

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR FEINSTEIN

1. The Civil Rights Division is charged with the critical task of protecting voting rights. According to the Division's website, the Voting Rights Section "enforces the civil provisions of the federal laws that protect the right to vote, including the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, the Help America Vote Act and the Civil Rights Acts."

- a. **Please describe what in your legal background prepares you to oversee the Justice Department's efforts to protect voting rights.**

RESPONSE: The Civil Rights Division handles a wide spectrum of legal issues related to federal civil rights laws. Among these are federal laws that protect voting rights. I believe my experiences as a law clerk on the U.S. Court of Appeals for the Seventh Circuit, a federal prosecutor, a U.S. Department of Labor (DOL) official, General Counsel of the Equal Employment Opportunity Commission (EEOC), and as private counsel in numerous civil rights cases have prepared me effectively to lead the Division's work, including its enforcement of voting rights laws. If confirmed, I look forward to working closely with the Voting Section to learn more about this critical work and how I can best support it.

- b. **Please describe the steps you have you taken, if any, to become familiar with the various federal laws that protect the right to vote.**

RESPONSE: I have reviewed information about the various voting rights laws enforced by the Division to help prepare for my duties should I be fortunate enough to be confirmed. I have reviewed the statutes enforced by the Civil Rights Division, and I have read case law that interprets those statutes, including decisions by the Supreme Court of the United States, several federal courts of appeals, and district courts. My understanding from public reports is that the Division is involved with the *Husted* litigation in the Supreme Court and the *Veasey* litigation in the Fifth Circuit, among other cases that involve voting rights laws. I am thus generally familiar with the Division's current voting rights work, although it would be inappropriate for me to comment further on pending litigation.

- c. **Please describe the steps have you taken, if any, to become familiar with the Justice Department's enforcement of those same federal laws.**

RESPONSE: As a private citizen, I am not privy to internal Department of Justice (Department) information about its enforcement activities. However, as

explained in my response to Question 1b, I have reviewed information about the Department's work to the extent it is available to the public, and am generally familiar with the types of enforcement efforts for which the Civil Rights Division is responsible.

- d. Please describe in detail the steps that you will take, if confirmed, to enforce the civil provisions of the federal laws that protect the right to vote.**

RESPONSE: I am committed to upholding the voting rights of all Americans, and to rigorous enforcement of all federal laws protecting the right to vote. If confirmed, I will carefully evaluate any case brought to the Department's attention based on the facts, the evidence, and the law. I will also meet with the chief of the Voting Section and other staff to review pending matters and take any appropriate action necessary to enforce the law effectively.

2. On May 11 of this year, President Trump signed an Executive Order establishing a Presidential Advisory Commission on Election Integrity. The Commission was established in part to investigate "fraudulent voter registrations and fraudulent voting." (E.O. 13799.)

- a. Have you had discussions with anyone in the Trump Administration, the Department of Justice, or the Commission on Election Integrity regarding voter fraud, the Commission's work, or the Commission's objectives? If so, please detail those conversations and whom they were with.**

RESPONSE: I had a general discussion with Department officials about voter fraud when I prepared to appear before the Senate Judiciary Committee hearing on September 6. Generally, the discussion focused on the Criminal Division's responsibility for voter fraud issues.

- b. Do you believe it is acceptable or appropriate for the Civil Rights Division or any other component within the Justice Department to coordinate with the Commission on Election Integrity?**

RESPONSE: My understanding based on public reports is that the Commission is independent and unrelated to the Department. Thus, I do not anticipate having a role in coordinating with the Commission.

- c. If not, what steps will you take to ensure there is no coordination between the Civil Rights Division and the Commission?**

RESPONSE: Please see my response to Question 2b.

3. On July 11, Senators Klobuchar, Whitehouse, and I sent a letter to Attorney General Sessions and then-Acting Assistant Attorney General for Civil Rights Tom Wheeler about a June 28 letter the Justice Department sent to forty-four states requesting information about state-level procedures for maintaining voter registration lists. We noted that the Department's request was made the same day that the Election Integrity Commission demanded sensitive voter data from all fifty states and posed nine questions. Despite setting a deadline of July 24, we still have not received a response from the Division.

- a. **Will you commit to responding to the July 11 letter regarding the Department's request for state-level procedures for maintaining voter registration lists?**

RESPONSE: I appreciate the importance of responding to Members' letters and requests for information. Because I am not currently serving in the Department, I am not familiar with the letter you reference. If I am confirmed, I will work with Division and Department officials to provide a response to your letter.

- b. **Will you commit to timely responding to any future inquiry from the Judiciary Committee, including any future inquiry or request made by Democratic Senators on the Committee?**

RESPONSE: If confirmed, I will work to respond in a timely manner to any inquiries from the Committee regarding the work of the Civil Rights Division.

4. As previously noted, one of the laws that the Voting Rights Section enforces is the National Voter Registration Act (NVRA). In addition to its provisions on voter registration mechanisms and the maintenance of voter registration lists, the NVRA has very specific provisions governing when registered voters may be removed or "purged" from the voting rolls. The State of Ohio has a law allowing election officials to start the process of purging eligible voters from the rolls if those voters have not engaged in any voter activity for two years, even if there is no evidence that a voter has moved.

In July 2016, the Civil Rights Division submitted an amicus brief in the U.S. Court of Appeals for the Sixth Circuit in *Randolph Institute v. Husted*, a case which challenged that Ohio voter removal procedure. In that brief, the Division argued that Ohio's procedure violated the NVRA (as well as the Help America Vote Act, or HAVA). Specifically, the Division argued that "Section 8 of the NVRA – when construed in light of its text, structure, purpose, and history – requires that before a State can start the confirmation process that leads to removal of voters from its voter registration rolls based on a change of residence, it must have reliable evidence that the voter has moved. Declining to vote does not provide such evidence." (Brief for the United States as *Amicus Curiae* Supporting Plaintiffs- Appellants and Urging Reversal, at 12, *Randolph Institute v. Husted*.) The brief also cited the Justice Department's guidance on the NVRA's voter purge procedural requirements: "States must have reliable evidence indicating a voter's

change of address before they initiate the NVRA-prescribed process to cancel the voter's registration based on a change of residence."

Just last month, the Department of Justice reversed course. In an amicus brief submitted in the United States Supreme Court, the Department argued that the NVRA does not require any reliable evidence that a voter has moved before commencing the removal process.

Rather, the Department argued, states may rely solely on "registrants' failure to vote as grounds for" starting the process of purging voters from the rolls. (Brief for the United States as Amicus Curiae Supporting Petitioner, at 13, *Husted v. Randolph Institute*.) The Civil Rights Division also changed its guidance on what is permissible under the NVRA. The Division now takes the position that it is permissible to begin the voter purge process so long as there is "information showing that a voter has not voted in elections nor made contact with a registrar over some period of time." (Civil Rights Division, Guidance on the National Voter Registration Act of 1993.)

- a. **Have there been any changes in the National Voter Registration Act that would justify the Department of Justice reversing its position in this case?**

RESPONSE: I am unaware of any recent changes to the National Voter Registration Act. Because I am not currently working at the Department, I am not familiar with the details of the Department's decision in this matter. In addition, my understanding is that the Department recently filed an amicus brief supporting the petitioner in this case before the Supreme Court of the United States. Because this issue is in ongoing litigation, it would not be appropriate for me to comment further.

- b. **If not, what possible justification is there for reversing course?**

RESPONSE: Please see my response Question 4a.

- c. **Do you agree that any American who is registered to vote has the right not to vote in any given election?**

RESPONSE: Please see my response to Question 4a.

- d. **If you agree that the right to vote includes the right not to vote in any given election, would you agree that the Justice Department's position in *Husted* essentially penalizes Americans for exercising their right not to vote? If not, why not?**

RESPONSE: Please see the response to Question 4a.

5. *Husted* is not the only voting rights case in which the Justice Department has changed its position since President Trump was sworn into office. As the *Washington Post* reported in

February, the Department “dropped its long-standing position that Texas intended to discriminate when it passed a strict voter-ID law.” (“Justice Department changes its position in high-profile Texas voter-ID case,” *Washington Post*, Feb. 27, 2017.) In that case, *Veasey v. Abbott*, the Department abandoned its previous argument that Texas’s law was meant to discriminate against minority voters. Instead, the Department argued (1) that the court should dismiss the claim that Texas’s law had a discriminatory purpose and (2) that a bill (SB5) amending the voter ID law (SB14) “removes any ‘discriminatory effect’ or intent the Court [previously] found . . . and advances Texas’s legitimate ‘policy objectives’ in adopting a voter ID law. (United States’ Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice, *Veasey v. Abbott*; United States’ Brief Regarding Remedies, *Veasey v. Abbott*.) Despite changes in the Justice Department’s position, a federal district court judge issued a permanent injunction against the Texas law, finding the new bill did “not negate” the old law’s “discriminatory purpose.” (Order Granting Section 2 Remedies and Terminating Interim Order, *Veasey v. Abbott*.)

- a. **Are you aware of the basis on which the Department of Justice changed its position in *Veasey v. Abbott* with respect to whether Texas’s voter ID law discriminates against minority voters? If so, what was it?**

RESPONSE: No. Because I am not currently working at the Department, I am not familiar with the details of the Department’s decision in this matter. I am also unfamiliar with the record in the matter. In addition, my understanding is that the Division is involved in ongoing litigation on this issue. It is therefore inappropriate for me to comment further.

- b. **Do you agree with the Department’s decision to abandon its claim that Texas’s voter ID law was enacted with discriminatory intent?**

RESPONSE: Please see my response to Question 5a.

- c. **Do you personally believe that Texas’s voter ID law discriminates either in its intent or its effect?**

RESPONSE: Please see my response to Question 5a.

6. At your hearing before the Committee, Senator Coons asked you “what process you would put in place, if confirmed, to review the case before the department withdraws a claim or changes its positions.” You responded in part: “With respect to particular matters, I would anticipate, if confirmed, that I would review the record in the case, review their recommendations, discuss with the lawyers working on the particular matter what the record shows, what their recommendation is, and then use my own judgment to take appropriate action.”

- a. **In deciding whether to withdraw a claim or change positions in a specific case, would you consult career attorneys in the Division who actually litigate these cases?**

RESPONSE: Yes.

- b. **As a general matter, how important do you think career attorneys are to the Civil Rights Division and its mission?**

RESPONSE: Career attorneys are vital to the mission and work of the Civil Rights Division, as they provide a wealth of expertise and experience in litigating the specific civil rights laws enforced by each of the Sections. If confirmed, I look forward to working closely with them to learn more about how I can best support their work.

7. **Please describe the importance of the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA) in increasing voter participation and protecting voting rights.**

RESPONSE: The National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA) are very important. The NVRA requires states to provide multiple options for voter registration in federal elections, which has made it easier for all Americans to register to vote and to maintain their registration. The HAVA provides funds to states to improve and modernize outdated voting systems. Additionally, the HAVA establishes minimum standards for states to follow in their election administration procedures. Both NVRA and HAVA are crucial to increasing voter participation and protecting voting rights.

8. **During a white-supremacist rally in Charlottesville last month, a young woman – Heather Heyer – was killed by a Nazi sympathizer.**

Nearly every single political leader strongly denounced the hate-fueled white supremacist rally. But President Trump stated that “there is blame on both sides.” (Trump Comments Aug. 16, 2017). **As the person nominated to lead the Department of Justice’s Civil Rights Division, do you agree with the President that there is “blame on both sides” for the violence in Charlottesville?**

RESPONSE: As I stated at my confirmation hearing, the events of Charlottesville were a terrible tragedy and a disgrace. I was very encouraged to see that the Attorney General immediately responded to the events in Charlottesville by announcing a civil rights investigation. I echo the Attorney General’s condemnation of the actions of white supremacists in Charlottesville. As he stated, they betray our core American values and cannot be tolerated. As a private citizen, I do not have access to information about the specific investigation, but my understanding is that the investigation is being coordinated between the Civil Rights Division, the Federal Bureau of Investigation, and the United States Attorney’s Office. If confirmed, I would do everything I can to support the investigation and bring justice to those who are responsible.

9. **Many known hate groups helped organize the white supremacist rally in Charlottesville,**

and have pledged to do so in major cities throughout the country.

- a. Do you believe that you will have a responsibility as the Assistant Attorney General for the Civil Rights Division to speak out against hate groups?**

RESPONSE: Yes. I strongly condemn the actions of the white supremacists in Charlottesville, and all acts of hatred, racism, bigotry, and violence. I believe the Civil Rights Division has a duty to ensure that justice is brought to any individual or group that violates our federal hate crimes statutes, and if confirmed, I will take a strong stance against all hate crimes.

- b. What will you do to make the enforcement of federal laws against racial and religious discrimination a priority?**

RESPONSE: As the Attorney General has stressed, the Department “will not tolerate threats or acts of violence targeting any person or community in this country on the basis of their religious beliefs or background.” I am likewise committed to rigorously enforcing all federal laws prohibiting racial and religious discrimination, and if confirmed, will make every effort to ensure the Civil Rights Division’s work on these matters has adequate and proactive support.

10. The Civil Rights Division had a long-running lawsuit against Sheriff Joe Arpaio because it found that the Maricopa County Sheriff’s Office had engaged in systematic, unconstitutional racial profiling of Latinos. The Division was also part of the lawsuit that resulted in a federal judge holding Sheriff Arpaio in criminal contempt for failing to comply with a federal court order. As you know, President Trump recently pardoned Sheriff Arpaio.

- a. In general, do you believe that complying with federal court orders is important for the rule of law?**

RESPONSE: Yes.

- b. Sheriff Arpaio systematically violated the civil rights for years. President Trump’s pardon indicates that he approves of that behavior. What implications does that have for the work of the Civil Rights Division?**

RESPONSE: I am only aware of this issue from media reports. I have not studied the record in this matter, and I understand from public reports that the Department, and the Division in particular, are involved in ongoing litigation concerning both Sheriff Arpaio and the Maricopa County Sheriff’s Office. It would therefore be inappropriate for me to comment. However, I am committed to working to end discriminatory police practices that violate the Constitution or other federal laws. I also note that the President’s exercise of this constitutionally assigned pardon power is independent of the obligation of the Department of

Justice to enforce the laws that Congress has charged it with enforcing.

- c. **What message do you think the Arpaio pardon sends to minorities across America?**

RESPONSE: Please see my response to Question 10b.

- d. **Have you read any of the reports that the Civil Rights Division has written as a result of its “pattern or practice” investigations into police departments? For example, have you read the Division’s reports on the Baltimore Police Department or the Chicago Police Department? If not – will you commit to reading those reports?**

RESPONSE: I am generally familiar with the reports you mentioned, and, if confirmed, I plan to study the reports in greater detail.

- e. **As a general matter, do you believe addressing systematic police misconduct is a worthy goal for the Civil Rights Division?**

RESPONSE: Yes. I believe that policing must be constitutional and that police must comply with the civil rights laws enforced by the Civil Rights Division in order to be effective. I also believe that it is important to support our police officers and give them the tools to do their jobs well. Such support can help promote public safety and reduce crime, including violent crime. I believe the Civil Rights Division should work to ensure that policing meets these important goals.

- f. **If you are confirmed, under your leadership, will the Division continue to use its authority to investigate allegations of systemic police misconduct within police departments?**

RESPONSE: I believe that the Department has an important duty to investigate police misconduct, and that constitutional and effective policing are essential to good government. Because I am not currently an employee of the Department, I am not privy to information about its current investigations into allegations of systemic police misconduct. However, if confirmed, I would evaluate each case based on the law and the particular facts, and take appropriate action in consultation with the Division’s career attorneys and other experts on these issues.

- g. **In your opening remarks at your hearing, you stated that “my clients have included a victim of a police shooting.” Please describe that case and what your representation involved, and how the case was resolved. How did working on that case impact your view of police misconduct?**

RESPONSE: I represented Anthony Royster in a police-involved shooting case against a Baltimore police officer. The case was *Royster v. Schludenberg*, Civil

Action No. 8:10-cv-02121-PJM (D. Md.). Mr. Royster alleged that a Baltimore police officer unlawfully shot him in the back during the early morning of September 12, 2007. Mr. Royster sued for alleged violations of 42 U.S.C. § 1983. Mr. Royster alleged that the defendant police officer violated his Fourth Amendment Rights when he shot Mr. Royster in the back. In particular, Mr. Royster alleged that the defendant's use of deadly force was a seizure under the Fourth Amendment of the United States Constitution, was not objectively reasonable, and was excessive. The case settled.

Working on the case reinforced my view that police must comply with the civil rights laws and must be very careful when they consider whether to use deadly force.

- h. While you were General Counsel of the Equal Employment Opportunity Commission, did the EEOC ever resolve cases through consent decrees?**

RESPONSE: Yes.

- i. If so, why did you find consent decrees a useful way to resolve cases?**

RESPONSE: Properly tailored, and in appropriate circumstances, consent decrees can serve as powerful tools to enforce the law, to monitor compliance, and to prevent future unlawful conduct.

11. In 2008, you testified in the Senate against legislation that was subsequently enacted as the Lilly Ledbetter Fair Pay Act. You said that you did "not believe the bill would advance the public interest." That law now ensures that women like Lilly Ledbetter who are victims of pay discrimination can find justice in our courts.

- a. Do you believe that there is a pay gap for women in which women are paid less for doing substantially similar or the same work?**

RESPONSE: Federal law requires that employers pay workers the same for doing substantially similar work without regard to their sex, race, color, religion, disability, age, and other protected traits. I believe firmly that men and women should be paid the same for the same work. I think progress has been made, but unfortunately, discrimination still exists.

- b. During your September 6 nominations hearing, you said that your 2008 testimony argued for "a broader remedy to the problem that the members of the committees were expressing." Your "broader remedy" was to abandon the reforms in the legislation in favor of codifying the doctrines of equitable tolling and estoppel already in use at the time.**

Since the doctrines of equitable tolling and estoppel were already available and used by courts, how would your proposal to codify these doctrines have provided new and broader relief to pay discrimination plaintiffs?

RESPONSE: The issue in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), was about when it is appropriate to extend the statute of limitations under Title VII of the Civil Rights Act of 1964. After the Supreme Court decided the case, I offered testimony about how the Congress could respond to that decision, and in particular, the concern that Title VII's statute of limitations – known as the charge-filing period – should be extended when victims of discrimination are unaware of hidden discrimination. I therefore explained that Congress could address that concern by codifying two doctrines endorsed by the U.S. Equal Employment Opportunity Commission (EEOC), namely, the equitable tolling and equitable estoppel doctrines.

Congress has never codified the equitable tolling and equitable estoppel doctrines that I discussed in my testimony. They are described in guidance issued by the EEOC. The courts are not bound by the EEOC's standards, and the courts have articulated different standards about these doctrines. This is because the EEOC lacks substantive rulemaking authority under Title VII of the Civil Rights Act of 1964. Therefore, if Congress codified the EEOC's standards, courts would be bound by them, and victims of unlawful discrimination would benefit from the extension of the limitations periods when they satisfy the EEOC standards.

The EEOC's interpretation of the equitable tolling and equitable estoppel doctrines would also address the problem identified by the dissent in the *Ledbetter* case. Specifically, the dissent expressed concern about "hidden" discrimination. For example, Justice Ruth Bader Ginsburg explained in her dissent that "[c]ompensation disparities . . . are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries." *Ledbetter*, 550 U.S. at 649–50. Justice Ginsburg also expressed concern about "concealed pay discrimination." *Id.* at 650.

The equitable tolling and equitable estoppel doctrines, as described by the EEOC and in my testimony, would provide an effective way to extend the limitations period to address such hidden and concealed discrimination. On January 24, 2008, I testified that "Congress could codify the EEOC's Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC's enforcement process and establish a clear, congressionally mandated rule for when the EEOC's charge-filing period ought to be extended."

I also explained that the EEOC standard, if codified by the Congress, would enable "the statutory time limits [to] be extended, or 'tolled,' for equitable reasons when a person who alleges unlawful discrimination 'was understandably unaware of the EEO process or of important facts that should have led him or her to

suspect discrimination.” The EEOC Compliance Manual, I testified, says that “[g]rounds for equitable tolling include: (1) no reason to suspect discrimination at the time of the disputed event; (2) mental incapacity; (3) misleading information or mishandling of a charge by the EEOC or State fair employment practices agency; and (4) timely filing in the wrong forum.”

Likewise, I testified about the EEOC’s equitable estoppel doctrine. I explained that the “the doctrine of equitable estoppel also permits the charge-filing period to be extended. This doctrine applies when any delay associated with the filing of a charge is attributable to active misconduct by an employer, union, or other respondent that is intended to prevent timely filing.”

Codification of these doctrines would benefit workers because the doctrines would apply to all forms of discrimination, including compensation discrimination against women. In short, my proposal was another way to establish a clear, Congressionally-mandated standard to obtain relief for victims of workplace discrimination, including women who experience sex discrimination in compensation. However, if confirmed, I am committed to following the law as it is currently enacted.

- c. **If you were arguing for a broader proposal, then why would the more limited protections in the bill “not...advance the public interest”?**

RESPONSE: Please see my response to Question 11b.

- d. **In your September 6 testimony, you said your testimony in favor of codifying doctrines already available to pay discrimination victims was responding to concerns Senators sought to address in the legislation. However, Senators’ concern was that Ms. Ledbetter and other pay discrimination victims in her position were unable to bring their claims. The purpose of the legislation we debated and passed was to ensure Ms. Ledbetter would have her day in court.**

If Senators followed your proposal to reject the legislation and instead codify the doctrines of equitable tolling and estoppel, would Ms. Ledbetter have been able to bring her case? What parts of your testimony were meant to ensure that Ms. Ledbetter would be able to bring her case successfully in court?

RESPONSE: Please see my response to Question 11b.

12. At your hearing, you indicated that you were not especially familiar with the July 2008 Office of the Inspector General / Office of Professional Responsibility Report, *An Investigation of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*.

- a. **Will you commit to reading this report?**

RESPONSE: If confirmed, I will read this report.

- b. After you have read this report, please detail any specific steps you intend to take to make sure the serious problems that report flags are not repeated.**

RESPONSE: If I am confirmed, I intend to ensure that all personnel decisions are made based upon merit and experience, consistent with the civil service laws and longstanding Department policy.

13. There is also a January 2015 National Academy of Public Administration Report on the Civil Rights Division.

- a. Will you commit to reading this report?**

RESPONSE: If confirmed, I will read this report.

- b. After you have read this report, please detail any specific steps you intend to take to make sure that its recommendations are fully implemented.**

RESPONSE: If I am confirmed, ensuring effective operational management and communication within the Division will be a top priority. It is imperative that management provide the support and tools that the dedicated employees in the Division need to do their important work.

14. Last month, the New York Times reported that the Justice Department's Civil Rights Division would investigate universities' and colleges' affirmative action programs.

It appears that the Division you have been nominated to lead intends to use its limited resources to investigate possible discrimination against white applicants, rather than historically disadvantaged ones. This is an unusual choice for a Division whose work has been crucial in ensuring a path to justice after centuries of discrimination. Indeed, we have seen some of those scars reopened as neo-Nazis and white supremacists have recently marched in the streets.

- a. Did you have any involvement in that announcement or that proposed project?**

RESPONSE: No.

- b. During your selection and nomination process, were you asked specifically about your commitment to pursuing investigations of these affirmative action programs?**

RESPONSE: No.

- c. **Please detail what you know or what you have learned, either before or after those stories appeared in early August, about the status of that effort.**

RESPONSE: Because I am not currently serving in the Department, I am unfamiliar with the facts and circumstances surrounding this issue and thus am unable to comment further.

- d. **Given the challenges facing our nation right now, do you intend to continue pursuing this initiative and investigating universities' affirmative action programs?**

RESPONSE: Because I am unfamiliar with the facts and circumstances concerning this issue, I am unable to comment. But, if confirmed, I, together with career staff, will carefully consider any complaint that alleges race discrimination in education. I am committed to ensuring that no student is discrimination against on the basis of race, color, national origin, or other protected characteristics, and that all colleges and universities conduct their admission processes in accordance with the law.

15. As you may be aware, the FBI has collected data on hate crimes since 1990 when Congress passed the *Hate Crime Statistics Act*. However, it's becoming increasingly clear that the FBI's tally is disturbingly incomplete, which prevents us from understanding the scope and scale of the problem.

While the FBI typically reports 7,000 to 10,000 hate crimes, the Bureau of Justice Statistics estimates that the true number may approach 300,000, which is approximately 30 times the FBI estimation. As the BJS report also indicates, the percentage of religiously motivated hate crimes nearly tripled between 2004 and 2012.

- a. **What do you think would foster more accurate and complete reporting of hate crimes by victims?**

RESPONSE: Because I am not currently working at the Department, I am not privy to the Department's efforts to collect more complete and adequate reporting of hate crimes and do not know enough to comment. If confirmed, I look forward to doing more to improve reporting of hate crimes.

- b. **What do you think would foster more accurate and complete reporting from local police to the FBI?**

RESPONSE: Because I am not currently working at the Department, I am not privy to the details of the reporting process between local police and the Federal Bureau of Investigation (FBI), and do not know enough to comment. If confirmed, I look forward to working with the FBI and local law enforcement to deepen cooperation on hate crime reporting.

- c. **Over the last year, there has been a dramatic rise in the number of hate crimes targeting the American Muslim community. In fact, the FBI has reported that hate crimes targeting Muslims increased by 67% between 2014 and 2015 – a startling increase. If you are confirmed to be the Assistant Attorney General of the Civil Rights Division, what action would you take on this problem?**

RESPONSE: I agree with the Attorney General’s statement that the Department “will not tolerate threats or acts of violence targeting any person or community in this country on the basis of their religious beliefs or background.” No person should be a victim of violence because of intolerance and bigotry due to his or her religion, or any other trait protected by law. I believe the Civil Rights Division should take an aggressive stance toward combating crimes of this nature, and if confirmed, I will be committed to rigorous enforcement of federal hate crimes statutes.

16. Since January of this year there has been an alarming trend of attacks on houses of worship. In addition to a series of threatening letters sent to mosques around the country starting late last year and continuing into 2017, there have also been an alarming number of mosque arsons since the beginning of this year. To name a few examples:

- January 7: The Islamic Center of Lake Travis in Austin, TX was burned to the ground before its construction was fully complete;
- January 14: The Islamic Center of Eastside in Bellevue, WA was set on fire intentionally
- January 27: Arson intentionally destroyed the Victoria Islamic Center in Victoria, TX
- February 24: The Islamic Society of New Tampa in Thonotosassa, FL was intentionally set on fire just months after a mosque in Fort Pierce, FL was set on fire;
- April 22: A fire destroyed the Brooklyn Broadway Jame Masjid and Islamic Center early in the morning while worshipers were inside; while there were no injuries, the mosque’s furniture and books were destroyed.
- August 5: A mosque in Bloomington, Minnesota was hit by an explosion early in the morning while worshipers were inside for morning prayers. While there were no injuries, the mosque suffered significant damages.

- a. **What steps will you take to address this problem and provide support for the Muslim community?**

RESPONSE: I believe that crimes motivated by prejudice have no place and should not be tolerated in American society. As the Attorney General recently stated, “[n]o person should have to fear being violently attacked because of who they are, what they believe, or how they worship.” It is important to investigate aggressively and prevent hate crimes in partnership with communities, and I am committed to ensuring that all Americans receive equal protection of the law. If confirmed, I will ensure that the Civil Rights Division takes a forceful stance toward combating religious hate crimes, and I will work with other components of the Department to provide support for religious communities.

17. According to Sikh Coalition surveys, a majority of Sikh students in cities throughout the nation experience bias-based bullying because of their religion. A 2014 survey of Sikh students in Fresno, California revealed that up to 67 percent of Sikh students who wear turbans experienced bullying and harassment. In 2014, the Civil Rights Division’s Educational Opportunities Section settled a bullying case against a school district in DeKalb County, Georgia on behalf of a Sikh student who experienced persistent bullying and harassment at school. The agreement resulted in improvements to the district’s anti-bullying policies that strengthen protections for all students in that school district. **What steps should the Civil Rights Division take to address bias-based bullying, and will this be a priority for you if you are confirmed?**

RESPONSE: I share your interest in ensuring that schools are safe, non-hostile learning environments for all students. Bullying, harassment, and other forms of discrimination can be a significant barrier to students reaching their full potential, and I believe that no student should be afraid to go to school. If confirmed, I will be committed to robust enforcement of federal laws prohibiting discrimination on the basis of religion and other protected traits in public schools and other institutions of learning.

18. In July 2016, the Civil Rights Division analyzed its enforcement of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and determined that “RLUIPA has a significant impact on protecting the religious freedom of, and preventing religious discrimination against, persons exercising their religions through the construction, expansion, and use of property, and persons confined to institutions.” **If you are confirmed to lead the Civil Rights Division, would you commit to robust and aggressive enforcement of RLUIPA, especially as it relates to the rights of religious minority groups and individuals?**

RESPONSE: If I am confirmed, I will be committed to enforcing all federal civil rights laws, including RLUIPA. I believe RLUIPA is important for protecting the rights of persons of all religious faiths, and persons of minority faiths in particular. If I am confirmed, I will look forward to learning more about this issue and ensuring that RLUIPA’s protections are enforced.

19. The July 2016 CRT report makes clear that the Division regularly relied on consent decrees to ensure that municipalities and other defendants fully comply with the mandates of RLUIPA and federal law. **If you are confirmed to lead the Civil Rights Division, would you commit to using all tools at your disposal, including consent decrees**

where appropriate, to ensure robust enforcement of the law?

RESPONSE: If confirmed, I will dedicate myself to fair and even-handed enforcement of the civil rights laws. This includes evaluating each case on the merits to decide the best approach to enforcement, and the most appropriate remedies, based on the specific facts and circumstances, including the use of consent decrees when appropriate.

20. You represented the University of North Carolina when it was sued by the Justice Department over North Carolina’s discriminatory law, House Bill 2, which restricted transgender people’s access to public restrooms.

a. Why did you choose to become involved in that case?

RESPONSE: The University of North Carolina retained my law firm as litigation counsel. The University did not enact House Bill 2 and the University took no action to enforce the statute before its repeal. In addition, the University’s policies prohibited (and continue to prohibit) discrimination on the basis of gender expression, gender identity, and sexual orientation. The University’s commitment to these policies remained unchanged following the passage of House Bill 2. For these reasons, the University took the position that it was not a proper defendant in the lawsuit that challenged House Bill 2.

b. In your view, does Title IX protect transgender students?

RESPONSE: I firmly believe that schools must ensure that all students are able to attend school and thrive in an environment free from discrimination and bullying. I am committed to enforcing Title IX and other federal laws to ensure the protection of all students, including lesbian, gay, bisexual, and transgender student. It is my understanding that both the Department of Justice and the Department of Education are considering further and more completely the issues that were involved in the House Bill 2 litigation. Because this issue is in ongoing litigation, it would not be appropriate for me to comment further.

c. If confirmed, under your leadership, how will the Civil Rights Division address claims by transgender students who have wrongly been denied access to bathrooms at school, or who have faced harassment or discrimination because of their gender identity?

RESPONSE: As explained above, because this issue is in ongoing litigation, I cannot comment on the merits. However, if confirmed, I would carefully and thoroughly consider all arguments and recommendations from career attorneys and the relevant law before reaching a decision on the Division’s approach.

d. If confirmed, under your leadership, will the Division advance the position that discrimination on the basis of gender identity is a form of sex discrimination prohibited by Title VII? What about discrimination on the

basis of sexual orientation?

RESPONSE: Please see my responses to Questions 20a-b.

- e. **Do you agree that sex discrimination laws such as Title VII, Title IX, and Section 1557 of the Affordable Care Act prohibit discrimination that is motivated by sex stereotypes, and would the Division maintain that interpretation under your leadership?**

RESPONSE: Please see my responses to Questions 20a-b.

21. Recently, the Department of Justice chose to file an amicus brief in a Second Circuit case, *Zarda v. Altitude Express*, just to argue that Title VII of the Civil Rights Act of 1964 does not protect LGBT Americans. And just last week, the Department of Justice chose to file an amicus brief in the Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* alleging that a wedding cake baker did not need to comply with Colorado's public accommodations law—a law which prohibits discrimination against LGBT individuals—because he had a First Amendment right to discriminate against such couples.

The Acting Assistant Attorney General of the Civil Rights Division signed both of these briefs.

- a. **If you had been the Assistant Attorney General when these briefs were filed, would you have signed them?**

RESPONSE: Because I am not currently working at the Department, I am not familiar with the details of the Department's position and internal discussions in this matter. In addition, because there is ongoing litigation in this matter, it would not be appropriate for me to comment.

- b. **Do you agree with the legal positions that these briefs advance?**

RESPONSE: Please see my response to Question 21a.

- c. **In your view, what do these briefs mean for the work of the Civil Rights Division in combatting discrimination against lesbian, gay, and bisexual Americans in employment, housing, credit and other areas covered by federal nondiscrimination law? Does it have implications for the work of the Civil Rights Division on behalf of transgender Americans?**

RESPONSE: Please see my response to Question 21a.

22. The Civil Rights Division is charged with the critical task of advancing the rights of people with disabilities. According to the Division's website, the Disability Rights Section "works to achieve equal opportunity for people with disabilities in the United States by implementing the Americans with Disabilities Act (ADA)." As the Disability Rights

Section notes, its work affects over 49 million people with disabilities.

- a. **Please describe what in your legal background prepares you to oversee the Justice Department's efforts to advance the rights of people with disabilities.**

RESPONSE: I have spent my career working to protect civil rights, including the rights of individuals with disabilities. I believe my experience both at the DOL and at the EEOC have provided me with substantial experience in enforcing civil rights laws applicable to individuals with disabilities, including the Americans with Disabilities Act (ADA). The DOL enforces various laws related to the rights of individuals with disabilities, and I participated in the enforcement of those laws when I served at the DOL. And, as you are aware, the EEOC has primary responsibility for enforcing Title I of the ADA, which prohibits private employers, State and local governments, employment agencies, and labor unions from discriminating in employment against qualified individuals with disabilities. The Department's Civil Rights Division has authority to bring suit against employers based on individual charges of discrimination where it has been referred to the Department by the EEOC, as well as to carry out enforcement activities under other titles of the ADA. I am confident that my prior work at the DOL and EEOC will serve as an excellent starting point for successfully understanding and overseeing the work of the Civil Rights Division in disability rights enforcement. In addition, in private practice, I have advised many individuals and entities about compliance with the ADA.

- b. **Please describe the steps you have you taken, if any, to become familiar with the ADA and other laws advancing the rights of those with disabilities, as well as the Division's enforcement of those laws.**

RESPONSE: Please see my response to Question 22a. In addition to my familiarity with disability rights laws based on my prior professional experience, I have been further following the public work of the Civil Rights Division on disability issues and reviewing relevant laws to ensure I am as up to date as possible in this area, should I be fortunate enough to be confirmed.

- c. **Please describe any experience or knowledge you have of the ADA or other laws advancing the rights of those with disabilities as they apply to public services, public accommodations, or other similar entities.**

RESPONSE: Please see my response to Question 22a. As noted, I previously served as the general counsel of the EEOC, which has primary responsibility for enforcing Title I of the ADA. I believe this will be relevant to and assist me in overseeing the Department's work in enforcing Titles II and III of the ADA, which prohibits discrimination by State and local governments and by places of public accommodations on the basis of disability. In addition, in the private practice of law, I have advised various individuals and entities about the ADA and other laws that advance the rights of individuals with disabilities.

- d. **Please describe in detail the steps that you will take, if confirmed, to enforce the ADA and other laws advancing the rights of those with disabilities.**

RESPONSE: I am committed to enforcement of the ADA, which has been a critical law enforcement function of the Department of Justice since its passage. If confirmed, I would carefully consider any complaint brought to the attention of the Department to ensure full and fair enforcement of the ADA in order to protect the rights of individuals with disabilities consistent with the facts, evidence, and the law. I will also meet with the chief of the Disability Rights Section and other staff to review pending matters and take any appropriate action necessary to enforce the law effectively.

23. In 1999, the United States Supreme Court held in *Olmstead v. L.C.*, 527 U.S. 581, that Title II of the ADA prohibits the unjustified segregation of people with disabilities. As June 2011 guidance from the Civil Rights Division makes clear, post-*Olmstead*, the Division has devoted considerable attention and focus to the ADA's "integration mandate," working to ensure that people with disabilities are able to "live, work, and receive services in the greater community, like individuals without disabilities." (Civil Rights Division, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*)

- a. **Please describe in detail how you would go about advancing the ADA's "integration mandate."**

RESPONSE: I am committed to enforcement of Title II of the ADA. As with any other case before the Department, I would carefully consider any allegation of violations of Title II of the ADA based on the facts, evidence, and the law, to ensure full and fair enforcement of the law.

- b. **Will you commit to continuing to ensure that the Civil Rights Division enforces *Olmstead's* "integration mandate"?**

RESPONSE: I am committed to a full and fair enforcement of Title II of the ADA. If confirmed, I will review any alleged violations based on the facts, evidence, and the law, to protect the rights of all individuals with disabilities.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR LEAHY

1. The Department of Justice's (DOJ) Civil Rights Division (CRD) was created in 1957 to "uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable in our society." If confirmed to run the Civil Rights Division, you will be its face and moral compass, determining whether it lives up to its mission.

- (a) This mission is just as critical now as it was 60 years ago. Recently, we have witnessed a rejuvenated white supremacy movement, discrimination against transgender patriots serving in our military, and the targeting of law-abiding immigrants who came to this country as children. **Do you consider any groups in our country to be especially vulnerable today? Whose constitutional and civil rights do you believe are under threat today?**

RESPONSE: Because I am not a current employee of the Department and am not privy to the cases it sees, it would be difficult for me to comment with specificity as to the most vulnerable groups. As a general matter, I can promise you that I am committed to upholding and protecting the civil rights of all Americans. Targeting any American because of who they are, what they believe, or who they worship has no place in our country, and if confirmed, I will work to vigorously enforce protections for civil and constitutional rights.

- (b) You have criticized protections for women against sex discrimination, affirmative action, age discrimination protections, and "ban the box" laws. **How do your critical views of our nation's core civil rights laws make you well-suited to vigorously enforce those same laws?**

RESPONSE: Our civil rights laws provide foundational protections in our nation, and I have always supported our civil rights laws and am firmly committed to upholding them. If confirmed, I will vigorously enforce all civil rights laws within the jurisdiction of the Civil Rights Division.

I fully support protections against discrimination and our core civil rights laws, and in my prior public service as general counsel of the EEOC, I was responsible for enforcing several civil rights laws and, with career attorneys and staff, did so aggressively and effectively.

I am committed to enforcing all of our civil rights laws, including those that relate to hate crimes, human trafficking, voting, and employment discrimination. I believe all of these and the other laws within the jurisdiction

of the Civil Rights Division are a fundamental and critically important part of our democracy. If confirmed, I will do my best to make sure that the Civil Rights Division enforces all of the civil rights law within its jurisdiction. I will prioritize the investigation and prosecution of hate crimes, which have no place in our society. I am committed to fighting all unlawful discrimination, be it on the basis of sex, race, age, disability, national origin, religion, and all other protected traits. If confirmed, I will take care to prosecute discrimination and enforce civil rights protections in voting, education, employment, housing disability, policing, and all other areas within the jurisdiction of the Civil Rights Division.

As I emphasized in my confirmation hearing, I fully support our nation's civil rights laws, including protections for women against sex discrimination, and I fully agree that these protections are important, and have always believed as much.

Finally, please see the letter submitted to the Senate Judiciary Committee from Richard Seymour, dated September 4, 2017 (attached).

2. Imposing a religious litmus tests on immigrants runs contrary to the foundational values of the United States. The first immigrants to this country were seeking religious freedom, and this ideal is now a bedrock principle of our constitution and society. As a candidate, President Trump called “for a total and complete shutdown of Muslims entering the United States.”

- (a) **Does the First Amendment allow for the use of religious litmus tests for entry into the United States? Is a blanket ban on a specific faith – or any policy attempting to achieve that goal – consistent with the First Amendment or our civil rights laws?**

RESPONSE: The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Religious liberty is one of the foundational principles of our nation and is expressly protected by the Constitution. Indeed, the Supreme Court has explained that a law “may not discriminate against ‘some or all religious beliefs.’” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021, 198 L. Ed. 2d 551 (2017) (citation omitted). Congress has passed further protections that recognize the importance of protecting religious liberty and prohibiting discrimination because of religion. The Civil Rights Division plays an important role in enforcing these protections. As a general matter, if confirmed, I am committed to using these laws to protect the rights of people of all faiths. I will evaluate every case based on its facts and circumstances.

- (b) **What did the Founders think about religious litmus tests, and religious freedom more generally? How would their views on this subject guide**

your approach to cases involving challenges to policies that either explicitly or effectively impose religious litmus tests of some kind?

RESPONSE: While I cannot speak to what any particular Founder thought, the Founders generally recognized the importance of religious freedom, so much so that they wrote protections for religious liberty into the First Amendment. If confirmed, I would vigorously enforce those same protections.

3. In 2009, Congress passed the Lily Ledbetter Fair Pay Restoration Act to restore the original intent of Congress to protect employees from sex, race, and other forms of discrimination. You appeared before Congress in your personal capacity to testify against the legislation. You testified that the bill would “not be in the best interest of the American people.” You instead argued for codification of standards related to equitable tolling and equitable estoppel. This would not just place a further pleading burden on the individual employee and require focus on issues other than the actual discrimination claim, but could also unfairly penalize an employee who may be aware of a pay differential but does not confirm its discriminatory cause until much later.

- (a) **Do you still believe today that the Ledbetter Act – now the law of the land – is “not in the best interest of the American people?”**

RESPONSE: I believe that it is in the best interest of the American people for men and women to be paid the same for performing the same work and without regard to their race, color, sex, national origin, religion, age, disability, genetic history, and other protected traits. My past testimony concerned the narrow issue of the statute of limitations for claims and potential legislative responses to the Supreme Court’s decision in *Ledbetter v. Goodyear*, 550 U.S. 618 (2007).

The issue in the *Ledbetter* case was about when it is appropriate to extend the statute of limitations under Title VII of the Civil Rights Act of 1964. After the Supreme Court decided the case, I offered testimony about how the Congress could respond to that decision, and in particular, the concern that Title VII’s statute of limitations – known as the charge-filing period – should be extended when victims of discrimination are unaware of hidden discrimination. I therefore explained that Congress could address that concern by codifying two doctrines endorsed by the EEOC, namely, the equitable tolling and equitable estoppel doctrines.

Congress has never codified the equitable tolling and equitable estoppel doctrines that I discussed in my testimony. They are described in guidance issued by the EEOC. The courts are not bound by the EEOC’s standards, and the courts have articulated different standards about these doctrines. This is because the EEOC lacks substantive rulemaking authority under Title VII of the Civil Rights Act of 1964. Therefore, if Congress codified the EEOC’s standards, courts would be bound by them, and victims of unlawful discrimination would benefit from the extension of the limitations periods when they satisfy the EEOC standards.

The EEOC's interpretation of the equitable tolling and equitable estoppel doctrines would also address the problem identified by the dissent in the *Ledbetter* case. Specifically, the dissent expressed concern about "hidden" discrimination. For example, Justice Ruth Bader Ginsburg explained in her dissent that "[c]ompensation disparities . . . are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries." *Ledbetter*, 550 U.S. at 649–50. Justice Ginsburg also expressed concern about "concealed pay discrimination." *Id.* at 650.

The equitable tolling and equitable estoppel doctrines, as described by the EEOC and in my testimony, would provide an effective way to extend the limitations period to address such hidden and concealed discrimination. On January 24, 2008, I testified that "Congress could codify the EEOC's Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC's enforcement process and establish a clear, congressionally mandated rule for when the EEOC's charge-filing period ought to be extended."

I also explained that the EEOC standard, if codified by the Congress, would enable "the statutory time limits [to] be extended, or 'tolled,' for equitable reasons when a person who alleges unlawful discrimination 'was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination.'" The EEOC Compliance Manual, I testified, says that "[g]rounds for equitable tolling include: (1) no reason to suspect discrimination at the time of the disputed event; (2) mental incapacity; (3) misleading information or mishandling of a charge by the EEOC or State fair employment practices agency; and (4) timely filing in the wrong forum."

Likewise, I testified about the EEOC's equitable estoppel doctrine. I explained that the "the doctrine of equitable estoppel also permits the charge-filing period to be extended. This doctrine applies when any delay associated with the filing of a charge is attributable to active misconduct by an employer, union, or other respondent that is intended to prevent timely filing."

Codification of these doctrines would benefit workers because the doctrines would apply to all forms of discrimination, including compensation discrimination against women. In short, my proposal was another way to establish a clear, Congressionally-mandated standard to obtain relief for victims of workplace discrimination, including women who experience sex discrimination in compensation. However, if confirmed, I am committed to following the law as it is currently enacted, and if confirmed, I will vigorously enforce all civil rights laws.

The Fair Pay Act is now the law of the land, and if confirmed, I will enforce it to the best of my ability.

(b) **Were the concerns you expressed during the hearing realized?**

RESPONSE: Because I am not an employee of the Department or the EEOC, I am not privy to the details or data about the enforcement of the Fair Pay Act. Therefore, I am not in a position to comment.

(c) **What assurances can you give that you would vigorously enforce the Ledbetter Act's protections if confirmed?**

RESPONSE: If confirmed, I will work to enforce the Fair Pay Act vigorously in the same way that I supported vigorous enforcement of labor and civil rights laws when I served at the Department of Labor (DOL) and the EEOC. Because I am not a Department of Justice employee, I am not privy to the details of its enforcement, but I look forward to learning more and ensuring that the law is enforced in a fair and even-handed manner.

4. **Do you view Title VII and Title IX of the Civil Rights Act as statutory protections codifying the core constitutional principle of equal protection under the law?**

RESPONSE: Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 have played an important role in protecting against discrimination, and both have enabled the Department to prosecute and intervene in many cases. I agree that each law relates to and embodies the constitutional ideal of equal protection, although the substantive law governing constitutional equal-protection analyses differs in some ways from the substantive law governing Title VII and Title IX analyses. I am committed to enforcing these laws fairly and zealously to fight discrimination.

5. If you are confirmed, one of the key duties of your office will be to protect the voting rights of all Americans. The Trump Administration is currently pursuing unfounded claims of widespread voter fraud while doing nothing about systematic voter suppression.

(a) **Do you share President Trump's belief that he won the popular vote "if you deduct the millions of people who voted illegally" last year? Are you aware of any evidence to support such a claim? If your answer to either is anything other than an unambiguous "no," what evidence do you have to support the claim that millions of votes were cast illegally?**

RESPONSE: I am not aware of data indicating that millions of people voted illegally in the 2016 election.

(b) **On June 28, 2017, the same day as the Presidential Advisory Commission on Election Integrity (the Commission) sent a letter to states asking for detailed voter information, the Civil Rights Division sent a letter to 44 states covered by the National Voter Registration Act asking what steps they were taking to remove allegedly ineligible voters from the rolls. Have you discussed this letter or broader effort with anyone associated with the**

Commission, CRD or DOJ, or the White House?

RESPONSE: Because I am not currently serving in the Department, I am not familiar with the letter you reference, and I have not discussed this issue with anyone associated with the Commission, the Civil Rights Division, the Department, or the White House.

6. While President Trump's repeated claims about widespread voter fraud are unfounded, there is undeniable evidence of voter suppression tactics used by states to disenfranchise vulnerable minority communities. Despite this evidence, Attorney General Sessions has begun to scale back the DOJ's lawsuits against states for intentionally discriminatory voter ID laws.

(a) If confirmed, would such lawsuits be a priority for CRD?

RESPONSE: As I firmly stated in my hearing, the Voting Rights Act is one of the most important laws within the jurisdiction of the Civil Rights Division. It is fundamental to who we are as a people. I zealously support enforcement of the Voting Rights Act. If confirmed, I will carefully evaluate federal voting rights cases that fall within the Division's jurisdiction to ensure fair and even-handed enforcement based on the facts, the evidence, and the law. I also intend to consider carefully the views and recommendations of the Division's career attorneys.

(b) What would you do if the Attorney General or the President attempted to prevent you from investigating clear instances of voter suppression?

RESPONSE: Every Department official swears an oath to uphold the Constitution and laws of the United States. If confirmed, I would take that oath sincerely and work fervently every day to keep that oath. If any superior tried to prevent me from fulfilling that oath, I would explain what I believe my duty and the oath require. If I was unable to persuade my superior, I would resign.

7. The vast majority of the law enforcement officers perform their difficult jobs with respect for their communities and in compliance with the law. However, there are incidents in which this is not the case. **Do you believe that investigating allegations of police misconduct is an important function of the CRD? If so, how do you plan to prioritize enforcement and allocate Division resources in furtherance of this function?**

RESPONSE: The Department of Justice and its Civil Rights Division have an important duty to review and investigate alleged civil rights violations by the police. My understanding is that these matters are often initially reviewed by state or local prosecutors and the internal affairs division of the police department involved. To the extent that police misconduct may require the Department's review, I am committed to working closely with the career prosecutors in the Civil Rights Division and Federal Bureau of Investigation agents to conduct thorough investigations and, when the facts

warrant it, to use the resources of the Department to initiate prosecutions against officers who abuse their authority and violate the federal civil rights laws.

8. As with all Americans, police officers are exposed to and may adopt unconscious and often subtle biases. However, the effects of that bias can be countered by acknowledgement and training. **Do you support the expansion of law enforcement training to address implicit bias, de-escalation responses, and officer engagement with individuals suffering from mental illness and intellectual disabilities?**

RESPONSE: Eliminating biases and discrimination in our society is and should be a top priority of the Civil Rights Division. I support measures that, taken within the bounds of federal law, eliminate these evils. Whether and when such measures are appropriate will depend on the facts and circumstances of unique cases. Thus, if confronted with a situation that concerns the law enforcement issues you raise, I would consider the facts and relevant law in consultation with career attorneys before reaching a final decision on the matter.

9. On July 2, 2008, DOJ's Office of Inspector General and Office of Professional Responsibility issued a report on allegations of politicized hiring and other improper personnel actions in the CRD during the Bush Administration. Among other things, the report found that head of CRD improperly "considered political and ideological affiliations when hiring and taking other personnel actions relating to career attorneys, in violation of Department policy and federal law, and his actions also constitute misconduct."

- (a) If confirmed, do you commit to ensuring that political and ideological affiliations are not considered in hiring and taking other personnel actions relating to career CRD attorneys?**

RESPONSE: Yes.

- (b) Do you also commit to ensuring that CRD regularly provides training on merit system principles and prohibited personnel practices in the Civil Service Reform Act, federal regulations, and DOJ policies to all personnel with a role in hiring or supervising career employees?**

RESPONSE: Because I do not currently work for the Department, I am not familiar with the current system of personnel training. Nonetheless, if confirmed, I look forward to learning more about the available training opportunities and adopting, in consultation with career staff, the best personnel training system possible to ensure that members of the Division conduct hiring and supervision with integrity and without regard to political, ideological, or any other prohibited considerations. If I am confirmed, I intend to ensure that all personnel decisions are made based upon merit and experience, consistent with the civil service laws and longstanding Department policy.

10. In August 2017, press reporting revealed that an internal announcement was circulated in the Civil Rights Division, seeking lawyers to work on “investigations and possible litigation related to intentional race-based discrimination in college and university admissions.” Press reporting also indicated that these lawyers would work in the Civil Rights Division “front office” where political appointees are based. A Department of Justice spokesperson stated that the announcement was only in relation to an investigation of “one admissions complaint,” but reporting indicates that the announcement uses the plural word, “investigations.”

(a) Are you aware of any communications or coordination between any part of DOJ and the White House on this initiative?

RESPONSE: No.

(b) Do you believe it is proper to lead such an investigation out of the front office? Do you have any concerns that this may lead to improper politicization of this initiative?

RESPONSE: Because I do not currently work for the Department, I am not familiar with the Department’s staffing and detail policies, and therefore not in a position to comment further.

(c) Do you commit to continuing to abide by the September 30, 2016, guidance issued by CRD and the Department of Education’s Office for Civil Rights, entitled “*Questions and Answers about Fisher v. University of Texas at Austin II*,” which states that the “Departments continue to strongly support efforts to promote diversity in elementary, secondary, and higher education”?

RESPONSE: The Supreme Court held in *Grutter v. Bollinger* that governmental uses of race are subject to strict scrutiny. 539 U.S. 306, 327, (2003). In particular, the Court in *Grutter* determined “that student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Id.* at 325. The Court reaffirmed these principles when it decided *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016). If confirmed, and if confronted with a particular issue regarding education, I would consider the specific facts at issue vis-à-vis the Constitution, statutes, and Supreme Court precedents such as *Grutter* and *Fisher*.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR DURBIN

1. In our meeting this week, we discussed the restrictive voting laws that several states have passed in recent years. State legislators often claim that they enacted these laws to prevent voter fraud—despite the overwhelming evidence that widespread voter fraud does not exist.

You pledged that, if confirmed, you would look at whether these types of laws are created with a discriminatory purpose and whether these laws have a discriminatory effect.

- a. **I want to make sure that I am clear on your position so, for the record, do you stand by this pledge?**

RESPONSE: Yes.

- b. **Can you elaborate on how you will determine if restrictive state voting laws have a discriminatory effect?**

RESPONSE: While I cannot speculate on particulars, I would determine whether state voting laws have a discriminatory effect by looking to the facts, the evidence, and relevant law in each case.

- c. **Will you commit to accepting the judgment of career Department attorneys in the Voting Section on enforcement cases, if you are confirmed?**

RESPONSE: Career Department attorneys are vital to the mission and work of the Civil Rights Division, as they provide a wealth of expertise and experience in litigating the specific civil rights laws enforced by each of the Sections. I look forward to working closely with them if confirmed, and will give their judgment substantial weight.

2. President Trump has claimed—without any evidence—that three to five million people voted unlawfully in the 2016 election. At our meeting, you stated that you are unaware of any widespread voter fraud in our elections. **Do you agree that President Trump is incorrect in his claim that 3 to 5 million people voted illegally in the 2016 election?**

RESPONSE: I am not aware of data indicating that millions of people voted illegally in the 2016 election.

3. At our meeting, we also discussed the decision of the Department of Justice (DOJ) to change positions in two recent voting rights cases—a case challenging the strict voter photo identification law in Texas and a case challenging Ohio’s attempt to purge voter rolls on the

basis of voter inactivity. In our discussion of these cases, you stated that to the extent any state denies access to the ballot, it is a concern.

a. Will you pledge to review the decisions to change positions in these cases?

RESPONSE: Yes. If confirmed, I would review the records in these cases and review the recommendations of the various Department attorneys involved.

b. Will you pledge to reverse these decisions if you find that, as evidence has shown, these actions by Texas and Ohio deny legitimate voters access to the ballot?

RESPONSE: My understanding from public reports is that the Division has signed briefs in the Texas case (in the Fifth Circuit Court of Appeals) and the Ohio case (in the Supreme Court). As I explained above, if confirmed, I would review the factual backgrounds, the Division's position in these cases, and Division attorneys' recommendations, after which I would take appropriate action. Because litigation is ongoing, it would not be appropriate for me to comment further.

4. Yesterday, the Presidential Advisory Commission on Election Integrity met in New Hampshire. The commission has come under renewed scrutiny in recent days for Vice Chair Kris Kobach's allegations that fraudulent votes swung the 2016 Senate race in New Hampshire. His claims were quickly debunked, and he appeared to attempt to backtrack on his outrageous allegations during yesterday's meeting. This controversy follows the commission's attempt to obtain personal voter data from all 50 states and the District of Columbia.

You stated in our meeting that "I don't see this commission as in any way affecting the Civil Rights Division if I am confirmed." You also said there is nothing the commission could do that will impact the way you enforce the Voting Rights Act.

a. For the record, do you stand by your statements?

RESPONSE: Yes.

b. Will you pledge that, if confirmed, you will not work with this commission or its members on voting issues?

RESPONSE: My understanding, based on public reporting, is that the Commission is independent of and unrelated to the Department. Thus, I do not anticipate having a role in the Commission's work.

5. As we discussed at our meeting, in January, the Civil Rights Division and U.S. Attorney's Office for the Northern District of Illinois issued a comprehensive report on constitutional violations by the Chicago Police Department. The report called for a court-enforceable consent decree, but under Attorney General Sessions, DOJ has stepped back on its efforts to address police misconduct through consent decrees. At our meeting, you noted that law

enforcement needs to be held accountable when misconduct occurs, and you shared examples from cases you handled when you lived in Chicago.

- a. **If confirmed, how will you approach the issues of police reform and police-community relations?**

RESPONSE: My understanding is that the Department's Community Relations Service, which consists of community relations experts, often engages directly with local communities in the wake of an incident. Additionally, the Department's Office of Community Oriented Policing Service (COPS) has expertise in this area. If confirmed, I would draw upon the expertise of these institutional resources as appropriate in approaching issues of police reform and police-community relations.

- b. **Will you commit to enforce the findings of the Chicago Police Department report?**

RESPONSE: I am generally familiar with the referenced report and, if confirmed, I plan to review it and the issues it addresses in greater detail. However, since I am not currently serving in the Department and do not have access to all available information on the matter, I am not in a position to comment on what actions, if any, I might take with respect to the report.

- c. **Will you commit to pursue consent decrees if they are needed to remedy constitutional violations by police departments?**

RESPONSE: If confirmed, I will dedicate myself to fair and even-handed enforcement of the civil rights laws. This includes evaluating each case on the merits to decide the best approach to enforcement, and the most appropriate remedies, based on the specific facts and circumstances, including the use of consent decrees when appropriate.

6. When we met, we also discussed hate crimes and, in particular, the significant increase in hate crimes targeting the Muslim-American community. The FBI's most recent annual hate crime incident report found a 66% increase in hate crimes targeting the Muslim-American community.

You stated that you are concerned by this terrible surge in hate crimes and that, if confirmed, you will bring to justice those who commit these crimes. **Can you elaborate on what steps you will take to address this disturbing trend if you are confirmed?**

RESPONSE: If confirmed, pursuing hate crimes cases will be one of my top priorities. I will support zealous investigations of potential hate crimes and prosecutions based on the statutes within the enforcement jurisdiction of the Civil Rights Division. I would look to career attorneys' recommendations and assess whether the facts and law support investigating and prosecuting hate crimes.

7. In a 2014 speech to the Anti-Defamation League, former FBI Director James Comey said: “Hate crimes are different from other crimes. ... Hate crimes impact not just individuals, but entire communities.”

He went on to say: “Prevention also means working closely with community groups and their leaders. It means listening to their concerns and letting them know what we can do to help. And it means building relationships of trust so they know they can call us and count on us to protect them.”

a. Do you agree with Director Comey’s statements?

RESPONSE: Yes.

b. What steps will you take to build those relationships of trust and work with vulnerable communities that are being targeted with hate?

RESPONSE: If confirmed, I will seek to ensure that the Civil Rights Division engages with vulnerable communities to build trust in the Department’s commitment to protecting their civil and constitutional rights. To this end, I will support the Department’s outreach to vulnerable communities through the Community Relations Service and other initiatives.

8. After 9/11, President Bush repeatedly emphasized that Muslims are not our enemies. He made it clear that our war was with the terrorists who perverted the teachings of Islam, not with Muslims who were faithful to what he called “a faith based upon love, not hate.” **Do you agree with these sentiments expressed by President Bush?**

RESPONSE: Yes. If confirmed, I will ensure that the Civil Rights Division takes an aggressive stance toward combating religious hate crimes. In addition, if confirmed, I will work with other components of the Department to provide support for all religious communities that are subjected to hatred and bigotry.

9. The growth in hate crimes has been coupled with a growing threat of violent right-wing extremist activity. In 2012, I held a hearing on domestic extremism where we discussed the rising threat posed by white supremacist and other extremist groups. Unfortunately, the threat has continued to grow.

A recently leaked, unclassified May 2017 FBI-DHS joint intelligence bulletin found that “white supremacist extremism poses [a] persistent threat of lethal violence,” and that white supremacists “were responsible for 49 homicides in 26 attacks from 2000 to 2016 ... more than any other domestic extremist movement.” And Politico reported last month that “suspects accused of extreme right-wing violence have accounted for far more attacks in the U.S. than those linked to foreign Islamic groups like al Qaeda and ISIS, according to multiple independent studies.”

Do you agree that violent right-wing extremism is a threat in the United States?

RESPONSE: Extremism in any form that leads to violence, hatred, and bigotry has no place in our society. Extremism is a threat in the United States.

10. Last month, we grieved the loss of a young woman named Heather Heyer, who died in a horrific incident of domestic terrorism in Charlottesville, Virginia. Her alleged killer appeared to have participated in a neo-Nazi rally in the city.

While most Americans joined in deep condemnation of the events that took place in Charlottesville, President Trump made a number of alarming comments about the violence, stating, “I think there is blame on both sides.” He also defended the individuals who gathered to protest the removal of a Confederate statue, saying, “Not all of those people were neo-Nazis, believe me. Not all of those people were white supremacists by any stretch” and that there were “very fine people” among the group.

At our meeting, you said that you didn’t know what the President was talking about, and you saw white supremacists and overt racists in the Charlottesville crowd.

a. For the record, do you stand by your statement?

RESPONSE: Yes. I strongly condemn the actions of the white supremacists in Charlottesville, and all acts of hatred, racism, bigotry, and violence. I believe the Civil Rights Division has a duty to ensure that justice is brought to any individual or group that violates our federal hate crimes statutes, and if confirmed, will take a strong stance against all hate crimes.

b. Will you pledge that, if confirmed, you will fully support the investigation into this incident and other investigations into alleged civil-rights violations by right-wing extremists?

RESPONSE: If confirmed, I will vigorously and zealously support the Department’s efforts to investigate potential violations of our civil rights laws and hold any and all perpetrators accountable. However, I do not want to prejudge or otherwise influence any outcomes by commenting directly on the Department’s ongoing investigation into the violence in Charlottesville. It is critical that we ensure that the investigation proceed independently and properly so that those who did commit acts of violence are held accountable and the victims receive the justice they deserve.

11. If you are confirmed as head of the Civil Rights Division, you will be charged with upholding the civil and constitutional rights of all Americans—including, as the Justice Department has phrased it, “some of the most vulnerable members of our society.”

a. After witnessing the hate on display in Charlottesville, do you agree that there is much work to be done in combating systemic racism and intolerance affecting vulnerable communities?

RESPONSE: Yes. As I stated at my confirmation hearing, the events in Charlottesville were a disgrace to this country and its values. I believe that hate crimes should not be tolerated in American society. I agree with the Attorney General’s recent statement that “[n]o person should have to fear being violently attacked because of who they are, what they believe, or how they worship.” If confirmed, I would take all steps available under federal law and within the jurisdiction of the Civil Rights Division to prosecute perpetrators of hate crimes.

b. Do you agree that combatting racism should extend to combatting policies that perpetuate discrimination, such as voter suppression efforts?

RESPONSE: Yes, federal law provides numerous avenues through which to combat racism and discrimination, including especially the Voting Rights Act (VRA). That law protects one of the most fundamental rights in our society—the right to vote. VRA litigation, among other types of litigation, often entails allegations of racism and discrimination. If confirmed, and if the facts of a particular case give rise to prohibited discrimination, I would faithfully enforce the federal laws that guard against such discrimination.

12. Research has shown that gainful employment is a critical tool in helping formerly incarcerated individuals rebuild their lives and remain out of the criminal justice system. Unfortunately, the approximately 70 million Americans who have criminal histories frequently find themselves locked out of the job market due to their record.

Studies have demonstrated that applicants who indicate a criminal record on initial job applications are less likely to get a callback from a potential employer. However, “ban the box” measures, which postpone criminal history inquiries until later in the hiring process, can improve these outcomes and help individuals with criminal histories reintegrate into society. Recognizing this, many of the nation’s largest employers, such as Walmart, Target, and Home Depot, have opted to ban the box on their job application forms.

Nine states—including Illinois—have implemented ban the box policies that apply to both public and private-sector employers. Twenty additional states have ban the box policies in place for state job applications.

The Federal government has taken action as well. In 2015, President Obama directed the Office of Personnel Management to issue new rules requiring federal agencies to delay inquiries into criminal history until the most qualified applicants are sent to a hiring manager. And in 2012, the Equal Employment Opportunity Commission (EEOC) issued key guidance on the use of arrest and conviction records in employment decisions. The guidance requires employers to make individualized assessments of an applicant’s criminal history by considering factors such as the gravity of the offense and the nature of the job sought.

However, in a 2013 post on Forbes.com that you co-authored, you criticized the EEOC’s guidance. You wrote that “[b]ecause of the EEOC’s policy, employers now face a Catch-22.

They must either hire criminals or risk an EEOC investigation and class action lawsuit.”

a. Can you explain this quote from your article?

RESPONSE: Yes. The EEOC issued guidance that was inconsistent with the burdens of proof contained in the Civil Rights Act of 1991. First, the Commission’s guidance placed the burden on employers to disprove disparate impact discrimination. The Civil Rights Act of 1991, however, mandates that a complaining party bears the burden of proving disparate impact. In particular, the law requires that a complaining party must “demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact[.]” 42 U.S.C. § 2000e-5(k)(1)(A)(i). In addition, the Commission’s guidance and enforcement cast doubt on the job-related and business necessity defense codified in the Civil Rights Act of 1991. For example, the Commission filed suit to challenge a policy that excluded individuals with convictions for murder, rape, child abuse, spouse abuse, theft, and crimes of dishonesty and moral turpitude, among others. The Commission thus took the position that favoring applicants with no criminal record over those with convictions for such crimes could violate Title VII of the Civil Rights Act of 1964. The Commission took similar positions in at least two other cases, and in both, the courts rejected the Commission’s position. In *EEOC v. Freeman*, the U.S. Court of Appeals for the Fourth Circuit rejected the EEOC’s challenge to an employer’s use of criminal history. *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015). And, in *EEOC v. PeopleMark*, the U.S. Court of Appeals for the Sixth Circuit likewise rejected the EEOC’s challenge to an employer’s use of criminal history and affirmed sanctions against the EEOC. *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013). For more about this, please see Exhibit 1, which is attached and is a September 4, 2017 letter from Richard Seymour to the Senate Judiciary Committee.

b. Do you believe that each and every crime in the Federal code should be considered a disqualifier for a job?

RESPONSE: No.

c. Do you support “ban the box” initiatives?

RESPONSE: “Ban the box” initiatives vary, and so it is not possible for me to comment on any particular matter. As a general matter, I believe that some “ban the box” ordinances may help individuals with a history of criminal convictions reintegrate into society.

13. As we discussed at our meeting, when I was Chairman of the Subcommittee on the Constitution, Civil Rights, and Human Rights, I held two hearings on the human rights, fiscal, and public safety consequences of solitary confinement. Anyone who heard the chilling testimony of Anthony Graves and Damon Thibodeaux—exonerated inmates who each spent more than a decade in solitary confinement—knows that this is a critical human rights issue that we must address.

The Civil Rights Division's Special Litigation Section is responsible for protecting the civil rights of people in state or local institutions, including jails, prisons, and juvenile detention facilities. In light of the mounting evidence of the harmful—even dangerous—impacts of solitary confinement, the section has pursued several cases against state and local facilities related to the use of this practice.

- a. For the record, do you believe that long-term solitary confinement can have a dangerous impact on inmates?**

RESPONSE: Solitary confinement is undoubtedly an extraordinary measure. I believe long-term solitary confinement can impact inmates. However, I am unfamiliar with the evidence to which this question refers. If confirmed, and if this issue arises in the Division, I would familiarize myself with the facts, statistics, and law concerning the potentially harmful impact of solitary confinement before reaching a decision on the issue.

- b. Do you agree that the practice should be subject to strict limitations?**

RESPONSE: As explained in my response to Question 13a, I would need to learn more about the issue and consider the views of experts and career attorneys before reaching a decision on this issue.

- c. Will you commit to fully investigating and addressing violations of the Civil Rights of Institutionalized Persons Act in state and local prisons and jails, if confirmed?**

RESPONSE: Yes, if I am confirmed, I will be committed to the zealous and rigorous enforcement of all laws within the jurisdiction of the Civil Rights Division, including the Civil Rights of Institutionalized Persons Act.

14. DOJ has made some troubling decisions in recent months related to LGBTQ discrimination policies and cases. In February, DOJ and the Department of Education rescinded joint guidance that made clear that discrimination on the basis of a student's transgender status is illegal. And in July, DOJ filed an amicus brief that argued that discrimination on the basis of sexual orientation is permitted under Federal civil rights law.

- a. Do you agree with these decisions by DOJ?**

RESPONSE: Because I am not currently working at the Department of Justice, I am not familiar with the details of the Department's position in this matter. In addition, because this issue is the subject of ongoing litigation, it would not be appropriate for me to comment.

- b. Do you believe that existing Federal civil rights law protects students and employees from discrimination on the basis of sexual orientation or gender identity?**

RESPONSE: This issue is pending in litigation. It would therefore not be appropriate for me to comment.

15. You decided to represent the University of North Carolina (UNC) in litigation related to H.B. 2—legislation often referred to as the North Carolina “bathroom bill,” which restricted transgender individuals’ ability to access public restrooms. In court, UNC argued that they were obligated to follow the state law.

- a. Why did you decide to get involved in this case?**

RESPONSE: The University of North Carolina retained my law firm as litigation counsel. The University did not enact House Bill 2 and the University took no action to enforce the statute before its repeal. In addition, the University’s policies prohibited (and continue to prohibit) discrimination on the basis of gender expression, gender identity, and sexual orientation. The University’s commitment to these policies remained unchanged following the passage of House Bill 2. For these reasons, the University took the position that it was not a proper defendant in the lawsuit that challenged House Bill 2.

- b. Do you think H.B. 2 violated Federal civil rights law?**

RESPONSE: I firmly believe that all schools must ensure that all students are able to attend school and thrive in an environment free from unlawful discrimination and bullying. However, because the issues at the heart of House Bill 2 are the subject of ongoing litigation, it would not be appropriate for me to comment further.

16. Over the course of your career in private practice, you have defended many corporate employers in civil rights cases filed against them. But you have also taken your advocacy a step further. In 2008, you testified before the Senate Health, Education, Labor, and Pensions Committee in opposition to the Fair Pay Restoration Act. This legislation would have reversed the Supreme Court’s 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Company*, in which the Court limited the ability of victims of long-term pay discrimination to sue their employers. The legislation permitted victims of pay discrimination to re-set the 180-day filing period with every discriminatory paycheck.

You argued that the bill would broaden employers’ scope of liability and increase the number of discrimination suits filed. Specifically, you suggested that the law would “create unanticipated and potentially ruinous liability for state and local governments, unions, employers, and others covered by the federal antidiscrimination laws.” You said the bill “would not be in the best interest of the American people.” Congress went on to pass the Lilly Ledbetter Act in 2009.

a. Do you still believe that the legislation was not in the best interest of the American people?

RESPONSE: As I emphasized in my confirmation hearing, I fully support protections for women against sex discrimination, have never criticized such protections, and fully support enforcement of sex discrimination protections.

The issue in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), was about when it is appropriate to extend the statute of limitations under Title VII of the Civil Rights Act of 1964. After the Supreme Court decided the case, I offered testimony about how the Congress could respond to that decision, and in particular, the concern that Title VII's statute of limitations – known as the charge-filing period – should be extended when victims of discrimination are unaware of hidden discrimination. I therefore explained that Congress could address that concern by codifying two doctrines endorsed by the EEOC, namely, the equitable tolling and equitable estoppel doctrines.

Congress has never codified the equitable tolling and equitable estoppel doctrines that I discussed in my testimony. They are described in guidance issued by the EEOC. The courts are not bound by the EEOC's standards, and the courts have articulated different standards about these doctrines. This is because the EEOC lacks substantive rulemaking authority under Title VII of the Civil Rights Act of 1964. Therefore, if Congress codified the EEOC's standards, courts would be bound by them, and victims of unlawful discrimination would benefit from the extension of the limitations periods when they satisfy the EEOC standards.

The EEOC's interpretation of the equitable tolling and equitable estoppel doctrines would also address the problem identified by the dissent in the *Ledbetter* case. Specifically, the dissent expressed concern about "hidden" discrimination. For example, Justice Ruth Bader Ginsburg explained in her dissent that "[c]ompensation disparities . . . are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries." *Ledbetter*, 550 U.S. at 649–50. Justice Ginsburg also expressed concern about "concealed pay discrimination." *Id.* at 650.

The equitable tolling and equitable estoppel doctrines, as described by the EEOC and in my testimony, would provide an effective way to extend the limitations period to address such hidden and concealed discrimination. On January 24, 2008, I testified that "Congress could codify the EEOC's Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC's enforcement process and establish a clear, congressionally mandated rule for when the EEOC's charge-filing period ought to be extended."

I also explained that the EEOC standard, if codified by the Congress, would enable "the statutory time limits [to] be extended, or 'tolled,' for equitable reasons when a

person who alleges unlawful discrimination ‘was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination.’ The EEOC Compliance Manual, I testified, says that “[g]rounds for equitable tolling include: (1) no reason to suspect discrimination at the time of the disputed event; (2) mental incapacity; (3) misleading information or mishandling of a charge by the EEOC or State fair employment practices agency; and (4) timely filing in the wrong forum.”

Likewise, I testified about the EEOC’s equitable estoppel doctrine. I explained that the “the doctrine of equitable estoppel also permits the charge-filing period to be extended. This doctrine applies when any delay associated with the filing of a charge is attributable to active misconduct by an employer, union, or other respondent that is intended to prevent timely filing.”

Codification of these doctrines would benefit workers because the doctrines would apply to all forms of discrimination, including compensation discrimination against women. In short, my proposal was another way to establish a clear, Congressionally-mandated standard to obtain relief for victims of workplace discrimination, including women who experience sex discrimination in compensation. However, if confirmed, I am committed to following the law as it is currently enacted, and if confirmed, I will vigorously enforce all civil rights laws.

b. Have your predictions of ruinous liability come to pass?

RESPONSE: Because I am not an employee of the Department or the EEOC, I am not privy to the details or data about the enforcement of the Fair Pay Act, and therefore I am not in a position to comment.

17. In 2010, there was a case before the EEOC, entitled *Ghori-Ahmed v. U.S. Commission on International Religious Freedom*. The Commission describes itself as “an independent, bipartisan U.S. federal government commission... dedicated to defending the universal right to freedom of religion or belief abroad.”

That’s why it was rather shocking when a former employee of the Commission filed a discrimination claim, based on her allegation that her permanent employment offer was rescinded after the Commissioners learned of her prior job with a Muslim civil rights organization. Though she subsequently received a temporary contract with the Commission, she claimed she was terminated when she filed her discrimination claim. Even more shocking was the response of the Commission, which was not to deny the allegations but rather to assert that it was not subject to Title VII of the Civil Rights Act.

I was quite surprised to learn of this incident, and in 2011, I worked to enact a number of reforms at the Commission—including making it explicitly clear that the U.S. Commission on International Religious Freedom is subject to Federal civil rights laws and cannot discriminate against an employee on the basis of that employee’s religion.

You represented the Commission in this case—in fact, it’s one of the cases listed in your biography on the Jones Day website. Can you explain how you came to represent the Commission, why you decided to take this case, and the rationale for the Commission’s defense? Why did the Commission, a governmental entity, retain private counsel in this case?

RESPONSE: The United States Commission on International Religious Freedom (USCIRF) retained my firm as litigation counsel in the matter. The matter referenced in Question 17 was then pending before an administrative judge at the EEOC. The EEOC’s jurisdiction extended to executive agencies. USCIRF was not an executive agency. Indeed, both Title VII itself and EEOC’s regulations mandated that the EEOC’s jurisdiction extended only to claims against agencies of the executive branch and certain other entities that do not include USCIRF. *See* 42 U.S.C. § 2000e-16(a) (listing entities); 29 C.F.R. § 1614.103 (same); *see also* 42 U.S.C. § 2000e-16(b). Because USCIRF was neither an agency of the executive branch, nor one of the covered identified entities, the administrative judge dismissed the case. The Department of Justice represented the USCIRF in subsequent proceedings, and the case settled.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR WHITEHOUSE

1. In your Senate Judiciary Committee questionnaire you noted that you provided legal services to the Trump campaign in 2016 and 2017.

- a. What did those services entail?

RESPONSE: I provided legal advice about employment law issues.

- b. Were you paid for your services?

RESPONSE: Yes.

- c. Did anyone in the Trump campaign ever state, suggest, or imply that you would be considered for an administration position in return for your legal services on the campaign?

RESPONSE: No.

2. According to its website, the Civil Rights Division of the Department of Justice (“the Division”) works to uphold the civil and constitutional rights of all Americans, particularly some of the “most vulnerable members of our society.”

- a. Who, in your view, are among “the most vulnerable members of our society” deserving of the Division’s particular attention?

RESPONSE: The Civil Rights Division’s mission is to protect the civil rights of all Americans, including individuals with disabilities, the elderly, and members of minority groups, such as religious, ethnic, and racial minorities, who are often the targets of discrimination and hate crimes.

- b. Do you agree that a primary purpose of both the Division and our federal civil rights laws—including, for example, Title VII, the ADA, and the ADEA—is to protect the rights of historically marginalized and vulnerable communities?

RESPONSE: Yes.

3. Please describe the circumstances of your nomination. Did you request to be considered for the nomination, or were you approached about it? With whom in the executive branch have you communicated about your nomination?

RESPONSE: I was approached regarding the position. I then met with Mr. Sessions, Mr. Rosenstein, and Ms. Brand (prior to their confirmations to their current positions). Subsequently, the Attorney General asked me to serve, if confirmed, as Assistant Attorney General for the Civil Rights Division.

I have communicated with various people at the Department of Justice about my nomination, including the Attorney General, Deputy Attorney General, and Associate Attorney General, as well as other senior officials in multiple components of the Department. I have also communicated with individuals in the White House Counsel's Office.

4. The Division is currently under the acting leadership of your former law firm partner, John Gore.

- a. What discussions, if any, have you had with Mr. Gore since he joined the Division in January?

RESPONSE: I have spoken with Mr. Gore at various times about a variety of topics, including the jurisdiction, history, and structure of the Civil Rights Division. Mr. Gore and I also spoke about my September 6 appearance before the Senate Judiciary Committee, and Mr. Gore helped me prepare for that hearing.

- b. Since January 2017, have you ever discussed the substantive work of the Division with Mr. Gore?

RESPONSE: Mr. Gore and I have had general discussions about public information related to the work of the Division of the sort described in response to Question 4a. We have not discussed the particulars of any pending or potential matter.

- c. Have you ever discussed specific Division cases with Mr. Gore?

RESPONSE: Please see my responses to Questions 4a-b.

- d. Have you discussed the Division's policy priorities or agenda with Mr. Gore?

RESPONSE: Please see my responses to Questions 4a-b.

5. During our one-on-one meeting, you indicated that you did not believe politics should play any role in your leadership of the Division, and that your function as AAG of the Division would be one of politically neutral law enforcement. As you know, the Civil Rights Division is charged with handling many of the most politically charged and divisive issues in our country. Do you think it is realistic to think that politics, or the Trump administration's policy agenda, will not play a role in your decision making? As AAG of the Civil Rights Division, do you believe you will have any policy making role at all?

RESPONSE: If confirmed, I would be zealously dedicated to fair and even-handed enforcement of the civil rights laws, regardless of politics. This includes evaluating each case on the merits to decide the best approach to enforcement and resolution based on the specific facts and circumstances and the Division's available resources. My understanding from the Division's website is that the Division performs a policymaking function with respect to the enforcement of the statutes within its jurisdiction and enforcement priorities. Thus, if confirmed, my understanding is that I would be involved in policy work to that extent. At bottom, my ultimate fidelity would be to fair and even-handed application of federal law, and to the oath that I will take, if confirmed, to protect and defend the Constitution and laws of the United States.

6. The Justice Department has reportedly begun work on an initiative to challenge affirmative action programs in higher education.

- a. Is challenging efforts to diversify higher education and ensure equal opportunity for all students consistent with the mission of upholding the rights "of the most vulnerable members of our society?"

RESPONSE: Because I do not currently work for the Department of Justice, I am not familiar with the Department's decisions regarding this issue or the facts on which these decisions have been made. Therefore, I am not in a position to comment further.

- b. Were you consulted or have you had any discussions with Division employees about this initiative?

RESPONSE: No.

7. In announcing its affirmative action initiative, the Division took the unusual step of soliciting resumes from career attorneys to staff this project as detailees, notwithstanding the fact that there is a dedicated section of the Division that handles discrimination in education.

- a. Do you think it is appropriate for this project to be managed by political appointees in the front office, rather than by career attorneys with relevant expertise in the Educational Opportunities Section?

RESPONSE: Because I do not currently work for the Department, I am not familiar with the Department's staffing and detail policies or decisions. Therefore, I am not in a position to comment further.

- b. When, if ever, is it appropriate for the Division to manage a program or initiative through the front office rather than through the relevant component section?

RESPONSE: Please see my response to Question 7a.

- c. Do you have any concerns that staffing major litigation with attorneys hand-picked by political appointees suggests that its prosecution is being driven by ideology rather than an impartial review of the law and facts?

RESPONSE: As I explained in response to previous questions, I am not familiar with the Department's staffing and detail policies. If I am confirmed, however, I intend to make all personnel decisions in a fair, even-handed, and ethical manner, consistent with civil service laws and Department policies. In so doing, I would seek to ensure that members of the Division conduct hiring, staffing, and supervision with integrity and without regard to political, ideological, or any other prohibited considerations.

- 8. At your hearing, you committed that ideology will never be considered when making hiring, firing, and assignment decisions.
 - a. As AAG, how will you ensure that ideology is not considered in selecting attorneys for certain assignments?

RESPONSE: Because I do not currently work for the Department of Justice, I am not familiar with the current system of hiring, firing, and assignments. If confirmed, my goal for the Division will be to select attorneys because of their talent and abilities as lawyers, and to comply fully with all civil service laws, regulations, and practices, without regard to political, ideological, or any other prohibited considerations.

- 9. What is the Division's policy for selecting detailees and making case assignment decisions? If you have not yet reviewed the Division's detailee policy, please do so.

RESPONSE: Because I do not currently work for the Department, I am not familiar with the Department's staffing and detail policies. If confirmed, I plan to review those policies.

- a. Does the Division follow the same policy on selecting detailees that the rest of the Department does? Please provide copies of the policy or policies.

RESPONSE: Because I do not currently work for the Department, I am not familiar with the Department's staffing and detail policies. If confirmed, I plan to review those policies.

- b. Are Division staff required to be trained on the detailee selection policy? Does this include political appointees as well as career officials?

RESPONSE: Please see my responses to Questions 7 and 8.

- c. Are Division staff required to be trained on hiring, firing, and case assignment policies? Does this include political appointees as well as career officials?

RESPONSE: Please see my responses to Questions 7 and 8.

- d. Who is responsible for conducting the training for Division employees on these policies? Who is responsible for ensuring that all CRT employees receive this training?

RESPONSE: Please see my responses to Questions 7 and 8.

- e. To the best of your knowledge, are political appointees and career staff in leadership offices (OAG, ODAG, and OAAG) required to be trained on the hiring policies as well as the policy for selecting detailees?

RESPONSE: Please see my responses to Questions 7 and 8.

- f. To the best of your knowledge, who is responsible for conducting the training for leadership office staff? Who is responsible for ensuring that all leadership office employees receive this training?

RESPONSE: Please see my responses to Questions 7 and 8.

- g. Have any detailees currently serving in the Division not been selected in accordance with the Division's detailee selection policy? If so, please provide their names, the process by which those detailees were selected, the criteria that were used to select those detailees, which portion(s) of the detailee policy was/were not followed in their selection process, and why that portion(s) of the detailee policy was not followed.

RESPONSE: Please see my responses to Questions 7 and 8.

- h. To the best of your knowledge, have political appointees in Department leadership offices (OAG, ODAG, and OAAG) played any role in the selection of Division detailees? If so, what role did they play? Is such participation consistent with the policy for selecting detailees? To the best of your knowledge, have political appointees in Department leadership offices played a role in selecting detailees in any other divisions?

RESPONSE: Please see my responses to Questions 7 and 8.

- 10. A 2008 report of the DOJ Office of the Inspector General and Office of Professional Responsibility found that, during the George W. Bush administration, political appointees in the Division violated federal law by "considering political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division." It will fall to you, as head of the Division, to ensure that these misdeeds are not repeated.

- a. Since your confirmation hearing, have you reviewed the July 2008 OIG / OPR Report, An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division? If so, what did you think of its findings and recommendations?

RESPONSE: I have not reviewed the July 2008 OIG/OPR Report since my confirmation hearing. If confirmed, I intend to review the Report.

- b. Are you committed to following this report's recommendations? What specific steps do you intend to take to ensure that the misdeeds of the past are not repeated?

RESPONSE: If I am confirmed, I intend to make all personnel decisions in a fair, even-handed and ethical manner, consistent with the law. As I explained in response to previous questions, if confirmed, I will be committed to ensuring that Division's hiring and staffing decisions are conducted with integrity.

- c. How will you ensure that all hiring, firing, and assignment decisions are based on merit rather than ideology?

RESPONSE: Please see my responses to Questions 7, 8, and 10b.

- d. During the last Administration, in response to concerns raised by the OIG, the Division adopted an "Experienced Attorney and Attorney Manager Hiring Policy" to ensure a "fair, transparent and merit based hiring process." Have you reviewed that policy? Will you commit to following it?

RESPONSE: Please see my responses to Questions 7, 8, and 10b.

11. Have you reviewed the January 2015 National Academy of Public Administration Report on the Division?

- a. Are you committed to following the NAPA recommendations? What specific steps do you intend to take to ensure that its recommendations are implemented?

RESPONSE: I am generally aware of the report, but have not reviewed it in any detail. As I stated above, because I am not currently working for the Department of Justice, I am not familiar with the details of the Division's current operational management. If I am confirmed, ensuring effective operational management and communication within the Division will be top priorities. If confirmed, I look forward to learning more about ways to improve the Division's work.

12. What is your understanding of the current policy that governs communications between Department of Justice employees – including political appointees – and the White House?

RESPONSE: My understanding is that the Department of Justice has certain standards or protocols in place that address communications between the Department and the White House. Because I do not currently work at the Department, I am not privy to the details of these standards and protocols. If confirmed, I plan to review the standards and protocols and to comply with them.

- a. What would you do if contacted by someone in the White House to discuss a pending enforcement matter or criminal case?

RESPONSE: If confirmed, I will commit to following longstanding Department policies and procedures regarding such contacts.

13. While you were under consideration for this nomination and since your nomination, have you been in communication with the following individuals? If so, please generally indicate the purpose of those communications, and whether these conversations involved discussions about particular initiatives or personnel.

- a. Kris Kobach
- b. Hans von Spakovsky
- c. J. Christian Adams
- d. Bradley Schlozman
- e. Roger Clegg
- f. Roger Severino
- g. Chuck Cooper

RESPONSE: I have heard from many people about my nomination. The communications have generally involved messages of support about the nomination and general background about the Civil Rights Division.

14. In response to Senator Blumenthal's question regarding the proposed 2018 budget cutting 121 positions in the Division, you responded that you were not familiar with the details of the budget but would review them.

- a. Based on your review, do you oppose the proposed cuts to the Division?

RESPONSE: Although I have generally reviewed the proposed budget, I am not familiar with the Division's current operational status or internal discussions regarding the Division's needs. Since I am not currently serving in the Department, I am not privy to internal resource allocation considerations, but if confirmed, I intend to learn more about the Division's budget as soon as possible.

- b. Under the proposed budget, would the Division have the appropriate resources to enforce our country's civil rights laws?

RESPONSE: Please see my response to question 14a.

15. As the Division's website explains, although "[t]he vast majority of the law enforcement officers in this country perform their very difficult jobs with respect for their communities and in compliance with the law," it is the role of the Division to enforce the laws that address police misconduct. During the Obama administration, the Division issued investigative reports that detailed the troubling prevalence of systemic police abuses in communities like Ferguson and Baltimore. These investigations led many jurisdictions to enter court-enforced consent decrees to put an end to these systemic abuses. Earlier this year, Attorney General Sessions signaled a retreat from the DOJ's enforcement of these important consent decrees, ordering a review of the Justice Department's approach to policing and asserting that "it is not the responsibility of the federal government to manage non-federal law enforcement agencies."

- a. What is your view of the enforcement role of the Division's Special Litigation Section?

RESPONSE: My understanding is that the Division's Special Litigation Section is entrusted with the role of enforcing federal laws to protect people at risk of harm in various areas. One such area is the enforcement of federal laws to ensure constitutional policing—protecting the civil rights of individuals in our communities who interact with state or local law enforcement officers. If confirmed, I would take seriously that enforcement role and work with career attorneys in the Section to investigate and prosecute illegal conduct.

- b. Do you agree with AG Sessions that "it is not the responsibility of the federal government to manage non-federal law enforcement agencies"?

RESPONSE: I agree with Attorney General's statements that "[l]ocal control and local accountability are necessary for effective policing," and "[l]ocal law enforcement must protect and respect the civil rights of all members of the public." State and local authorities are the front line in the defense of civil liberties. The Civil Rights Division must stand ready and willing to assist state and local authorities when necessary. That intervention may not be appropriate in every case, but when the Division's intervention is required, I would faithfully enforce federal law in light of the specific facts and circumstances.

- c. Do you agree that the federal government/DOJ should not devote resources to addressing police misconduct? Why or why not?

RESPONSE: In its discharge of its legal obligations, the Department should investigate all allegations that fall within the Department's jurisdiction. Indeed, as I understand the Special Litigation Section's work, the Section does just that

with regard to police misconduct. If confirmed, I would vigorously work with the Section's career attorneys in our joint discharge of our obligation to uphold and enforce federal laws within the Division's jurisdiction.

- d. Do you believe the Division has responsibility to ensure that non-federal law enforcement agencies are not engaged in systemic, pattern or practice discrimination against minority populations? If confronted with evidence of such abuses, how should the Division respond?

RESPONSE: Please see my responses to Questions 15a-c.

- e. If confirmed, how will you ensure that the Division continues to play a meaningful role in enforcing the law to prevent systemic police abuses against minority communities?

RESPONSE: Please see my responses to Questions 15a-c.

- f. Given the Division's role in enforcing certain criminal laws, would you be bound by AG Sessions' recent guidance to "pursue the most serious, readily provable offense" and harshest sentences? Do you commit to prosecuting the most serious, readily provable civil rights offenses you can identify?

RESPONSE: Please see my responses to Questions 15a-c.

- 16. In your opening remarks at your hearing, you testified that "my clients have included a victim of a police shooting." Please describe in detail the nature of the matter and your representation, how it was resolved, and the amount of hours you spent on the matter. How has working on this case shaped your view of police misconduct?

RESPONSE: I represented Anthony Royster in a police-involved shooting case against a Baltimore police officer. The case was *Royster v. Schluderberg*, Civil Action No. 8:10-cv-02121-PJM (D. Md.). Mr. Royster alleged that a Baltimore police officer unlawfully shot him in the back during the early morning of September 12, 2007. Mr. Royster sued for alleged violations of 42 U.S.C. § 1983. Mr. Royster alleged that the defendant police officer violated his Fourth Amendment Rights when he shot Mr. Royster in the back. In particular, Mr. Royster alleged that the defendant's use of deadly force was a seizure under the Fourth Amendment of the United States Constitution, was not objectively reasonable, and was excessive. The case settled.

Working on the case reinforced my view that police must comply with the civil rights laws and must be very careful when they consider whether to use deadly force. I am unable to state precisely the number of hours that I spent on the case and estimate it to be approximately 300 hours and probably more. I also supervised a team of lawyers, paralegals, and staff, and collectively, our team spent more than 4,000 hours working for Mr. Royster on his case.

17. Like all Americans, police officers are exposed to and adopt both unconscious and overt biases. Do you support the expansion of law enforcement training to address issues such as implicit bias, the importance of de-escalation responses, and officer engagement with individuals suffering from mental illness and intellectual disabilities?

RESPONSE: Because I am not currently serving in the Department or involved in these issues, I am unfamiliar with the types of training you reference or facts and statistics regarding their efficacy. If confirmed, I look forward to learning more about this issue before forming an opinion.

18. For years, the Division has been a party to litigation against Maricopa County for the pattern or practice of police discrimination perpetrated against Latinos by the Maricopa County Sheriff's Office under former Sheriff Joe Arpaio. As you know, a federal judge held Mr. Arpaio in criminal contempt of court for continuing to discriminate against Latinos in violation of court orders. President Trump pardoned Mr. Arpaio on August 25, 2017.

- a. Are you concerned that President Trump's pardon of Arpaio undermines the years-long work of career Division lawyers?

RESPONSE: I am only aware of this issue from media reports. I have not studied the record in this matter, and I understand from public reports that the Department, and the Division in particular, is involved in ongoing litigation concerning both Sheriff Arpaio and the Maricopa County Sheriff's Office. It would therefore be inappropriate for me to comment.

- b. Are you concerned that the pardon sends the message that systemic discrimination against Latinos should be tolerated?

RESPONSE: Please see my response to Question 18a.

- c. Do you agree with President Trump's pardon of Arpaio?

RESPONSE: Please see my response to Question 18a.

19. In your confirmation hearing, you replied to Senator Coons that you were not aware of any data to support President Trump's claim that millions of people voted illegally in the 2016 presidential election.

- a. Are you aware of any such data now?

RESPONSE: I am not aware of data indicating that millions of people voted illegally in the 2016 election.

- b. In the absence of any such data, will you repudiate the President's claims of widespread voter fraud?

RESPONSE: As explained in my response to Question 19a, I am not aware of data or analyses regarding this issue. I am therefore unable to comment on the issue. In addition, it would be inappropriate for me to comment on an issue that may be the subject of pending investigations or litigation.

- c. Do you think it was responsible for the President to tell the American people that millions of people voted illegally in the 2016 election?

RESPONSE: Please see my responses to Questions 19a-b.

- d. Do you believe that such widespread voter fraud occurred?

RESPONSE: Please see my responses to Questions 19a-b.

20. President Trump has established a presidential advisory commission on “election integrity” (the Commission), whose mission is to investigate and make recommendations for combatting supposed widespread voter fraud – no evidence of which exists. The Commission is Vice Chaired by Kris Kobach, the Kansas Secretary of State who has become infamous for his anti-immigrant policies and his relentless attempts to weaken voter protection laws.

- a. What value does this Commission provide to the enforcement of civil rights laws under the Division’s jurisdiction?

RESPONSE: My understanding based on public reports is that the Commission is independent and unrelated to the Division. Further, I am not aware of the Commission’s work and how it relates to the Division’s work. Thus, I am unable to comment on the Commission’s value or role, if any, regarding the enforcement of civil rights law within the Division’s jurisdiction.

- b. What role can the Commission play in combating alleged voter fraud that the Division cannot?

RESPONSE: Please see my response to Question 20a.

- c. Last week, Mr. Kobach wrote a column on the alt-right website Breitbart outlining his claim that fraudulent out-of-state votes swung the 2016 New Hampshire elections to Democrats. Subsequent reporting has shown these were likely either people without cars or college students, legal residents of New Hampshire eligible to vote in its elections. Are you aware of any evidence to support Kobach’s claim of voter fraud in the 2016 New Hampshire elections? In the absence of any such data, will you repudiate Mr. Kobach’s claims?

RESPONSE: I am not familiar with the claims noted in your question or any related data or analyses. I am therefore unable to comment.

- d. As prospective AAG of the Division, are you concerned that the Vice Chair of the President's advisory commission on "election integrity" is spreading misinformation about voter fraud? As AAG of the Division, what will you do to combat this?

RESPONSE: Please my response to Question 20a.

- e. Do you think it would be appropriate for any person in the Division to communicate in any manner with a member of the Commission about pending DOJ investigations or litigation? If so, under what circumstances?

RESPONSE: Because I am not currently working in the Department, I am not familiar with the Department's policies regarding communications about pending investigations or litigation as they pertain to the Commission. If confirmed, I will follow those policies and take measures to ensure that Division employees similarly follow those policies.

21. In July, the Commission wrote to all state Secretaries of State asking for sensitive voter roll information, including party affiliation, voting history, and felony conviction information. It has been reported that as many as 44 states will not provide all the information requested. On the same day, the Voting Section of the Division wrote to 44 Secretaries of States asking for election-related data on voter confirmation notices, removals from the voter registration list, and active and inactive registered voter lists.

- a. Do you believe it is appropriate for a presidential advisory commission to request voter information that includes individuals' voting history, party identification, and felony conviction information?

RESPONSE: I am not familiar with the Commission's activities other than what is publicly reported. In addition, it would not be appropriate for me to comment on an issue that is or may be the subject of pending investigations or litigation.

- b. Do you know whether the Division coordinated or communicated with the Commission in issuing its requests?

RESPONSE: No. Please see my responses to Questions 20a and 21a.

- c. Do you have any concerns that the integrity and independence of the Division could be compromised by the appearance of working with this commission?

RESPONSE: Please see my response to Question 21a.

- d. Will you commit that under your leadership the Division will not communicate or

collaborate with the Commission on any matter?

RESPONSE: Please see my response to Question 21a.

22. In response to Senator Coons’s question regarding the Justice Department’s decision to abandon the claim that Texas’s voter ID law is intentionally discriminatory in *Veasey v. Abbott*, you stated that you would review the decision and exercise your best discretion as to whether to uphold that action.

- a. Based on your review, do you agree with the Department’s decision to abandon its claim in *Veasey*?

RESPONSE: Because I am not an employee of the Department, I am not familiar with the details of the Department’s decision. In addition, my understanding is that this litigation is pending in the U.S. Court of Appeals for the Fifth Circuit, and the Division has filed briefs. For these reasons, it would not be appropriate for me to comment. Nonetheless, as I said in my hearing, if confirmed, I would review the decision and exercise my best judgment and take appropriate action.

- b. Do you believe that the Department’s decision to drop its legal challenge to Texas’s voter ID law after a federal district court held that the policy was substantially motivated by discrimination “against African American and Latino voters” is consistent with the Division’s mission to uphold the constitutional and statutory rights of “the most vulnerable members of our society”?

RESPONSE: Please see my response to Question 22a.

23. Throughout our nation’s history, African Americans have faced systemic discrimination embodied in myriad laws and policies—from slavery to “separate but equal” to Jim Crow to federal housing regulations that specifically discriminated against African Americans, just to note a few examples. In the past year, federal courts around the country have found intentional discrimination behind voting restrictions that discriminate against African American and Latino voters. How should the Division’s priorities and enforcement policies account for this long history of discrimination that persists today?

RESPONSE: I am firmly committed to upholding the civil rights of all Americans, and to rigorous enforcement of all federal laws protecting the right to vote. As I stated in my hearing, the Voting Rights Act is one of the most important laws within the jurisdiction of the Civil Rights Division. It is fundamental to who we are as a people. If confirmed, I will carefully evaluate federal voting rights cases that fall within the Division’s jurisdiction to ensure fair and even-handed enforcement based on the facts, the evidence, and the law. I also intend to consider carefully the views and recommendations of the Division’s career attorneys.

24. Under your leadership, what will the Division do to combat the troubling rise of white supremacist groups?

RESPONSE: Hatred and bigotry, especially of the sort on display in Charlottesville, have no place in this country. White supremacy is inconsistent with our core American values and civil rights violations related to that ideology cannot be tolerated. The violent hatred that was on display in Charlottesville was a disgrace to our nation and its values. If confirmed, I will vigorously and zealously support the Department's efforts to investigate potential violations—including potential violations in Charlottesville—of our civil rights laws and hold any and all perpetrators accountable. However, I do not want to prejudge or otherwise influence any outcomes by commenting directly on the Department's ongoing investigation into the violence in Charlottesville. It is critical that we ensure that the investigation proceeds independently and properly so that those who did commit acts of violence are held accountable and the victims receive the justice they deserve.

25. Since January of this year there has been an alarming trend of attacks on Muslim houses of worship. In addition to a series of threatening letters sent to mosques around the country starting late last year and continuing into 2017, there have also been an alarming number of mosque arsons since the beginning of this year. To name a few examples: (1) January 7: Islamic Center of Lake Travis in Austin, TX was burned to the ground before its construction was fully complete; (2) January 14: The Islamic Center of Eastside in Bellevue, WA was set on fire intentionally; (3) January 27: The Victoria Islamic Center in Victoria, TX was intentionally set on fire; (4) February 24: The Islamic Society of New Tampa in Thonotosassa, FL was intentionally set on fire just months after a mosque in Fort Pierce, FL was set on fire; (5) April 22: A fire destroyed the Brooklyn Broadway Jame Masjid and Islamic Center early in the morning while worshipers were inside; (6) August 5: A mosque in Bloomington, Minnesota was hit by an explosion early in the morning while worshipers were inside for morning prayers.

- a. What specific steps will you take as head of the Division to address this problem and provide support for the Muslim community?

RESPONSE: I believe that crimes motivated by prejudice have no place and should not be tolerated in American society. As the Attorney General recently stated, no person should have to fear being violently attacked because of who they are, what they believe, or how they worship. It is important to investigate, prosecute, and prevent hate crimes in partnership with communities, and I am committed to ensuring that all Americans receive the full protection of the law.

26. In your hearing testimony, you stated that LGBTQ individuals have a right to be treated with respect in the workplace. But the Justice Department recently filed an amicus brief in the Second Circuit arguing that Title VII of the Civil Rights Act of 1964 does not prohibit employment discrimination on the basis of sexual orientation. This position conflicts with EEOC guidance and a decision earlier this year by the Seventh Circuit Court of Appeals.

- a. In your view, what does that mean for the work of the Division in combatting

discrimination against lesbian, gay, and bisexual Americans in employment, housing, credit and other areas covered by federal nondiscrimination law? Does it have implications for the work of the Division on behalf of transgender Americans?

RESPONSE: Because I am not currently working for the Department, I am not privy to the details regarding the Department's position in this matter. Further, it would not be appropriate for me to comment on ongoing litigation.

- b. Would you have signed the brief supporting that position?

RESPONSE: Please see my response to Question 26a.

- c. Do LGBTQ individuals have a legal right not to be fired or harassed at work due to their sexual orientation?

RESPONSE: Please see my response to Question 26a.

- d. Under your leadership, will you recommend that the Division advance the position that discrimination on the basis of sexual orientation is a form of sex discrimination prohibited by Title VII?

RESPONSE: Please see my response to Question 26a.

- e. Under your leadership, will you recommend that the Division advance the position that discrimination on the basis of gender identity is a form of sex discrimination prohibited by Title VII?

RESPONSE: Please see my response to Question 26a.

- f. The Division has a critical coordinating role regarding agencies' civil rights activities. Under your leadership, how will the Division respond if agencies seek to roll back recognition of long-standing civil rights principles, such as coverage of discrimination motivated by sex stereotyping?

RESPONSE: If I am confirmed, I will, to the best of my ability, enforce all laws against sex discrimination, including protections against sex stereotyping. Please also see my response to Question 26a.

27. In response to Senator Coons's question about Title IX's protections for transgender students, you shifted to talking about the Shepard-Byrd Hate Crimes Act, a law that specifically enumerates sexual orientation and gender identity as protected characteristics. However, numerous federal courts have recognized that laws prohibiting sex discrimination reach discrimination against LGBTQ individuals based on their sexual orientation and gender identity even if the words "sexual orientation" or "gender identity" are not specifically included in the law's text.

- a. Was the EEOC wrong in *Macy v. DOJ* when it held that discrimination against an individual who is transgender is a form of sex discrimination?

RESPONSE: As explained in my response to Question 26a, because there is ongoing litigation on this issue, it would not be appropriate for me to comment.

- b. If so, explain why discrimination against an individual for converting from one religion to another is religious discrimination, but discrimination against an individual who has undertaken a gender transition is not sex discrimination.

RESPONSE: Please see my responses to Questions 26a and 27a.

28. While it is estimated that more than 1.5 million Americans are transgender, most Americans report they do not personally know a transgender person. In your role you may have to make important decisions that will impact the daily lives and basic rights of transgender Americans.

- a. Do you personally know anyone who is transgender? If so, have your views about issues affecting transgender Americans changed at all as a result of these meetings? If you have not, and even if you have, will you commit to meeting with transgender Americans and their families and hearing their stories before making major decisions that could impact their lives?

RESPONSE: I know at least one transgender person and possibly more. My view is that transgender Americans, like all Americans, should be treated with respect and dignity.

29. You chose to represent the University of North Carolina (UNC) when it was sued by civil rights groups and the Department of Justice after North Carolina passed a law (HB2) restricting transgender people's ability to access public restrooms. As someone who volunteered to oppose the Division's enforcement efforts in the HB2 case, how would you address the harm to morale and loss of confidence in the agency that may result, particularly for those career lawyers in the Division who worked on that case, from your selection as the head of the Division?

RESPONSE: The University of North Carolina retained my law firm as litigation counsel. The University did not enact House Bill 2 and the University took no action to enforce the statute before its repeal. In addition, the University's policies prohibited (and continue to prohibit) discrimination on the basis of gender expression, gender identity, and sexual orientation. The University's commitment to these policies remained unchanged following the passage of House Bill 2. For these reasons, the University took the position that it was not a proper defendant in the lawsuit that challenged House Bill 2.

If confirmed, I will work to ensure that Division employees are united in the Division's mission to protect the civil rights of all Americans. To that end, I intend to consult with and listen to career attorneys' recommendations in handling particular case before reaching my

own decision on how best to proceed.

30. At your confirmation hearing, you suggested that you would recuse yourself not only from matters relating to UNC and the North Carolina's anti-transgender law, but might also recuse yourself "more broadly." Will you commit to recuse yourself from all matters concerning UNC and North Carolina's anti-transgender law for the duration of your tenure as AAG?

RESPONSE: If I am confirmed and a matter comes before me in which I believe recusal might be warranted, I would review the law and the facts, consult with career ethics officials at the Department, and recuse myself from any matter where such a recusal is appropriate.

31. What do you believe is the proper role of the Division if other components of the Department of Justice push for positions that undermine civil rights?

RESPONSE: The Division's role includes enforcement of the civil rights laws within its jurisdiction, protection of the civil rights of individuals in the United States, and seeking remedies for violations of and compliance with the law.

32. As you know, a state law in Mississippi was passed in 2016 (HB 1523) that prevents local governments from taking action when a person is discriminated against based on their sexual orientation or gender identity. What role does the Division have in addressing laws like HB 1523?

RESPONSE: The Division has a role in enforcing federal civil rights laws for all Americans. Such enforcement necessarily includes evaluating the specific facts and circumstances of each case to decide the best approach. Beyond that general description of the Division's role, it would be inappropriate for me to comment on particular laws that are or may be subject to pending investigations or litigation.

33. Do you believe that transgender students should be able to access sex-segregated facilities in accordance with their gender identity?

RESPONSE: I firmly believe that schools must ensure that all students are able to attend school and thrive in an environment free from discrimination and bullying. I am committed to enforcing Title IX's sex discrimination prohibitions and other federal laws to ensure the protection of students, including lesbian, gay, bisexual, and transgender students. It is my understanding that both the Department of Justice and the Department of Education are considering further and more completely the issues that were involved in the House Bill 2 litigation. Because this issue is in ongoing litigation, it would not be appropriate for me to comment further.

34. Will you pledge that under your leadership, the Division will vigorously implement and enforce laws like the Ledbetter Act, as well as regulations, and guidance that help working people uncover and challenge pay discrimination?

RESPONSE: If I am confirmed, I pledge that, under my leadership, the Division will vigorously implement and enforce *all* civil rights laws within the Division's jurisdiction.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR KLOBUCHAR

Voting Rights

The Justice Department's Civil Rights Division has a strong history of upholding the Voting Rights Act, including litigating cases challenging discriminatory voting laws. In two of these cases, the Fourth and Fifth Circuit Courts of Appeals have found that voter ID laws in North Carolina and Texas, respectively, were discriminatory and violated the Voting Rights Act. I am very concerned that the Department reversed its position in the Texas case earlier this year, despite courts having ruled that the law was enacted with the intent to discriminate against minority voters.

1. If you are confirmed, do you plan to stand by the decision to reverse the Justice Department's position in the Texas voter ID case?

RESPONSE: Because I am not currently working at the Department of Justice (Department), I am not familiar with the details of the Department's decision in this matter. Additionally, because there is ongoing litigation it would not be appropriate for me to comment. However, I am committed to upholding and protecting the voting rights of all Americans and to enforcement of the Voting Rights Act, which has been a critical law enforcement function of the Department for many years.

2. Do you consider protecting the right to vote and guarding against voter discrimination to be an important responsibility of the Civil Rights Division? If so, how will you carry out this part of the Department's mission?

RESPONSE: Yes. I fully agree that protecting the right to vote and guarding against voter discrimination are important responsibilities of the Civil Rights Division. If confirmed, I will carefully evaluate federal voting rights cases that fall within the Division's jurisdiction to ensure fair and even-handed enforcement based on the facts, the evidence, and the law.

3. Will you commit to appearing before this Committee in a public hearing to discuss the Department's recent decisions with respect to Voting Rights Act enforcement cases if you are confirmed to this position?

RESPONSE: If confirmed, I will work with the Department's Office of Legislative Affairs should the Committee request that the Department testify at a hearing.

4. Following the *Shelby County* decision, it is critical that the Justice Department continues to pursue appropriate cases under other sections of the Voting Rights Act, so that every

eligible citizen has a chance to cast a ballot. Specifically, I am referring to Section 2, which prohibits voting practices or procedures that discriminate on the basis of race, and the Section 3 “bail-in” provision, through which more states can be subject to preclearance.

If confirmed, will you commit to actively enforcing the Voting Rights Act’s other provisions that were not affected by the *Shelby County* decision, including Section 2 and Section 3(c)?

RESPONSE: I will faithfully execute the Constitution and laws of the United States, including provisions of the Voting Rights Act. As I firmly stated in my hearing, the Voting Rights Act is one of the most important laws within the jurisdiction of the Civil Rights Division. It is fundamental to who we are as a people, and I zealously support its enforcement. If confirmed, I will carefully evaluate federal voting rights cases that fall within the Division’s jurisdiction to ensure fair and even-handed enforcement based on the facts, the evidence, and the law.

5. On July 11, I sent a letter joined by ten other Senators to ask Attorney General Sessions and Acting Assistant Attorney General of the Civil Rights Division Tom Wheeler for additional information regarding the Justice Department’s apparent coordination with the Presidential Advisory Commission on Electoral Integrity in requesting sensitive voter roll data from state election officials. As you likely know, the Commission’s June 28 request for voter data was met with resistance from state election officials from both parties, and 44 states refused to provide the Commission with the data that it requested. The letter also asked questions regarding the Department’s position on enforcement of the National Voter Registration Act.

Although I understand that you were not at the Department during this time, I am concerned that I still have not received a response to this letter, even though the letter requested a response by July 24. **Will you commit to ensuring that the Department provides a response if you are confirmed to this position?**

RESPONSE: I appreciate the importance of responding to Members’ letters and requests for information. Because I am not currently serving in the Department, I am not familiar with the letter you reference. If I am confirmed, I will work with the Division and the Department to provide a response to your letter.

6. I believe that we should be doing everything we can to foster the right to vote, which lies at the foundation of our democracy. My state has a tradition of same-day registration, which has helped our high turnout rates. I introduced the Same Day Registration Act, which is modeled after Minnesota’s law, to make same-day registration available in more states. I am also working to introduce legislation to automatically register eligible voters when they turn 18.

Can you comment on these proposals intended to help citizens exercise their constitutional right to vote?

RESPONSE: I firmly agree that the right to vote is a fundamental right. I am not familiar with the details of the Same Day Registration Act. If confirmed, I look forward to learning more about this legislation.

Human Trafficking: Human Trafficking Prosecution Unit and ACTeams

7. One of my highest priorities has been working to combat human trafficking. The Justice Department's Human Trafficking Prosecution Unit, which is part of the Civil Rights Division, is one of the most effective tools that we have in the fight against trafficking. Notably, the Unit saw a 62 percent increase in cases filed in fiscal years 2011-2015 over the previous five years—but its funding has remained flat for the past several years. It is for this reason that I led a bipartisan letter to the Appropriations Committee with Senator Cornyn earlier this year advocating for adequate funding for the Unit and other anti-trafficking efforts.

Will you commit to supporting the Human Trafficking Prosecution Unit, including seeking additional funding for its work bringing traffickers to justice?

RESPONSE: I am fully committed to supporting the important work that the Human Trafficking Prosecution Unit of the Division's Criminal Section does to combat the scourge of human trafficking. Since I am not currently serving in the Department, I am not privy to internal resource allocation considerations, but if confirmed, I intend to learn more about the Division's budget as soon as possible.

Hate Crimes

8. Like many of my colleagues, I am concerned by the recent increase in hate crimes across the country. In Minnesota, this has targeted people of all faiths, races, and backgrounds. I spoke with our Jewish community about this after two of our Jewish Community Centers were threatened earlier this year, and I am also concerned about the violence and harmful rhetoric directed at our Muslim community—particularly after the bombing of a mosque last month.

What is your perspective on the cause of the recent rise of hate crimes, and how do you believe the Civil Rights Division should work to combat this troubling trend?

RESPONSE: While it would be difficult for me speculate as to the possible causes of recent trends in hate crime perpetration, I believe that hate crimes have no place and should not be tolerated in American society. I agree with the Attorney General's recent statement that "[n]o person should have to fear being violently attacked because of who they are, what they believe, or how they worship." If confirmed, I would take all steps available under federal law to prosecute perpetrators of such crimes.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR COONS

1. Does Title IX of the United States Education Amendments of 1972's prohibition against sex discrimination encompass discrimination based on gender identity and sexual orientation?

RESPONSE: In light of the ongoing litigation in *Zarda v. Altitude Express* and other cases, it would not be appropriate for me to comment.

2. Is discrimination on the basis of gender identity a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 and Title IX of the United States Education Amendments of 1972?

RESPONSE: In light of the ongoing litigation in *Zarda v. Altitude Express* and other cases, it would not be appropriate for me to comment.

3. Is discrimination on the basis of sexual orientation a form of discrimination prohibited by Title VII of the Civil Rights Act of 1964 and Title IX of the United States Education Amendments of 1972?

RESPONSE: In light of the ongoing litigation in *Zarda v. Altitude Express* and other cases, it would not be appropriate for me to comment.

4. In July 2017, breaking with the Equal Employment Opportunity Commission's position, the Department filed an amicus brief in the Second Circuit in *Zarda v. Altitude Express* disputing Title VII of the Civil Rights Act of 1964's coverage of claims of discrimination on the basis of sexual orientation. If confirmed, will the Civil Rights Division of the Department of Justice continue to take this position in *Zarda* and other cases?

RESPONSE: Because I am not currently working at the Department, I am not familiar with the details of the Department's position and internal discussions in this matter. In addition, because this issue is subject to ongoing litigation, it would not be appropriate for me to comment.

5. Do sex discrimination laws such as Title VII of the Civil Rights Act of 1964, Title IX of the United States Education Amendments of 1972, and § 1557 of the Affordable Care Act prohibit discrimination that is motivated by sex stereotypes?

RESPONSE: In light of the ongoing litigation in *Zarda v. Altitude Express* and other cases, it would not be appropriate for me to comment.

6. The Department of Justice announced that it is reconsidering its regulations implementing the nondiscrimination provisions of the Affordable Care Act that prohibited, among other things, discrimination in the provision of medically necessary health care to transgender people. If confirmed, will you instruct the Civil Rights Division not to defend these regulations?

RESPONSE: Because I am not currently working at the Department, I am not familiar with the details of the Department's position in this matter. However, I look forward to learning more about this issue if confirmed, and would ensure a careful and considered review of the matter.

7. Do you believe that transgender students should be able to access sex-segregated facilities in accordance with their gender identity?

RESPONSE: I firmly believe that schools must ensure that all students are able to attend and thrive in an environment free from discrimination and bullying. I am committed to enforcing Title IX and other federal laws to ensure the protection of all students, including LGBT students. It is my understanding that both the Department of Justice and the Department of Education are working to consider this issue further and more completely. However, because it is the subject of ongoing litigation, it would not be appropriate for me to comment further.

8. You represented the University of North Carolina as a defendant in a lawsuit by civil rights groups and the Department of Justice after North Carolina passed a law (HB2) restricting transgender individuals' ability to access public restrooms corresponding to their gender identity. If confirmed, will you recuse yourself from litigation involving transgender individuals' ability to access public restrooms corresponding to their gender identity?

RESPONSE: If I am confirmed and a matter comes before me in which I believe recusal might be warranted, I would review the law and the facts, consult with career ethics officials at the Department, and recuse myself from any matter where such a recusal is appropriate.

9. Department of Justice surveys show that more than one third of transgender individuals who are awaiting trial or serving sentences in jails or prisons report suffering sexual assault or abuse in the last 12 months. If confirmed, how will you work to prevent and respond to this form of violence?

RESPONSE: Although I am not familiar with the study you reference, I believe that sexual assault of any individual in jail or prison is unacceptable. I am committed to vigorously enforcing federal laws that protect the rights of incarcerated persons, and if confirmed, will carefully consider any allegation of such sexual abuse brought to the Division's attention to ensure appropriate enforcement action based on the facts, the evidence, and the law.

10. Do you agree with the Department of Justice’s amicus brief in *Masterpiece Cakeshop v. Civil Rights Commission*, which asks the Supreme Court to rule that laws barring businesses from refusing to serve gay couples may violate the First Amendment?

RESPONSE: Because I am not currently working at the Department, I am not familiar with the details of the Department’s position in this matter. Because this is the subject of ongoing litigation, it would be inappropriate for me to comment.

11. Are state and local governments required to accommodate government workers who state a religious or moral objection to serving individuals of a certain race or sexual orientation?

RESPONSE: State and local governments are required to follow state and federal laws, state constitutions, and the U.S. Constitution, including their protections of religious freedom and guarantees against racial and other discrimination. How these protections apply in a given circumstance will depend on the particular facts, and the applicable laws.

12. Are state and local government officials obligated to comply with federal civil rights laws even where doing so would conflict with their religious or moral beliefs?

RESPONSE: Please see my response to Question 11.

13. Earlier this year, after six years of litigation, *Veasey v. Abbott* returned to the United States District Court for the Southern District of Texas on remand. At that point, the Justice Department dropped its claim that the Texas legislature passed its voter ID law with the intent to discriminate against minorities. Nonetheless, the Court found that the legislature had passed the law with discriminatory intent.

- a. Going forward, if the career attorneys in the Voting Rights Section of the Civil Rights Division believe that a claim they have been litigating is meritorious, would you continue to assert that claim?

RESPONSE: As I firmly stated in my hearing, the Voting Rights Act is one of the most important laws within the jurisdiction of the Civil Rights Division. It is fundamental to who we are as a people, and I zealously support its enforcement. If confirmed, I will carefully evaluate any federal voting rights case that falls within the Division’s jurisdiction, and the views and recommendations of the Division’s career attorneys, to ensure appropriate enforcement based on the facts, the evidence, and the law.

- b. If confirmed, will you direct the Civil Rights Division to assert claims that changes to voting laws were passed with discriminatory intent when those claims are supported by the evidence?

RESPONSE: Please see my response to Question 13a.

- c. What types of circumstances or evidence would lead you to believe that a law that restricts who can vote was passed with discriminatory intent?

RESPONSE: Whether a law was passed with discriminatory intent will depend on the particular facts and relevant law. I would carefully evaluate each individual allegation brought to my attention to ensure a case-specific assessment of this issue based up the facts, the evidence, and the law.

14. A 2014 report by Justin Levitt published in the *Washington Post* (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=.dc645a28fb6b) found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were 1 billion ballots cast. However, the Department of Justice has been involved in many successful cases against jurisdictions that violate the Voting Rights Act.

- a. Do you agree with me that evidence suggests the Department should devote more resources to bringing violations of Voting Rights Act cases over cases combatting in-person voter fraud?

RESPONSE: Since I am not currently serving in the Department, I am not privy to the discussions and facts regarding resource allocation. However, if confirmed, I intend to learn more about the Division's budget as soon as possible. As a general matter, I believe it is important to enforce federal voting rights laws, including the Voting Rights Act.

- b. Do you agree that laws passed with the stated purpose of protecting "voter integrity" can be abused to suppress the votes of racial minorities?

RESPONSE: I am committed to upholding and protecting the voting rights of all Americans and to enforcement of the Voting Rights Act, which has been a critical law enforcement function of the Department for many years. Whether a particular law affects voters in violation of the Voting Rights Act will depend on the particular facts and relevant law.

- c. If confirmed, what will be your role in the Presidential Advisory Commission on Election Integrity?

RESPONSE: My understanding based on public reports is that the Commission is independent and unrelated to the Department. Thus, I do not anticipate having a role in the Commission.

- d. If the Presidential Advisory Commission on Election Integrity took actions or made statements you find to be antithetical to the promotion of civil rights, what steps would the Civil Rights Division take in response?

RESPONSE: As I explained in my response to Question 14c, I do not anticipate having a role in the Commission. If confirmed, my duty will be to enforce the Voting Rights Act and the other laws within the jurisdiction of the Civil Rights Division.

15. In April 2017, Attorney General Sessions ordered a comprehensive review of all police reform activities, including any existing or contemplated consent decrees, and he stated that “these investigations and consent decrees . . . can turn bad. They can reduce morale of the police officers.”

- a. Do you believe that consent decrees can be a useful tool when working with local law enforcement to resolve pattern or practice investigations?

RESPONSE: Yes.

- b. If confirmed, are there circumstances in which you would advocate for the use of a new consent decree in an investigation of state or local law enforcement?

RESPONSE: The decision whether to use a consent decree in a particular case would depend on the specific facts and circumstances of the matter.

- c. Do you believe the Department of Justice should continue to follow the provisions outlined in the Baltimore consent decree?

RESPONSE: I understand from public reporting that the Attorney General has ordered a review of consent decrees that the federal government has reached with law enforcement agencies. Because certain consent decrees fall under the purview of the Civil Rights Division, I would expect to be involved with that review. Since I am not currently serving in the Department, I am not in a position to comment on what actions I might take on a particular consent decree as those decisions would be fact-specific and would require a review of the full record for each matter.

- d. Are internal oversight mechanisms that many police departments rely on sufficient to identify and prevent wrongful conduct and discipline offending officers?

RESPONSE: Because I am not currently serving in the Department or involved in these issues, I am unfamiliar with the mechanisms you reference or facts and statistics regarding their efficacy. If confirmed, I look forward to learning more about this issue.

- e. What mechanisms would you support to improve relationships between law enforcement and the communities they serve?

RESPONSE: Please see my response to Question 15d.

- f. Do you support the expansion of law enforcement training to address issues such as implicit bias and officer engagement with individuals suffering from mental illness or intellectual disabilities?

RESPONSE: Please see my response to Question 15d.

16. The tragic events in Charlottesville, VA are a recent demonstration of the threat that hate groups pose to individuals' safety and the security of racial and religious minorities. If confirmed, what steps would you take in response to these hate groups?

RESPONSE: I believe that hate crimes have no place and should not be tolerated in American society. I agree with the Attorney General's recent statement that "[n]o person should have to fear being violently attacked because of who they are, what they believe, or how they worship." If confirmed, I would take all steps available under federal law to prosecute perpetrators of such crimes. I would also do everything I can to support the Department's civil rights investigation of the events in Charlottesville and bring justice to those who are responsible.

17. If confirmed, what steps would you take to encourage and incentivize participation in the Hate Crime Statistics Act data collection program?

RESPONSE: I am unfamiliar with the program; however, if confirmed, I will learn more about this issue and be in a better position to assess the Division's involvement.

18. In 2008, you testified against the Fair Pay Restoration Act. If confirmed, will you direct the Civil Rights Division to take affirmative steps to investigate pay discrimination claims and file lawsuits when there is evidence supporting the claim of discrimination?

RESPONSE: I am committed to enforcing all civil rights laws. If confirmed, and when a claim of unlawful discrimination comes to the Division's attention, I would expect the Division to investigate the matter and take appropriate action based upon the facts, the evidence, and the law.

19. There are reports that the current administration is planning to challenge race-conscious admissions policies, that the litigation would be run by political appointees in the front office, and that career Civil Rights Division attorneys were asked to submit resumes to be allowed to work on the case.

- a. Do you believe that the scarce resources of the Civil Rights Division should be used to challenge affirmative action policies?

RESPONSE: Because I am not currently serving in the Department, I am unfamiliar with the facts and circumstances surrounding this issue and thus am unable to comment further.

- b. Is it ever appropriate to run a Civil Rights Division case out of the front office or to require career attorneys to submit resumes for screening to work on the case?

RESPONSE: If I am confirmed, I intend to make all personnel decisions in a fair, even-handed, and ethical manner, consistent with civil service laws and longstanding Department personnel policies.

- 20. If confirmed, what procedures would you put in place to avoid politicization of the Civil Rights Division and ensure consultation with career attorneys?

RESPONSE: I believe that the Department and the Division have excellent, hard-working career attorneys and, if confirmed, I intend to work closely with them in handling the Division's cases. I also believe it is important that all Department of Justice officials understand and comply with the laws that govern their conduct, including the civil service protection laws. Politics should not be considered when hiring career attorneys and staff. If confirmed, I am committed to ensuring that those with hiring authority under my supervision receive proper training and understand their obligations with respect to hiring.

- 21. Earlier this year, the President issued an Executive Order that banned individuals from seven Muslim-majority countries from traveling to the U.S. and slashed refugee admissions. A subsequent Executive Order targeting six countries is being litigated right now. Then-candidate Trump promised a ban on all Muslims entering the country when he was running for president.

- a. Have you discussed this proposal with him?

RESPONSE: No.

- b. Do you believe the executive orders to be constitutional even though they discriminate against people of a certain faith?

RESPONSE: Because this matter involves pending litigation, it would not be appropriate for me to comment on it.

- c. Do you believe that it is proper for a court to consider then-candidate Trump's statements as evidence when considering claims that the executive orders constitute religious discrimination?

RESPONSE: Because this matter involves pending litigation, it would not be appropriate for me to comment on it.

- 22. Statistics consistently show that African Americans are arrested and incarcerated at higher rates than their white peers. Do you believe that criminal records screenings by employers can give rise to a disparate impact claim?

RESPONSE: I am aware of four disparate-impact cases filed by the EEOC that challenge the use of criminal records by the defendants in those cases. The federal courts of appeals affirmed the dismissal of two of those cases; one of the cases settled; and, as far as I know, one is currently pending in litigation. Because I am not currently serving in the Department or involved in Division cases involving these issues, I am unfamiliar with specific matters that may be pending before the Division, if any. If confirmed, and if the issue arises in the Division, I look forward to learning more about this issue.

23. President Trump issued a pardon for former Arizona Sheriff Joe Arpaio, who was awaiting sentencing for criminal contempt related to violations of court orders in litigation brought by the Justice Department, based on unconstitutional racial profiling.

- a. Do you believe the Civil Rights Division's investigation of Sheriff Arpaio was a "witch hunt"?

RESPONSE: I am only aware of this issue from media reports. I have not studied the record in this matter, and I understand from public reports that the Department, and the Division in particular, is involved in ongoing litigation concerning both Sheriff Arpaio and the Maricopa County Sheriff's Office. It would therefore be inappropriate for me to comment.

- b. Do you believe Sheriff Arpaio was convicted for "just doing his job"?

RESPONSE: Please see my response to Question 23a.

- c. Do you believe this was a just use of the President's pardon power?

RESPONSE: Please see my response to question 23a.

24. Evidence shows that solitary confinement has significant mental health consequences when used for extended periods of time.

- a. Do you believe solitary confinement should only be used as a last resort?

RESPONSE: Solitary confinement is undoubtedly an extraordinary measure. I am unfamiliar with and have not studied the evidence referenced in this question vis-à-vis the relevant law. However, I am committed to ensuring the civil rights of incarcerated persons, and if confirmed, look forward to learning more about this issue.

- b. Do you believe solitary confinement should ever be used for juveniles?

RESPONSE: Please see my response to Question 24a.

25. As a Justice Department lawyer, when is it appropriate to refuse to follow a directive of the President?

RESPONSE: Every Department of Justice attorney swears an oath to faithfully execute and defend the Constitution and laws of the United States. It would therefore be appropriate to refuse to follow a directive of the President if it is illegal or unconstitutional.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR BLUMENTHAL

1. I have introduced a bill, the NO HATE Act (S. 662), that would offer victims of hate crimes additional civil remedies in court, improve the reporting of hate crimes, and encourage community-wide healing after a hate crime has occurred.

Will you review my NO HATE Act and let this Committee know whether the Administration can support it?

RESPONSE: I believe that hate crimes have no place in American society, and that they must be prosecuted to the fullest extent of the law. I am not familiar with the NO HATE Act, but, if confirmed, I look forward to reviewing it.

2. Despite the large number of hate crimes per year, the Civil Rights Division has pursued only a few dozen federal hate crimes prosecutions since the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) was passed in 2009.

- a. **In your estimation, why have there been relatively few prosecutions under the HCPA?**

RESPONSE: Because I am not currently working at the Department, I am not familiar with the data regarding cases handled by the Civil Rights Division in recent years, nor am I familiar with the Division's decision-making process in individual cases. I agree with the Attorney General's recent statement that "[n]o person should have to fear being violently attacked because of who they are, what they believe, or how they worship." If confirmed, I would take all steps available under federal law to prosecute perpetrators of such crimes.

- b. **What factors would you consider in deciding whether to bring federal hate crimes charges against a suspect?**

RESPONSE: If confirmed, I would decide whether to bring federal hate crimes charges against a suspect on the basis of the specific facts, the evidence, and the law.

- c. **Will you commit to zealously investigate potential hate crimes and, when the facts warrant it, prosecute violations of federal hate crime laws?**

RESPONSE: Yes. If confirmed, pursuing hate crimes cases will be one of my top priorities. I commit to investigating potential hate crimes zealously and bringing prosecutions when warranted by the facts and evidence and based on the

statutes within the enforcement jurisdiction of the Civil Rights Division.

d. Will you consult with local communities and local law enforcement in deciding whether to pursue federal hate crime charges?

RESPONSE: It is my understanding that the Department's Community Relations Service, which consists of community relations experts, often engages directly with local communities in the wake of an incident. Additionally, the Department's COPS office has expertise in community-oriented policing. If confirmed, I would draw upon the expertise of these institutional resources as appropriate in deciding whether to pursue federal hate crime charges.

3. I have called upon Attorney General Sessions to investigate all potential crimes that occurred in Charlottesville.

Will you commit to zealously investigate all potential violations of the law by James Alex Fields, Jr., and any associated groups in Charlottesville, including violations of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act as well as the civil rights conspiracy statute (18 U.S.C. 241)?

RESPONSE: The violent hatred that was on display in Charlottesville was a disgrace to our nation and its values. If confirmed, I will vigorously and zealously support the Department's efforts to investigate potential violations of our civil rights laws and hold any and all perpetrators accountable. However, I do not want to prejudge or otherwise influence any outcomes by commenting directly on the Department's ongoing investigation into the violence in Charlottesville. It is critical that we ensure that the investigation proceeds independently and properly so that those who did commit acts of violence are held accountable and the victims receive the justice they deserve.

4. The EEOC under President Obama determined that workplace discrimination based on sexual orientation is covered by Title VII of the Civil Rights Act. However, the Department of Justice under Attorney General Sessions recently filed an *amicus* brief before the Second Circuit in *Zarda v. Altitude Express* stating that sexual orientation is not covered by Title VII.

a. As a former EEOC General Counsel, is it your view that Title VII protects against workplace discrimination on the basis of sexual orientation?

RESPONSE: Because there is ongoing litigation on this issue, it would not be appropriate for me to comment.

b. Do you agree with the amicus brief filed by the Department in *Zarda* this year? Would you have signed that brief?

RESPONSE: Because I am not currently working at the Department, I am not privy to the details regarding the Department's position in this matter.

Further, it would not be appropriate for me to comment on ongoing litigation.

- c. **Will you direct the Division to pursue violations of Title VII on the basis of sexual orientation?**

RESPONSE: If I am confirmed, I will be committed to the zealous and rigorous enforcement of the laws within the jurisdiction of the Civil Rights Division. Since the question of whether Title VII prohibits discrimination on the basis of sexual orientation is presently the subject of ongoing litigation, however, it would be inappropriate for me to comment further.

5. **Will you commit to zealously enforce the Freedom of Access to Clinic Entrances (FACE) Act?**

RESPONSE: If confirmed, I intend to zealously enforce all civil rights laws within the Division's jurisdiction, including the FACE Act.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

QUESTIONS FROM SENATOR HIRONO

1. It has been reported that the Department of Justice is planning on redirecting resources from civil rights enforcement towards investigation and litigating university admissions policies that discriminate against white applicants.

- a. Is it your view that white applicants are disadvantaged in college admissions?

RESPONSE: The Department of Justice has responsibility for enforcement, among other laws, of the Equal Protection Clause of the Fourteenth Amendment at institutions of higher learning, see 42 U.S.C. § 2000c-6, and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits discrimination on the basis of race, color, and national origin by recipients of federal funds, including institutions of higher learning. I have not reviewed data on this issue, and thus I cannot comment further. However, I believe that universities should be free of all unlawful discrimination on the basis of race, sex, color, national origin, and all other protected traits.

- b. Is it the position of the Department that white applicants are disadvantaged in college admissions?

RESPONSE: Because I am not currently serving at the Department, I am unaware of its position and any related information.

2. Do you believe that admissions policies that include a consideration of race as one factor are constitutional? Please explain why or why not.

RESPONSE: In *Fisher v. University of Texas at Austin*, the Supreme Court determined that the Constitution permits consideration of race in admissions only when “the admissions process can withstand strict scrutiny.” 136 S. Ct. 2198, 2208, 195 L. Ed. 2d 511 (2016) (citations omitted). Strict scrutiny requires that a college or university “demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.” *Id.* (citations and inner quotations omitted).

If confirmed and confronted with a particular issue regarding admissions policies, I would consider the specific facts at issue and all applicable law such as *Fisher*.

3. In August, the Department of Justice dropped its objections to Ohio’s voter purge procedures. Do you agree with the Attorney General that the National Voter Registration Act allows the purging of rolls without any evidence that the voter has moved to another

state? In your view, does such a purge pose other legal or constitutional questions and, if confirmed, how would you undertake an analysis of those questions?

RESPONSE: It is my understanding that the Department recently filed an amicus brief supporting the petitioner in a case before the Supreme Court of the United States, *Jon Husted v. A. Philip Randolph Institute*, that relates to this issue. Because this issue is in ongoing litigation, it would not be appropriate for me to comment further.

4. You represented the Archdiocese of Washington in its challenge to the Affordable Care Act's contraception coverage requirement. Do you believe there are limits on what a corporation – whether a religious non-profit or otherwise – can claim as a religious belief to deny certain benefits?

RESPONSE: The standards that govern a corporation's claim about its religious beliefs are those contained in the First Amendment to the Constitution of the United States, the Religious Freedom Restoration Act, Title VII of the Civil Rights Act of 1964, and other laws and regulations. The Supreme Court discussed these issues in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), and in other cases. If confirmed, I would direct the Civil Rights Division to abide by the First Amendment, the Religious Freedom Restoration Act, Title VII, and other laws and regulations that protect religious liberty, as described by the Supreme Court in the *Hobby Lobby* case and in other cases.

5. You chose to represent the University of North Carolina when it was sued by the Department of Justice and a coalition of civil rights groups after the state passed a law (HB 2) that limited the access of transgender people to public restrooms. At the hearing, you claimed that this was merely a "procedural defense," but you declined to answer when asked whether Title IX protects transgender students. What limits do you believe there are on the ability of states to enact and enforce discriminatory laws like HB2? What legal protection, if any, do you believe the law provides against laws like these that bar transgender individuals from using restrooms and other single-sex spaces that accurately reflect their gender identity?

RESPONSE: I firmly believe that all schools must ensure that all students are able to attend and thrive in an environment free from discrimination and bullying. I am committed to enforcing Title IX and other federal laws to ensure the protection of all students, including lesbian, gay, bisexual, and transgender students. It is my understanding that both the Department of Justice and the Department of Education are considering further and more completely the issues that were involved in the HB 2 litigation. Because this issue is in ongoing litigation, it would not be appropriate for me to comment further.

6. Do you have any experience litigating voting rights cases? If not, what steps have you taken to familiarize yourself with this area of the law?

RESPONSE: During my government service and in private practice I have handled hundreds of matters pertaining to civil rights laws. Although voting rights cases have not been a major part of my work, if confirmed, I will zealously enforce the Voting Rights Act and other federal voting laws. I will also work closely with the Division's Voting Section,

who are the experts on voting rights matters. I have reviewed information about the various voting rights laws enforced by the Division to help prepare for my duties should I be fortunate enough to be confirmed. I have reviewed the statutes enforced by the Civil Rights Division, and I have read case law that interprets those statutes, including decisions by the Supreme Court of the United States, several federal courts of appeals, and district courts.

7. I'm very interested in how the Civil Rights Division under your leadership will review state laws that have the purpose or effect of suppressing the right to vote. For example, under Section 3 of the Voting Rights Act, courts can reinstate the preclearance requirement on a jurisdiction-by-jurisdiction basis. As AAG for Civil Rights, would you seek this remedy against states, counties, or cities that impose discriminatory voting requirements? What other steps would you take to ensure that the right to vote by all Americans regardless of race, as guaranteed by the Constitution, is protected?

RESPONSE: As I firmly stated in my hearing, the Voting Rights Act is one of the most important laws within the jurisdiction of the Civil Rights Division. It is fundamental to who we are as a people, and I zealously support its enforcement. Although I cannot comment on a hypothetical situation, if confirmed, I will decide what remedies related to state voting laws may be appropriate based upon careful consideration of the record in the case, the recommendations of career attorneys in the Division, and the law.

8. President Trump has claimed that millions of people voted illegally in the 2016 election, and has set up an "election integrity commission" to prove that claim correct and encourage voter suppression laws.
 - a. Despite the lack of evidence, do you believe that there is evidence that millions of people voted illegally in the 2016 election?

RESPONSE: I am not aware of data indicating that millions of people voted illegally in the 2016 election.

- b. Would you use any of the resources of the Civil Rights Division to assist the "election integrity commission" in its pursuit of the President's claim that millions of people voted illegally, or otherwise have involvement with this commission as head of the Civil Rights Division? If so, what would be the involvement?

RESPONSE: My understanding from public reports is that the Commission is independent and unrelated to the Department. Thus, if confirmed, I do not anticipate having a role with the Commission.

- c. What is your view of this Commission, how it came to be, its composition, and its role?

RESPONSE: My understanding from public reports is that President Trump issued an executive order establishing the Commission. I do not know the Commission's role or purpose. I have read in press reports that it is or will be comprised of Kansas

Secretary of State Kris Kobach, and other members.

9. Attorney General Sessions has ordered a review of all consent decrees that the federal government has reached with law enforcement agencies. Will you be involved in that review as Assistant Attorney General? If you are involved, what criteria will you use to determine whether to leave a consent decree in place or move to amend or terminate it?

RESPONSE: I understand from public reporting that the Attorney General has ordered a review of consent decrees that the federal government has reached with law enforcement agencies. Because some of those consent decrees may fall under the purview of the Civil Rights Division, I would expect to be involved with that review. Since I am not currently serving in the Department, I am not in a position to comment on what actions I might take on any particular consent decree, as those decisions would be fact-specific and require a review of the full record for each matter.

**Nomination of Eric S. Dreiband to be
Assistant Attorney General, Civil Rights Division
Questions for the Record**

SENATOR LEAHY

Attachment in response to Question 1(b).

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September 4, 2017

The Honorable Charles E. Grassley
Chairman
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U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
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**RE: Nomination of Eric S. Dreiband and the Unfortunate August 31
Statement of the Leadership Conference on Civil and Human Rights**

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A. Who I Am

First, a word of introduction. I went to law school in 1965 in order to handle civil rights cases, have spent more than fifty years representing civil rights plaintiffs,¹ for nearly a quarter of a century helped prepare civil rights lawyers for their Supreme Court arguments, have been involved with civil rights organizations throughout my professional career, have repeatedly testified before Congressional Committees on civil rights issues, have written extensively on employment discrimination issues, having with a management co-author published fifteen editions of EQUAL EMPLOYMENT LAW UPDATE from 1996 through 2007 for the American Bar Association's Section of Labor and Employment Law (most of them running between 1,800 and 2,000 pages in length), and because of my experience and knowledge of employment and civil

¹ I am a member in good standing of the Bars of the District of Columbia and of Maryland. I am also a member of the Bars of the Supreme Court of the United States, the U.S. Courts of Appeals for the D.C., Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits, and of the U.S. District Courts for the Eastern District of Michigan, the Northern District of Mississippi, the Northern District of New York, and the Southern District of Texas, and the Bankruptcy Court of the Central District of California.

rights law have often been asked to speak to Bar and other organizations.² I was Chair of the ABA Section of Labor and Employment Law from August 2011 to August 2012; at the time, it was the third-largest entity within the ABA, with more than 26,000 members. I am a Fellow and former Governor of the College of Labor and Employment Lawyers. My views are my own, of course.

I worked with the Law Students' Civil Rights Research Council in Louisiana in the Summer of 1966, traveling in the North of the State with the Congress of Racial Equality's Deputy Southern Director signing up plaintiffs for school desegregation cases and later making these trips on my own,³ and working on employment, desegregation,⁴ and demonstration cases. I later was a member of its National Board. I worked the next Summer and for 15 months after my 1968 graduation from Harvard Law School for the U.S. Commission on Civil Rights investigating voting discrimination in Southside Virginia and in Mississippi, working on Northern discrimination, and other matters. I then worked for Marian Wright Edelman at the Washington, which later became the Children's Defense Fund.⁵ I left to start my own practice

² Alabama Conference of the N.A.A.C.P.; ALI-ABA; ALI CLE; American Arbitration Association; ABA Section of Business Law; ABA Section of Dispute Resolution; ABA Section of Labor and Employment Law; ABA Section of Litigation; ABA Section of Tort Trial and Insurance Practice; American Psychological Association; Association of the Bar of the City of New York; American Association for Justice (formerly ATLA); Center for American and International Law; Atlanta Bar; Connecticut Bar; District of Columbia Bar; Equal Employment Opportunity Commission; Federal Judicial Center (appearing on FJC videotape on employment law for training Federal judicial law clerks; and FJC / New York University member of panel on Jury Instructions at judges' conference); Florida Bar; Georgetown University Law Center; King County, Washington, Bar (Pacific Coast Legal Conference); Lawyers' Committee for Civil Rights Under Law; Mexican American Legal Defense and Educational Fund; Minnesota Bar (Upper Midwest Employment Conference and separate meeting); NAACP Legal Defense and Educational Fund; National Employment Law Institute; National Employment Lawyers' Association; New York State Bar; New York University Law School; Ohio Bar; Pennsylvania Bar Institute; Practicing Law Institute; Society for Industrial and Organizational Psychology; South Carolina Bar; U.S. Conference of Administrative Judges; U.S. Department of Justice; U.S. Bureau of Prisons; University of Louisville Law School; University of Richmond Law School; Wisconsin Bar; and organizations of plaintiffs' attorneys in the District of Columbia, Florida, New Jersey, Texas, and Wisconsin.

³ We always warned them, before they signed retainers, that they would be fired by any white employers they had, they would never again be employed by any other whites, and the Klan was certain to burn crosses in front of their houses. These were among the bravest people I have ever met.

⁴ Because school board resistance meant integration proceeded at glacial paces, I analyzed the published statistics of the Louisiana Board of Education on school funding, and prepared charts showing that the Parish School Boards we were suing generally spent six times as much per child on white students than on black students. I presented testimony in one of those cases. We could not get immediate-desegregation orders, but we could get immediate equal-spending orders—*Plessy v. Ferguson* relief that resulted on black teachers getting books for all their students, and writing paper and other supplies, for the first time in their careers, and black students getting bused to school in much safer vehicles, and far better school lunches.

⁵ While there, I filed charges with the EEOC and filed a lawsuit, against J.P. Stevens & Co., that 25 years later — and after a trial and three consolidated appeals, and one subsequent appeal by the company and several changes of defense counsel — was settled in 1995 for \$20 million on back pay, every cent of which went to the class.

in October 1973, doing the same work. The Lawyers' Committee for Civil Rights Under Law hired me in January 1977 to direct some, then all, of their employment discrimination work. I was there for 24 years.⁶ While there, I litigated cases in U.S. District courts, and the Courts of Appeals, second-chaired some Supreme Court cases, filed *amicus* briefs in numerous cases in the Supreme Court and Courts of Appeals, and organized moot courts to help attorneys argue their cases in the Supreme Court. I was involved, by *amicus* or preparation, in the majority of Supreme Court civil rights cases involving employment, and a substantial number of the Court's non-employment civil rights docket. I am a member of the Board of Trustees and Board of Directors of the Lawyers' Committee, although I speak for myself alone.

I was for a few years a Co-Chair of the Leadership Conference's Employment Task Force. I was a member of its Drafting Task Force on the Civil Rights Act of 1991. I represented the interests of the Lawyers' Committee in negotiations I put together with the U.S. Chamber of Commerce, the Society for Human Resource Management, and privacy organizations, to seek a compromise on the Fair Credit Reporting Act that would leave employers free to use outside investigators to enquire into claims of serious misconduct of all kinds. I ultimately testified to the House Banking Committee on a way to accomplish that goal. I have testified before Congress numerous times on civil rights questions, including before the Subcommittee on the Constitution of this Committee in 1981.

I am also an arbitrator and a mediator. I am on the American Arbitration Association's Commercial Arbitrator roster and its Employment Arbitrator roster, and on the American Health Lawyers Association's roster for Arbitration and Mediation. My mediations and arbitrations, whether through these organizations or not, occur when the parties decide to put matters into my hands to help them reach a resolution or to reach a binding decision. The need for integrity is absolute, which is why I value it so highly in Eric Dreiband.

I have spent my entire professional life in pursuit of civil rights and basic fairness. To my mind, that does *not* mean that plaintiffs must win all cases. That would be tyranny, not civil rights. Civil rights law requires that employers must be held liable only when they have violated the law, and must be exonerated when they have not. If the law is to command respect, it is just as important to test the defenses as it is to test the claims.

Everyone must individually be treated with basic fairness, no matter whom they represent. If basic fairness is accorded only to those with whom we agree, that spells the death knell for civil society.

⁶ While the focus of the Lawyers' Committee was on racial discrimination, I made it a condition of my employment that I be allowed to handle sex discrimination cases as well. And we did.

B. My Prior Letter

I previously joined the July 25, 2017 letter of civil rights lawyers representing employees, union lawyers representing labor unions, and management lawyers representing employers—all of whom have direct, years-long personal knowledge of Eric Dreiband, in strong support of his nomination.

C. My Reasons for Writing This Letter

I am writing again because I have seen the unfortunate August 31 letter of opposition from the Leadership Conference on Civil and Human Rights, joined by other organizations that relied to their detriment on the Leadership Conference's accusations.

If those accusations were true, I would be in the lead in calling for the rejection of Mr. Dreiband's nomination.

The accusations are either untrue, however, or depend on ski-jump conclusions from facts that cannot bear such weight, or depend on a fundamental misunderstanding of the duties of counsel to their clients that if accepted generally would destroy the rule of law, or depend on the assumption that whoever disagrees with one's preferred position must be a bigot.

I am responding in this letter to what seem to be the chief criticisms the Leadership Conference is making,

I urge the Leadership Conference to take to heart the statements in this letter, and remedy the damage it has done to its credibility by withdrawing the letter and apologizing to Mr. Dreiband, this Committee, and its own members, for presenting such a misleading statement of opposition.

D. The Leadership Conference's Main Criticisms of Mr. Dreiband

1. **The LCCHR's Accusation that Mr. Dreiband "fought against equal pay for women," and "expressed opposition to meaningful access to the courts for women who were paid less than men for the same job" and described him as opposed to "the need for women to be able to remedy long-term pay discrimination"**

The Leadership Conference's accusation on this point was conclusory, and gave no explanation of what Mr. Dreiband had actually said, so as to make its lurid conclusions follow from the facts. It stated only:

Women's Rights: In both congressional testimony and litigation, Mr. Dreiband has fought against equal pay for women. In 2008, he opposed bipartisan legislation – the Fair Pay Restoration Act – that would have reversed the Supreme Court's infamous Ledbetter v. Goodyear Tire & Rubber Company decision. In testimony before the Senate Health,

Education, Labor and Pensions Committee, Mr. Dreiband expressed opposition to meaningful access to the courts for women who were paid less than men for the same job.^{FN2/} Congress rejected Mr. Dreiband's views on the need for women to be able to remedy long-term pay discrimination, and passed the bill in early 2009.

Footnote 2, its only support, was Mr. Dreiband's January 24, 2008 prepared statement to the Senate Committee on Health, Education, Labor and Pensions, at its hearing on the Fair Pay Restoration Act.

It would have been accurate to say that Mr. Dreiband opposed the Fair Pay Restoration Act in the form presented, *if* the LCCHR *also* admitted that Mr. Dreiband testified that the doctrines of equitable tolling and equitable estoppel protected women and others who did not know facts critical to their decision whether to file an EEOC charge, that this protection lasted until they obtained this information, and that Congressional codification of this principle would be a good alternative to the Ledbetter bill and would get the job done. His prepared statement made all of these points, and said specifically:

As an alternative to the Fair Pay Restoration Act, Congress could codify the EEOC's Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC's enforcement process and establish a clear, Congressionally-mandated rule for when the EEOC's charge-filing period ought to be extended.

The core issue that got the Ledbetter bill passed was the gut-level unfairness of a statute of limitations running before a woman knew there was a problem. As it turned out, that was not involved in the *Ledbetter* case itself, because she knew she was being paid less than the men around her years before she filed a charge. The issues of equitable tolling and equitable estoppel never came up.

The following exchange happened in the oral testimony of Mr. Dreiband during the hearing:

Mr. Dreiband. ... The reason, if I understood, Senator, your question, that equitable tolling or any other discovery rule, theory, or anything like that did not apply in Ms. Ledbetter's case was because her lawyer said it wouldn't change the outcome of the case because the record in the case and the record as presented to the U.S. Supreme Court of the United States indicated that Ms. Ledbetter knew about the pay disparities several years before she filed the charge. And, in fact, the way they framed the question presented in the case, they assumed that all of the discriminatory decisions were made outside of the charge-filing period.

Senator Isakson. On that point, and this is the question I want to ask. And let us remove Ms. Ledbetter's case for a second and assume it was a case with the same

circumstances except that there wasn't a record of prior notice. Would the discovery, equitable tolling, or the estoppel rule allow you to go beyond the 180 days and file the case?

Mr. Dreiband. Potentially, yes. The EEOC standard, for example, says that any time a person who alleges unlawful discrimination ``was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination, the charge-filing period can be extended." That is the standard EEOC has endorsed. It is the standard that several Federal courts have endorsed that I have cited in my written testimony.

S.Hrg. 110-825 (Jan. 24, 2008).

It is simply not possible to read Mr. Dreiband's testimony as any of the things of which the Leadership Conference accused him. He did *not* fight "against equal pay for women," he did *not* express "opposition to meaningful access to the courts for women who were paid less than men for the same job, and he did *not* oppose "the need for women to be able to remedy long-term pay discrimination."

I would also like to make a few observations. Mr. Dreiband's analysis of the law before the *Ledbetter* decision is accurate. It is the same as mine. I am not sure jhow Justice Ginsburg came to believe that the Court was rolling back existing protections, but that was a mistake. Justice Ginsburg would be the first to admit she is capable of mistake.

Similarly, Mr. Dreiband's analysis of the practical difficulties was also based in real-world problems. Those same problems affect plaintiffs, and it can become very difficult to recover when a claim rests on events long ago.

Finally, I was a supporter of the Lilly Ledbetter bill. I met with the sponsors of the ABA House of Delegates resolution endorsing the paycheck accrual principle in Title VII, and helped persuade them to add the age and disability laws to their resolution, so it would track the pending bill and make the ABA's endorsement more meaningful.

However, I would have been fairly happy if Congress had adopted Mr. Dreiband's alternative suggestion of a statutory codification of the EEOC's generous interpretation of equitable tolling and equitable estoppel. That would have cured the limitations on the doctrines imposed by some lower courts and been just as effective.

The Leadership Conference's lurid accusations are without any support at all.

2. The LCCHR's Accusations that Mr. Dreiband Tried to Weaken the EEOC or Opposed Civil Rights

This accusation is a theme running through the LCCHR's statement. In some cases, it is nothing more than an accusation that Mr. Dreiband did not act unethically and throw his client to the wolves when the EEOC came calling. In some, it is an accusation that Mr. Dreiband spoke what he thought was the truth as to problems with the EEOC's approach, and failed to act like the Three Monkeys in seeing, hearing, and saying no evil. In some, it is an accusation that Mr. Dreiband allowed a competing value priority over the One Truth promulgated by the Leadership Conference.

These are all far from the arena of proper commentary on a nomination, and tar the commenter rather than the nominee. There are absolute fundamentals in a democratic form of government subject to the rule of law:

Lawyers must be able to represent their clients zealously, making all proper arguments in their behalf, without being confused with their clients. Someone who defends a man accused of murder must not be treated as if he were the murderer, or the system of justice will break down. Similarly, anyone who defends a civil rights defendant must not be accused of being a bigot trying to undermine the law, or the rule of law will break down.

I am frankly shocked by this part of the Leadership Conference's remarks. It does not do to wave an airy hand at Mr. Dreiband's victory in *EEOC v. Bloomberg LLP* (2015)⁷ by dismissing the entire system of justice in that case as involving "a conservative judge." That is supposed to explain everything.

Judge Loretta Preska is an honorably serving Federal judge confirmed through this Committee. The Leadership Conference I knew would never have stooped so low as to do this. It had respect for the judiciary, and would never have engaged in an conveniently airy *ad hominem* criticism of a judge as negating all of her work.

If the EEOC thought any ruling was inaccurate, it could have appealed and gotten a ruling on appeal. Since it did not and withdrew its appeal when Bloomberg did the same, and since the Leadership Conference did not identify a single statement or position by Mr. Dreiband that fell outside of professional standards, it cannot rescue itself by throwing stones at the judge.

⁷ There are numerous decisions in this case on WestLaw, but none from 2015. *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3260150 (S.D.N.Y., Aug. 4, 2010); *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3466370 (S.D.N.Y. Aug. 31, 2010); *E.E.O.C. v. Bloomberg L.P.*, 751 F.Supp.2d 628 (S.D.N.Y. Oct. 25, 2010), *decision clarified on reconsideration* (Dec. 2, 2010); *E.E.O.C. v. Bloomberg L.P.*, 778 F.Supp.2d 458 (S.D.N.Y. Aug. 16, 2011); *E.E.O.C. v. Bloomberg L.P.*, 967 F.Supp.2d 816 (S.D.N.Y. Sept. 9, 2013); *E.E.O.C. v. Bloomberg L.P.*, 967 F.Supp.2d 802 (S.D.N.Y. 2013), *appeal withdrawn* 2nd Cir. 13-3861 (Feb. 6, 2014); *E.E.O.C. v. Bloomberg L.P.*, 29 F.Supp.3d 334 (S.D.N.Y. April 28, 2014). I checked the docket entries and found nothing in 2015 that stood out.

In the *Villareal* case, Mr. Dreiband is blamed for winning a case on behalf of his client. In the *Ghori-Ahmad* case, he is blamed for settling a case that presumably provided some relief to the plaintiff. In the *DeJesus* and *Abercrombie & Fitch* cases, he is blamed for losing the cases. In the *Bass Pro* case, he did not represent the employer but an amicus, and he is blamed because his position lost. In the *University of North Carolina* case, he is blamed for helping others in his firm on the case, and there is not even a decision yet. Plainly, there is nothing a defense lawyer can do that will not trigger the Leadership Conference's condemnation: win, lose, draw, don't know, or even comment from the sideline, it's all the same to them, and deserving of condemnation.

The Leadership Conference does not identify anything that Mr. Dreiband should have done differently to escape its condemnation, except not get involved in cases of which it disapproves. It seeks a veto over clients' choice of lawyers and lawyers' willingness to represent clients, and seems not even to realize that its approach is irredeemably hostile to the functioning of our system of justice and the rule of law. But of course, to the Leadership Conference, even an adverse ruling can be explained away by merely insulting the judge.

The *Abercrombie & Fitch* case deserves closer mention. Mr. Dreiband was one of seven attorneys representing the company, was not counsel of record, and did not argue the case.⁸ Yet his mere name on a brief is enough to condemn him. The Supreme Court did not say the company's position was extreme; the Leadership Conference pulled that out of the air. While anyone who has ever been involved in litigation knows that there will be differences of opinion on an appellate or trial team—good lawyers demand differences on their teams, so they can consider all perspectives—there is no public record of who thought what. For the Leadership Conference, apparently the wish is its own fulfillment: it must have been Mr. Dreiband who took the “extreme” position rejected by the Court.

As alarming as these Leadership Conference positions are, its criticism of Mr. Dreiband for daring to represent the Roman Catholic Church in resisting the contraceptive mandate of the Affordable Care Act on those with religious objections displays an even more shocking position: Rejection of the First Amendment value of freedom of religion. Former Vice President Biden's discussion of his faith in the 2016 Vice Presidential debate and the tons of ink spread on the subject, demonstrate the seriousness of these concerns.

It does not do to flip off the First Amendment just as the Leadership Conference flips off Judge Loretta Preska and the rule of law. To do so smacks of a religious test of mandatory secularism overriding all other values, in flat violation of the founding principles of our country. Whether Catholic like me or a member of any other faith or an atheist, our collective freedom

⁸ WestLaw shows Shay Dvoretzky, Washington, DC, for Respondent; Mark A. Knueve, Daniel J. Clark, Vorys, Sater, Seymour and Pease LLP, Columbus, OH, Shay Dvoretzky, Counsel of Record, Eric S. Dreiband, Yaakov M. Roth, Jeffrey R. Johnson, Jones Day, Washington, DC, for Respondent.

depends on our opposing such an imposed uniformity of anti-religious thought and forbids crushing the beliefs of those who do not think like the crusher.

3. The Accusations About Mr. Dreiband Opposing Legislation to Make ADEA Enforcement More Effective

This is another complete misfire, but may simply arise from not knowing the problems with litigating under a “mixed motives” standard.

Plaintiffs’ employment lawyers are deeply divided on the subject, which is why the National Employment Lawyers Association has never joined the call to insert “mixed motives” analysis into the Age Discrimination in Employment Act. It is true that it is easier to show that age was a motivating factor than to show that age was the deciding factor, but it is also true that under a “mixed motives” standard it is very easy for employers to wave away all the evidence of an unlawful age motive and rest their defense on the idea that they would have made the same decision anyway. The result is that the plaintiff cannot get individual injunctive relief, cannot get general injunctive relief if he or she is gone as most are, cannot get back pay, and cannot get liquidated damages. In some courts, the plaintiff’s attorney receives a fee award that is mere pennies on the dollar because of the low relief obtained. In others, a larger fee award may be made but that then creates a problem for the client, who wonders if going down the “mixed motives” route was just to benefit the lawyer. At least one Federal judge has told me he thinks there is a gross conflict of interest whenever a case is brought on a “mixed motives” basis and the jurisdiction allows full fees even when the plaintiff gets nothing but a declaratory judgment.

I personally belong to the school of thought holding that the “mixed motive” approach is a ticket to perdition. It may help survive summary judgment, but it gives the jury a perfect way to split the baby and they don’t now they’re really denying all relief to the plaintiff. Great theory, but a dud in practice. I believe it is much easier for an age discrimination plaintiff to win worthwhile relief under Gross and the traditional “because” standard of liability than it is to win under a mixed-motives approach.

Proponents of the bill have never explained why it is that defendants sometimes try to force a case into “mixed motives” mode so they can more easily beat back the most important claims for relief.

I have reviewed Mr. Dreiband’s testimony on the proposed legislation, and agree with him on every point he raises. I represent age discrimination plaintiffs, and could comfortably have given the identical testimony, raising virtually identical points.

4. The Accusations That Mr. Dreiband is Against “Fair Chance Hiring”

The Leadership Conference accuses Mr. Dreiband of being “a staunch opponent of bipartisan efforts to remove barriers to employment for people with arrest or conviction histories,” and of criticizing the EEOC’s actions in this field. Frankly, I believe Mr. Dreiband makes very good points, and I agree with them. I spoke about this EEOC initiative to the American Law Institute in 2016, and my conclusion was that the Commission had left Title VII jurisprudence far behind, that its guidance was incompatible with Title VII, and that the EEOC needed to withdraw and rethink its guidance.

There is no question that there is an enormous need to re-integrate criminal offenders into society. That is a social goal that does not seem to me to justify placing law-abiding job applicants at the back of the line. There is also no question that very high recidivism rates can easily justify a criminal-history bar for many crimes under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq.*, a set of standards worked out with the EEOC, the Department of Justice, the Department of Labor, the Treasury Department, and the Office of Personnel Management. The EEOC’s guidance completely ignores the Uniform Guidelines.

The EEOC’s guidance also reflects a preoccupation with social goals to the exclusion of practicality and common sense. It states, for example, that arrests may not be taken into account because of the presumption of innocence, unless the employer conducts its own investigation of the events and determines that the person should have been convicted if tried. No employer has the resources to replicate local police departments and prosecutors’ offices.

A short thought experiment demonstrates why the EEOC’s guidance does not make practical sense. A day care center needs to fill a job as child care attendant and has two applicants. One has multiple arrests for child molesting, but no convictions. The other is clean. Another experiment involves truck driver applicants, one of whom has multiple DUI arrests but no convictions, and the other of whom has a good driving record. If we are to ask society to respect the law and comply with it, these employers must be allowed to do the sensible thing without the expensive steps required by the EEOC.

Mr. Dreiband is correct that the EEOC’s presumptions of disparate impact stand the law on its head. They have not been endorsed by the courts. See, *e.g.*, *E.E.O.C. v. Freeman*, 778 F.3d 463 (4th Cir. 2015), which affirmed the grant of summary judgment to the Title VII defendant. The court summarized its decision at 464-65: “In 2001, Freeman began conducting background checks on its job applicants, which the Equal Employment Opportunity Commission (“EEOC”) alleges had an unlawful disparate impact on black and male job applicants. The district court granted summary judgment to Freeman after excluding the EEOC’s expert testimony as unreliable under Federal Rule of Evidence 702. Without this testimony, the district court found the agency failed to establish a *prima facie* case of discrimination. For the reasons below, we affirm the district court’s exclusion of the EEOC’s expert testimony and grant of summary judgment to Freeman.” Defendant’s policy was nuanced. The court described it at 465:

Freeman is a provider of integrated services for expositions, conventions, and corporate events, with offices in major cities throughout the United States. In 2001, the company commenced background checks of job applicants' credit and criminal justice histories. Criminal background checks were required for all applicants, and credit history checks for "credit sensitive" positions involving money handling or access to sensitive financial information. Freeman's credit and criminal background check policies excluded applicants whose histories revealed certain prohibited criteria. If an applicant's history included one of the listed criteria, like a conviction for a crime of violence, the applicant was not hired.^{FN1} Freeman modified these criteria on July 20, 2006, and again on August 11, 2011, after which it no longer conducted credit checks.

FN1. Freeman required a form authorizing a background search to be completed with each job application, which, according to a company handbook, Freeman thought would "deter individuals with negative information from applying." However, the checks were not conducted until after a conditional offer of employment had been made. It appears most criteria, as well as making false statements on the job application, led to automatic disqualification. But, Freeman usually gave applicants a reasonable amount of time to resolve outstanding arrest warrants before rescinding an offer.

As discussed below, the Commission's attack on Freeman's practices seems to have had nothing to do with Freeman's actual practices, which were nuanced and which were applied after a conditional job offer—in short, what a model employer is supposed to do under many versions of the "ban the box" legislation many jurisdictions have passed. Putting aside the question of case selection, the EEOC's failure to produce competent evidence of disparate impact—because of the exclusion of expert evidence that was impossible to credit—in all fairness absolutely required the grant of summary judgment.

Judge Agee's separate concurrence on the striking of the EEOC's expert is a telling commentary. The judge issued a *cri de coeur* asking why the EEOC continued to rely on so unreliable an expert:

Although I concur in Judge Gregory's opinion, I write separately to address my concern with the EEOC's disappointing litigation conduct. The Commission's work of serving "the public interest" is jeopardized by the kind of missteps that occurred here. ... And it troubles me that the Commission continues to proffer expert testimony from a witness whose work has been roundly rejected in our sister circuits for similar deficiencies to those we observe here. It is my hope that the agency will reconsider pursuing a course that does not serve it or the public interest well.

Id. at 468. Judge Agee discussed in detail what he saw as very significant problems with the expert work in this case, and in other cases in which the same expert's work had been rejected. This is just one of his criticisms:

Murphy undeniably “cherry-picked.” The very few pieces of post–October–2008 data that Murphy included consisted of 19 applicants. Of those 19, one was a double-counted applicant, one was a “fail” miscoded as a “pass,” and the remaining were all “fails” under one or the other (or both) checks. This 100% failure rate among the 19 post–October–2008 applicants wildly varies from the 3.5% failure rate for criminal checks and 9.9% failure rate for credit checks reflected in the rest of the data. *See* J.A. 326 (noting that “the likelihood of failing either [check] is low”). Thus, not only was Murphy capriciously selective in his use of post–October–2008 data, but the high number of “fails” among his few selections suggests that he fully intended to skew the results. The district court certainly thought so, terming Murphy’s work “an egregious example of scientific dishonesty.” ...

Id. at 470. Judge Agee went on, in the same sad and sorrowful vein. At one point, he stated: “These problems would be troubling enough standing alone, but they are even more disquieting in the context of what appears to be a pattern of suspect work from Murphy.” *Id.* He stated that in addition to the EEOC’s duty to conciliate, the Commission had “a duty to cease enforcement attempts after learning that an action lacks merit,” and that “the EEOC failed in the exercise of this second duty.” *Id.* at 472 (citation omitted). He concluded:

The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its “significant resources, authority, and discretion” will affect all “those outside parties they investigate or sue.” *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). Government “has a more unfettered hand over those it either serves or investigates, and it is thus incumbent upon public officials, high and petty, to maintain some appreciation for the extent of the burden that their actions may impose.” *Id.* The Commission’s conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so.

Id. at 472-73. Ultimately, the district court ordered the EEOC to pay Freeman \$938,771.50 in fees and costs for unreasonably litigating the case. *E.E.O.C. v. Freeman*, 126 F. Supp. 3d 560, 584 (D. Md. 2015). The EEOC did not appeal.

In short, problems abound with the EEOC’s guidance, and Mr. Dreiband cannot fairly be blamed for pointing them out.

5. Scraping the Bottom of the Barrel: The Accusations About Undermining the EEOC by Truthfully Describing a Real Problem: EEOC’s Suing First, and Asking Questions Later

It is pretty much given that lawyers at the top of their profession are expected to address significant unsettled legal issues and warn colleagues and clients about them. I do it all the time, as my writing and speaking engagements show.

The Leadership Conference scraped the bottom of the barrel when it stated that discussing an important open issue was the same as undermining the agency: “After his brief tenure at the EEOC, Mr. Dreiband attempted to undermine the agency’s mission and narrow its ability to bring litigation. He co-wrote an article for Law360 on March 8, 2012 entitled “The EEOC Strategy of Sue First, Ask Questions Later,” in which he criticized the EEOC’s use of discovery to identify and seek relief for discrimination victims it hadn’t known about before filing a lawsuit.” The Leadership Conference cited the article at <https://www.law360.com/articles/314725/the-eeoc-strategy-of-sue-first-ask-questions-later>.

The article correctly described the Eighth Circuit’s decision in the CRST one of the most badly reasoned Title VII decisions in the last decade:

The [U.S. Equal Employment Opportunity Commission](#) (EEOC) claims that it can sue an employer and use discovery to identify, investigate and seek relief for individuals it never heard of before it filed its lawsuit. On Feb. 22, 2012, however, the U.S. Court of Appeals for the Eighth Circuit determined that the EEOC has no such authority.

The court’s decision adds to a growing list of cases that have rejected what some courts have described as the EEOC’s “sue first, ask questions later” litigation strategy.

In EEOC v. [CRST Van Expedited Inc.](#), the Eighth Circuit affirmed the dismissal of the EEOC’s claim on behalf of 67 class members after the court found that the EEOC did not identify these class members before it filed suit. The court’s decision deals a serious blow to the EEOC’s systemic litigation program, and the decision is not alone.

Not one word in this description is wrong. The article then fairly discussed other decisions to the same effect, noted that other courts disagree, and went on to address some open questions that had to be resolved:

Remaining Issues

Three issues remain unresolved.

First, it remains unclear whether other courts will dismiss EEOC class claims when the EEOC seeks to litigate claims on behalf of individuals who it does not identify, investigate, issue reasonable cause findings and conciliate about before it files suit. Second, it is an open question whether all, some or none of the EEOC’s pre-suit procedures apply to the EEOC pattern or practice cases. Section 707(e) of Title VII, 42 U.S.C. § 2000e-6(e), provides that “all” Section 707 actions “shall be conducted in accordance with the procedures set forth in section [Section 706].” The EEOC’s pre-suit obligations are “procedures set forth in” Section 706. This suggests that the reasoning of EEOC v. CRST and other similar cases should apply to the EEOC “pattern or practice” cases.

Whether Section 707(e) means what it says — that is, whether courts will require that the EEOC pattern or practice actions comply with all Section 706 procedures, including person-by-person investigation, reasonable cause determinations and conciliation — remains to be seen.

Third, it is unclear to what extent the Eighth Circuit's decision in CRST, and the other cases described in this article, will affect EEOC class litigation for alleged violations of the Age Discrimination in Employment Act and the Equal Pay Act. Those statutes do not require EEOC to satisfy Title VII's multi-step administrative process.

What Happens Next?

CRST and the upcoming Sixth Circuit decision in Cintas may be the most significant EEOC appellate cases in many years. If the Sixth Circuit follows the Eighth Circuit's CRST decision and affirms the dismissal of the EEOC's class claim, both cases may herald a shift in the way the EEOC investigates and conciliates Title VII cases.

The EEOC may have to provide employers with precise notice of the scope and nature of any claims that form the basis of its class lawsuits. The EEOC may respond by subjecting employers to additional and more comprehensive requests for information during EEOC investigations.

This may cause more contentious interactions between the EEOC and employers during investigations. More onerous requests for information may also mean more disruption for employers. And the EEOC remains willing, perhaps even eager, to subpoena information from employers during investigations, and to seek enforcement of such subpoenas by means of enforcement actions in federal court.

So, while the court's decisions in EEOC cases against Dillard's, UPS, CRST and Cintas favor employers, it remains to be seen whether other courts will follow those decisions and whether the EEOC will respond by conducting more aggressive, more invasive, and more burdensome investigations.

Every word of this is true, and no word of the article endorses the result of the CRST decision. It is an accurate summary and advisory, and useful to both sides.

My own comment on the decision, in CLE papers I presented to the Pennsylvania Bar Institute, the National Employment Lawyers Association, and the Arizona State Bar in 2012, was:

Comment by Richard Seymour on *E.E.O.C. v. CRST Van Expedited, Inc.*: The court's ruling imposes an unreasonable burden on the EEOC: it would have to re-open the administrative process every time it learned of a new victim in discovery, do an administrative investigation as to that person, reasonably attempt to conciliate as to that person despite the company's position that conciliation was futile, and then seek to amend its claims in court to add the persons. While the court professed concern with the expanding list of victims and complained that the EEOC's approach would cause repeated delays of the trial date, the court's remedy would be far worse. In class actions, the specification of the persons entitled to relief is handled in Stage II, after the determination of liability. Where multiple practices are challenged as discriminatory, it would be wasteful of the limited resources of the court, and of the parties, to engage in useless attempts to finalize the list of persons who were harmed prior to the decision on which practices unlawfully caused harm. Nothing in the letter or spirit of Title VII compelled the court's imposition of these burdens on the EEOC.

Note that pretty much every other part of the decision was similarly disastrous to the law. My pointing these out does not mean I agreed with the decision, any more than Mr. Dreiband's pointing out the effects of the decision constituted an endorsement.

The EEOC failed seek rehearing before the full Eighth Circuit Court on any of the disastrous interpretations of Title VII, and limited its rehearing petition to the fee award against it. It won what proved to be a temporary reprieve and still wound up having to pay a great deal of money to CSRT years later, and still labors under the wretched effect of these decisions.

The Leadership Conference's condemnation of Mr. Dreiband for alerting the Bar and clients to important open issues is a classic shoot-the-messenger ploy, and illustrates for deeply into the bottom of the barrel it has sunk in an effort to provide some cover to try to make its opposition to Mr. Dreiband look reasonable. Its condemnation applies with equal justification to me and to every other attorney who takes legal issues seriously and dares to discuss them.

**6. Scraping Through the Bottom of the Barrel and Into the Dirt
Beneath: The Leadership Conference's Descent into McCarthyism**

The essence of McCarthyism was guilt by association. Few things are as antithetical to any system of justice, or basic sense of decency, that arguments based on guilt by association. Yet that is what the Leadership Conference engages in the "Ideological Affiliations" part of its jeremiad.

a. Guilt Supposedly Arising from the Republican National Lawyers Association

The Leadership Conference condemns Mr. Dreiband for being “a longtime member of the Republican National Lawyers Association.” Its first particular complaint is that this is “an ideological organization.” Well, hello. A Republican this or a Democratic that is by definition ideological. Its second particular complaint is that the organization engaged in “highly partisan assaults on President Obama.” I believe we just covered the fact that this was a Republican organization. Indeed, I have been involved in Democratic groups that engaged in highly partisan attacks on Republican office-holders with whom they disagreed. Its third particular complaint is that this group “recently applauded the creation of the Pence-Kobach voter suppression commission, asserting: “Secretary Kobach has long been a leader on election integrity issues such as voter list maintenance.” Please see the first point, and by the way, when one is arguing guilt by association one cannot create one’s own name for the group just because one thinks it is cute.

Here, I must make a confession. I started life as a Republican, and became a Democrat when President Nixon decided to slow down the pace of school desegregation and attacked “forced busing.” I am not happy as a Democrat because it has far too many policies I reject, but it still stands for accountability and preserving the civil justice system. This Committee and the Senate have wisely resisted so far all of the attacks on the civil justice system emanating from the House side, but these attacks force me to remain in a party some of whose positions I dislike. And I firmly believe that there are Republicans who dislike some Republican positions but who are forced to remain Republican because there are Democratic positions that are important to them and they dislike even more. We may even share some dislikes, but draw the balances differently. Can either I or my hypothetical like-minded Republican fairly be tarred with guilt by association for everything our Parties do? Not in a pig’s eye, if we respect our system of government and each other’s differences of opinion, and refuse to engage in the politics of personal destruction that so sickens the American people.

So, too, with Mr. Dreiband and the Republican National Lawyers Association.

b. Guilt Supposedly Arising from the Federalist Society

Next, the Leadership Conference condemns Mr. Dreiband for being a member of the Federalist Society and serving as the vice president of the organization’s Chicago Lawyers Chapter. We are left to wonder what dread things he did do in Chicago at the time. One thing he did is represent criminal defendants *pro bono*. He saved the life of a particularly heinous felon who killed a Catholic priest, and the felon got 114 years in prison to think it over. I have attached a copy of a 2007 article from the Chicago Tribune talking about it. I do not know if the Chicago chapter of the Federalist Society approves or disapproves of the *pro bono* representation of vicious felons, but the Leadership Conference leaves us to wonder what it has to do with anything. The Leadership Conference’s only particular complaint is that both the Chicago chapter and the national organization do things of which they disapprove: “These organizations have promoted federal judges and policies that restrict civil and human rights in America.” That does not do much to quell my concern about an ideological shotgun, blasting away everything the Leadership Conference considers an objectionable viewpoint. This Committee

reviews the Federal judges it may or may not recommend, and may be much more familiar than I with what useful or dread role the Federalist Society plays in nomination and confirmations.

I now have two more confessions. One is right on point: I have been a member of the ABA, according to the overstatement on my membership card, for 49 years. During that time, it has provided ratings and testimony on virtually every Federal judge. I know that there has been some upset among Republicans about its role, but in candor I have to say that my membership in the ABA would have to disqualify me from anything, if Mr. Dreiband's membership in the Federalist Society disqualifies him from anything.

And here life gets complicated. The only thing worse than a McCarthyite "guilt by association" argument is a poorly thought-out "guilt by association" argument. It turns out that Mr. Dreiband is also a long-time member of the ABA whose dues support the judicial nominee evaluation system and testimony. Should Republicans reject his nomination for guilt by association with the ABA, or should Democrats reject his nomination for guilt by association with the Federalist Society?

And one final confession before moving to the next point: I have spoken to the Federalist Society twice, once to the George Mason Chapter and once to a national convention. What struck me forcefully was that these were people much more conservative than I, but who were very anxious to hear the best possible presentation of competing views so they could rethink their own. Every panel on a controversial issue had someone like me to poke holes in their ideas, and to respond as best she or he could to holes being poked in their own. It was intellectually alive! This is the same approach we follow in my own beloved ABA Labor and Employment Law Section: we are the only entity in the ABA that insists on balanced panels presenting all points of view. That is how one learns and grows.

I thought about joining the Federalist Society to keep them and me roiled up, but they kept taking positions that irritated me, so I have been putting it off. I yet might. I like meeting different ideas respectfully, and talking things through. I do it with my defense-bar colleagues all the time, Eric Dreiband included.

c. Guilt Supposedly Arising from Working with Kenneth Starr

The Leadership Conference's third time sinking on its McCarthyite journey is to say "Early in his career, Mr. Dreiband worked for three years for Independent Counsel Kenneth Starr on the prosecution of Clinton Administration officials."

What did he do? We do not know. To the Leadership Conference, we apparently do not need to know.

I just looked up the names of those convicted of crimes by Mr. Starr's group. They were Robert Palmer, Web Hubbell, Christopher Wade, Neal Ainley, Stephen Smith, Larry Kuca, Jim Guy Tucker, James McDougal, Susan McDougal, William Marks Sr., and John Haley.

Again, it is frustrating when a guilt-by-association smear is so poorly thought-out. Does the Leadership Conference think all felons should be given a free pass if we like the President

with whom they were associated? Does it think the Constitution allows a political test for the application of the criminal laws? We do not know; apparently we are all supposed to cower in terror at the mention of Mr. Starr's name, and above all, *not think*.

So this is another dreadful misfire, except that the making of the argument raises extremely serious questions about what is going on at the Leadership Conference. This saddens me immensely. This is not the organization I knew and respected.

E. The Leadership Conference's Real Motivations Are Revealed at the End

1. A Holy War: Refighting the Last Election

The first two sentences of the last paragraph of the Leadership Conference's statement show its determination to fight the last election, and to oppose any nominee the Administration may nominate to the position of Assistant Attorney General for Civil Rights:

In its first six months, the Trump Administration has exhibited an open hostility to core civil rights principles. The Justice Department's Civil Rights Division must serve as a bulwark against that troubling trend. ...

The Leadership Conference's standard is thus revealed to be someone who will conduct a guerilla war within the Justice Department to make any change of Administration irrelevant. The Leadership Conference does not reveal how this strange standard could possibly work. It does not seem to recognize that an Assistant Attorney General must follow directions from above, and must follow the law and regulations. No government could possibly work if the only acceptable nominees are those who pledge to ungovernably insubordinate.

2. The Demand for Personal Purity in the Eyes of the Leadership Conference, Untainted by inconvenient Experience and Knowledge

The next sentence of the last paragraph is a demand for political purity unsullied by knowledge, experience, or judgment:

The American people need and deserve an Assistant Attorney General for Civil Rights who has a demonstrated commitment to marginalized communities and to enforcing our nation's civil rights laws.

Mr. Dreiband has a lifelong commitment to civil rights, but not the kind that the Leadership Conference recognizes. Anyone who has really been active in the field knows that defense counsel—not plaintiff's counsel like me—are the first line of compliance for the civil rights laws: they tell their clients what should properly be done, to keep them out of trouble and avoid injuries that might have to be redressed later. That is one of the reasons I spend so much time talking to them.

It is also unclear to me what the Leadership Conference means by marginalized communities. Laid-off Rust Belt factory workers are about as marginalized as you can get, whether their race happens to be black or white. That does not mean that any of them have had their civil rights violated; there can be no discrimination in employment opportunities where there are no employment opportunities. It is

troubling that the Leadership Conference on Civil and Human Rights makes no reference at all to civil rights in its purity demand.

3. The Nub of It: No Defense Counsel Are Capable of Handling the Job

The last three sentences of the Leadership Conference's jeremiad repeat the Leadership Conference's breathtaking misstatements and distortions, say in essence that ethically and honorably representing defendants is sinful, and make clear its view that only someone without sin, someone who is a carbon copy of the last holder of the position—the current Executive Director of the Leadership Conference—would be acceptable:

Instead, Mr. Dreiband would bring personal views that are hostile to civil rights, and the experiences and perspectives of a career spent primarily defending powerful corporations accused of discrimination. As a coalition of advocates for justice, including many law organizations, we do not attribute to Mr. Dreiband the conduct of his clients; rather, we criticize him for the anti-civil rights positions he has espoused in pursuing their interests, which mirror his own personal ideology. Mr. Dreiband is the wrong person to lead the Civil Rights Division, and we urge the Senate to oppose his confirmation.

The message of the Leadership Conference is clear: try to fill this position with the objectively most qualified person in the world, and we will destroy him just as we are trying to destroy Mr. Dreiband.

This is beyond disgusting.

F. What Next for this Committee?

I respectfully submit that the Leadership Conference has forfeited all credibility and should be ignored until it gets its house in order.

In the event that any member of the Committee has any doubt about the validity of the Leadership Conference's views, I suggest that a panel be scheduled. I would be happy to appear on the panel with the Executive Director of the Leadership Conference and we can both submit to such questions as the members may have.

G. What Next for the Leadership Conference?

The Leadership Conference's destruction of its own credibility has betrayed its own Board, its members who rely on it for accurate and dispassionate analysis, this Committee, and Mr. Dreiband. The Board needs to step in and exercise proper governance, including recusing the Executive Director from this matter and directing that this disgraceful statement be withdrawn and that public apologies be made to all who were attacked or misled.

The threat to the Leadership Conference by this self-inflicted injury is so great that it should call on someone of undoubted stature, such as former Attorney General Dennis Holder, to

conduct the kind of full inquiry he recently did at Uber, and make a public report with suggestions to prevent this happening again.

Institutional credibility takes generations or decades to build, but can be destroyed very quickly. The sooner the process of restoration starts, the sooner it can regain trust. The Leadership Conference is badly needed, but only if it is credible.

If the Leadership Conference is determined to continue on its downward path, I expect to be the next one smeared, for daring to tell truth to power. If it chooses to take the upward path, it will withdraw its opposition and apologize by the time of the September 6 hearing. Either way, we will know soon.

H. Conclusion

I continue to believe that Eric Dreiband is the best possible nominee for the position of Assistant Attorney General for Civil Rights. His most prominent attribute is integrity, and his second most prominent is sound judgment. He has respect for competing views, and will listen. The fact that he has inspired everyone who knows him, from the staff of the EEOC to my fellow members of the ABA—and myself—speaks volumes about him. The fact that he has consistently represented criminal defendants pro bono speaks volumes about him. He will not take on luster from the office of Assistant Attorney General; he will provide additional luster to this storied post.⁹



Richard T. Seymour

September 4, 2017

⁹ I will not be able to be at the hearing, since I am currently hospitalized with pneumonia, but can be reached by cell phone and e-mail. My CV, last updated in 2013, is available on request.

Priest's killer gets 114 years

December 20, 2001 | By Kirsten Scharnberg, Tribune staff reporter.

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A Cook County judge spoke of Jesus Christ as he sentenced a man to 114 years in prison for the murder of a disabled Roman Catholic priest.

"Two thousand years ago a man named Jesus was betrayed for 30 pieces of silver," Judge Kenneth Wadas said Wednesday, peering down from his bench at Burrell Gerald, the priest's former caretaker who was convicted in September of murdering the clergyman to steal his car and money for an all-night drug binge. "You betrayed Father Paul Smith for 30 pieces of rock cocaine."


From the start, the high-profile first-degree murder case has been steeped with themes of God and faith, innocence and evil.

Pat Kelly, one of three Cook County prosecutors assigned to the case, argued that Gerald had "no soul."

Eric Dreiband, one of Gerald's attorneys, told the judge that his client is the son of a conservative Christian minister who had only turned to drugs and crime because of his shame at being a homosexual.

During the hearing, the third-floor courtroom was crowded with nuns, priests and dozens of longtime parishioners of Holy Angels Church, the South Side parish where Smith had been the elementary school's much-loved principal for three decades.

"Father Paul Smith represented one of our most moral symbols of society, religion," Kelly said before sentencing. "Everything he represented, Burrell Gerald is lacking."



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As he announced Gerald's sentence, the judge said he was haunted by the 1996 case in which Gerald, 41, and a second man, Fred Carter, killed Smith by shrouding the wheelchair-bound, 65-year-old priest's face with duct tape, suffocating him. The two men then robbed the priest of \$200, a watch, a cellular phone and a 1988 Oldsmobile, which they later rented out to a local drug dealer in exchange for crack cocaine, according to evidence presented in the case.

"I've given this case more thought than maybe any other case I've come in contact with," Wadas said.

Wadas, who previously had sentenced Carter, 37, to 114 years in prison, imposed Gerald's sentence under a state statute that allows him to give longer prison terms to defendants convicted of preying upon the elderly and infirm. The sentence was the maximum Wadas could have imposed.

After Gerald's sentencing, the three men who had prosecuted the case gathered outside the courtroom, shaking hands and hugging the priests, nuns and members of Holy Angels, the largest African-American Catholic parish in the United States.

June 30, 2002

Catholic Gets 3 Year Sentence For Fondling 13-year-old Girl (/1993-02-07/news/9303176570_1_rev-robert-mayer-altar-boys-sentencing-hearing)

February 7, 1993

Ex-priest gets 15 years in child porn case (/2003-01-31/news/0302010162_1_lengthy-sentence-child-pornography-child-porn-case)

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