. Do those statistics alarm you?

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.

b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

It is unconstitutional for a judge or jury to impose the death penalty or any other criminal sentence because of a person's race. Whether a statistical racial disparity in the application of the death penalty renders a death sentence unconstitutional is presently pending in litigation, *see Wood v. Oklahoma*, No. 17-6891 (U.S.), 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.

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

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<sup>9</sup> The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

I would evaluate the prosecutor's charging practices to determine whether the statistical disparity is explainable by any factor other than race. If I determined that the race of the victim or defendant played a role in the prosecutor's request for a particular sentence, I would consider any and all available remedial steps consistent with applicable statutes and case law.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted June 13, 2018**  
**For the Nominations of**

- Holly A. Brady, to be U.S. District Judge for the Northern District of Indiana
- Andrew Brasher, to be U.S. District Judge for the Middle District of Alabama
- James Patrick (“JP”) Hanlon, to be U.S. District Judge for Southern District of Indiana
- David Steven Morales, to be U.S. District Judge for the Southern District of Texas
- Lance Edward Walker, to be U.S. District Judge for the District of Maine

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

**a. What is the process you would follow before you sentenced a defendant?**

I would approach each sentencing decision with the appreciation that it is one of the most serious and solemn duties of any trial judge. Initially, I would ensure that the applicable Sentencing Guidelines range for the offense conduct is correctly calculated. Then I would evaluate any applicable statutes, the presentence report, and any victim statements. Ultimately, I would attempt to impose a sentence “sufficient, but not greater than necessary, to comply” with the congressionally designated purposes of federal sentencing: “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; [] to afford adequate deterrence to criminal conduct; [] to protect the public from further crimes of the defendant; and [] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553.

**b. As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

In addition to my response to 1.a. above, if confirmed, I expect to discuss the issue of sentencing extensively with colleagues within the district to ensure that our sentencing practices are consistent and that like cases are treated alike regardless of which judge has the case.

**c. When is it appropriate to depart from the Sentencing Guidelines?**

Under Supreme Court and Eleventh Circuit precedent, the Guidelines are not binding on trial judges. The factors listed in 18 U.S.C. § 3553(a) may call for varying from the advisory Guidelines range. Part K of Section 5 of the Guidelines also lists specific circumstances that can justify a departure from the advisory Guidelines range.

**d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.<sup>1</sup>**

**i. Do you agree with Judge Reeves?**

I have represented criminal defendants subject to a mandatory minimum, and I have also been a prosecutor in cases in which a mandatory minimum sentence was applied. But I have never studied whether mandatory minimum sentences are likely to deter certain types of crime, and I am not familiar with Judge Reeves' position on that issue.

**ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

The equity of mandatory minimums is a political question that is reserved for the judgment of Congress. As a nominee to a federal court, it would be inappropriate for me to comment on legislative policy judgments.

**iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my answer to 1.d.ii

**iv. Former-Judge John Gleeson has previously criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.<sup>2</sup> If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

**1. Describing the injustice in your opinions?**

If confirmed, I would apply any mandatory minimum sentencing statutes to the extent such statutes are constitutional. I believe it is appropriate for a judge to state for the record that he or she would not have sentenced a

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<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

<sup>2</sup> See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

particular defendant to a particular sentence if not compelled by a statute. But judges should not offer personal criticisms of Congress's decision to impose a mandatory minimum sentence.

**2. Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

The question of what crime to charge is one that our Constitution leaves to the executive branch. I would raise charging decisions with federal prosecutors if I were concerned about ethical impropriety, lack of professionalism, or prosecutorial misconduct.

**3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

The clemency power is reserved to the Executive Branch. However, as explained above, I believe a judge may in an appropriate case state on the record that he or she would not have imposed a certain sentence but for a statutory requirement so that executive branch officials are aware of the judge's views for the purposes of considering clemency.

**e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes.

2. 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?**

Yes.

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

Yes. It is my general understanding that racial minorities are statistically more likely to be imprisoned than whites.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

**a. Do you believe that it is important to have a diverse staff and law clerks?**

Yes.

**b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes.