Nomination of Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit Questions for the Record
December 6, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be "originalist"? If so, what does that mean to you? If not, how would you describe your approach?

As a judge, I would be bound by oath to interpret the United States Constitution by applying all precedents of the Supreme Court and the Fifth Circuit. *See, e.g., Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (observing that "the Court of Appeals should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions"); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016) (noting that courts of appeals "decline to get ahead of the Supreme Court"); *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999) (explaining a "panel is bound by the precedent of previous panels absent an intervening Supreme Court case explicitly or implicitly overruling that prior precedent"). If confirmed, I would fully and faithfully apply all binding precedents of the Supreme Court and the Fifth Circuit, regardless of my own views about the merits of any particular precedent.

In my understanding, an "originalist" approach seeks to interpret constitutional provisions according to their original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 581-87 (2008) (interpreting Second Amendment terms "Arms," "keep," and "bear" by using founding-era dictionaries and other sources); *id.* at 576-77 (observing that "[t]he Constitution was written to be understood by the voters," and that constitutional interpretation therefore "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation") (internal quotations omitted). Where the Supreme Court has interpreted specific constitutional provisions by seeking to discern their original public meaning, I would fully and faithfully follow those precedents. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (interpreting Sixth Amendment's Confrontation Clause according to founding-era understanding of English common law).

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

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

   It is never appropriate for lower courts—including federal circuit courts—to depart from binding Supreme Court precedent. Please also see my response above to Question 1.

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

In rare circumstances, it may be proper for a circuit judge to question Supreme Court precedent in a separate opinion, provided that the opinion makes clear that the judge is nonetheless bound to follow all binding Supreme Court precedent regardless of the judge's view of its merits. For instance, it may be proper in an appropriate case for a circuit judge to write a separate opinion pointing out legal doctrines the Supreme Court might choose to develop or lower-court conflicts the Supreme Court might choose to resolve. *See, e.g., Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring) (questioning Supreme Court's then-controlling two-step requirement in qualified immunity cases); *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of *en banc* rehearing) (in light of "diametrically opposing" circuit court decisions, stating that "the Supreme Court should exercise its certiorari jurisdiction and resolve this circuit split"). In any event, it is the Supreme Court's prerogative to develop its own jurisprudence; circuit courts, by contrast, are always duty bound to follow it.

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

In the Fifth Circuit, a panel of circuit judges may not overrule a precedent of a previous panel. Consequently, the only circumstance in which the Fifth Circuit may overrule its own precedent is by taking the "extraordinary" step of hearing a case *en banc*. *See, e.g., United States v. Castillo-Rivera*, 853 F.3d 218, 227 (5th Cir. 2017) (Higginbotham, J., concurring) (explaining that, under the "'rule' of orderliness … one panel may not overrule another," but that "[a] panel's application of the *stare decisis* rule is always reviewable by an *en banc* proceeding"); 5th Cir. I.O.P., Petition for Rehearing *En Banc* (explaining that "[a] petition for rehearing *en banc* is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent").

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

As a nominee to a lower federal court, it would be inappropriate for me to comment on what circumstances might justify the Supreme Court in overturning its own precedent. The Supreme Court has "the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484.

3. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A

text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

A circuit judge must treat all Supreme Court precedent as "superprecedent," in the sense that all of the Supreme Court's decisions—including *Roe v. Wade* and *Planned Parenthood v. Casey*—are binding on all lower federal courts.

b. Is it settled law?

Please see my response above to Question 3(a).

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

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

I have not studied this particular issue. Regardless, my personal views would have no bearing on my role in deciding the constitutionality of any particular government regulation of firearms. As with any other issue that might come before me, my role would be to decide such questions based on a full and faithful application of controlling precedent. With respect to the interpretation of the Second Amendment, *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully.

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

Heller expressly stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited"; it emphasized that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

conditions and qualifications on the commercial sale of arms"; and, finally, it explained that "the sorts of weapons protected [by the Second Amendment] were those in common use." 554 U.S. at 626-27 (internal quotations omitted).

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

I have not studied that question, and I understand that the majority and dissent in that case had different views of it. Regardless, *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully, just as I would apply all binding Supreme Court precedent.

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

Obergefell "holds [that] same-sex couples may exercise the fundamental right to marry in all States" and "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." 135 S. Ct. 2584, 2607-08 (2015). *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully.

6. At your nomination hearing, Senator Leahy asked you a number of questions about an article you wrote in which you argued that the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), had "imperil[ed] civic peace." You responded that you were simply making a "plea" for civic peace between those on the both sides of the same-sex marriage issue. While your article does highlight the importance of civic discourse and the "robust, free, and open exchange of ideas on controversial topics," the conclusion you draw about *Obergefell* as an "abject failure" is plain: "[T]he decision imperils civic peace." (*Obergefell Fallout*, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE (ABC-CLIO 2016)

a. In the more than two years since the Supreme Court held that there is a nationwide right to same-sex marriage, has *Obergefell* "imperil[ed] civic peace"? If your answer is "yes," please describe how it has done so.

In the referenced article, I discussed the value of civic peace in terms of fostering mutual respect for both sides in any sensitive public debate. I expressed concern that such civility could be diminished by dismissing one side's view in a harsh manner, as in my view certain pre-*Obergefell* lower court opinions appeared to do. *See Obergefell Fallout*, *supra*, at 135-36. The article went on to recognize that *Obergefell* did affirm the "decent and honorable" character of those holding traditional views of marriage, but the article expressed the view that the Court could have done more to defuse the strong feelings on both sides. *Id.* at 136-37.

Regardless of any views expressed as a legal commentator, however, my role as a judge would be to apply all Supreme Court precedents fully and faithfully

(including *Obergefell*).

b. Have you expressed similar concerns about "imperil[ed] civil peace" regarding any other pending litigation you have worked on?

Not that I recall. For the context of that quotation, please see my response to Question 6(a) above. Whenever I have litigated sensitive legal issues over my twenty-year career, I have striven as an officer of the court to treat parties and counsel on the other side with respect, to avoid touching on political or personal matters, and to focus solely on the legal issues in the case. If I were confirmed as a judge, I would have an even greater duty to treat both sides of any dispute fairly and impartially and to decide cases based on objective legal rules and not my own personal preferences.

7. You delivered a speech in December 2014 to Brigham Young University's chapter of the Federalist Society. According to speech notes that you provided to the Committee, you asked whether a trio of Supreme Court cases — *Loving v. Virginia, Zablocki v. Redhail*, and *Turner v. Safely* — together established a fundamental right to marry. You also wrote: "Do these cases add up to a right to marry someone of the same-sex? Well, ask yourselves this: do they add up to a right to marry your first cousin? A thirteen year old? If you say yes to the same-sex marriage question, don't you also have to say yes to these other ones?

a. In what way is granting LGBT couples the right to marry equivalent to allowing someone to marry a thirteen-year-old or their first cousin?

The referenced speech was one given to law students in which I discussed the analysis in the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), which requires courts to articulate a "careful description" of an asserted fundamental right and to ask whether that asserted right is "objectively, deeply rooted in this Nation's history and tradition." The rhetorical questions in my speech notes were merely designed to illustrate how a court might apply the *Glucksberg* analysis to the question eventually decided in *Obergefell*, namely whether a "careful" description of the fundamental "right to marry" recognized in previous decisions encompassed same-sex couples. The questions were not designed to suggest any answer one way or the other but instead simply to illustrate how the substantive due process analysis works.

In any event, *Obergefell* subsequently held that "same-sex couples may exercise the fundamental right to marry in all States." 135 S. Ct. at 2607. That is a precedent of the Supreme Court that, if confirmed, I would apply fully and faithfully.

b. Do you believe that in light of *Obergefell*, state laws prohibiting individuals of a certain age from getting married or laws prohibiting certain family members from marrying each other are not constitutionally sound?

While *Obergefell* did not address such laws, the Supreme Court stated in *Windsor v. United States*, 133 S. Ct. 2675, 2691-92 (2013), that the marriage laws vary in some respects from State to State," such as laws concerning "the required minimum age" as well as "the permissible degree of consanguinity." To the extent that such laws touch on the meaning of *Obergefell*, such matters could potentially come before me if I were confirmed as a judge. Therefore, I am ethically precluded from offering any opinion under the canons of judicial ethics applicable to judicial nominees.

8. In 2015, you submitted an amicus brief in *Obergefell v. Hodges* on behalf of fifteen states, including Louisiana. You urged the Court to reject the argument that the Fourteenth Amendment provides a right to same-sex marriage nationwide. Among other arguments, you claimed that defining marriage in "man-woman terms . . . rationally structure[s] marriage around the biological reality that the sexual union of a man and woman — unique among all human relationships — produces children."

a. In light of the arguments you advanced in your amicus brief, do you believe that only people who can have children should be legally able to get married?

In representing clients I do not advance my personal views, but the interests of my clients. The arguments advanced in the referenced *amicus* brief were the arguments of the *amici* States concerning possible justifications for those States' marriage laws.

In any event, regardless of the arguments I made on behalf of clients in that case, the Supreme Court has now decided in *Obergefell* that "same-sex couples may exercise the fundamental right to marry in all States" and "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." 135 S. Ct. at 2607-08. *Obergefell* is a precedent of the Supreme Court and, like all other binding Supreme Court decisions, I would apply it fully and faithfully as a judge.

b. Do you believe that fewer heterosexual couples have gotten married or have had children as a result of the legalization of same-sex marriage nationwide?

I have not studied the matter and have no basis to opine on it.

9. At your nomination hearing, I asked you about an amicus brief you submitted in *Abbott v. Veasey*, which involved a Texas law imposing a stricter voter ID requirement. In responding about your work on *Abbott*, you mentioned your work on another voting rights case as well—*North Carolina v. North Carolina State Conference of the NAACP*. Representing the state of North Carolina, you sought to defend a number of restrictive voting regulations, including a voter ID requirement, that the Fourth Circuit had found "target[ed] African Americans with almost surgical precision." (*North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016)) The Fourth

Circuit likewise concluded that "the General Assembly enacted legislation restricting all — and only — practices disproportionately used by African Americans." (*Id.* at 230)

a. Do you believe it is lawful and legitimate for states to enact electoral laws that target voting practices disproportionately used by members of one race?

The Supreme Court has made clear that the Constitution and numerous federal laws, including the Voting Rights Act, limit state regulation of elections. In both the *Veasey* and *North Carolina* cases, I represent or represented clients arguing that certain state election laws—including voter identification requirements—did not run afoul of these federal constraints. The arguments I made in those cases are good-faith arguments about facts and law, and, as with any legal representation, did not necessarily reflect my personal views on any particular voting or election laws. If confirmed, I would apply the binding precedents of the Supreme Court and the Fifth Circuit governing those issues, quite apart from any personal policy views I hold or any argument I previously made as an attorney representing a client. (Additionally, the *Veasey* case is still pending, and so it would be inappropriate for me to comment further on it as an attorney for an *amicus*).

b. At your hearing, I asked whether you believed that voter fraud was a problem, and you replied that you did not have a "personal view" on the matter, but that "ID laws can act prophylactically to prevent voter fraud." In light of your claim, what evidence do you have that voter ID requirements can help "prevent voter fraud"?

In my answer, I was referring to the Supreme Court's decision upholding Indiana's voter identification law in *Crawford v. Marion County Election Board* against an Equal Protection challenge. *See* 553 U.S. 181 (2008). Justice Stevens' plurality opinion explained that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," and that "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196. Justice Stevens' opinion also remarked that, whereas "[t]he record contains no evidence of any such [voter] fraud actually occurring in Indiana at any time in its history," nonetheless "[i]t remains true … that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists[.]" *Id.* at 194-95.

c. In *Abbott*, you also argued that voter ID requirements "foster public confidence in elections — thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy." In your view, is the "peaceful, orderly transfer of power" possible <u>without</u> voter ID requirements?

Given that *Veasey v. Abbott* remains pending and I am counsel for an *amicus* in

the case, it would be inappropriate for me to express a personal opinion on this matter.

d. How did you come to represent the state of North Carolina in *North Carolina v. North Carolina State Conference of the NAACP*?

I already represented the leaders of the North Carolina General Assembly in other litigation when they retained my firm to file a petition for writ of certiorari in this matter in the United States Supreme Court.

10. When you served as Louisiana's Solicitor General, you defended the state in *Connick v. Thompson*, 563 U.S. 51 (2011). The facts of that case are quite troubling — a prosecutor deliberately withheld physical evidence that would have exonerated Thompson, who had been convicted of robbery and capital murder. After that exculpatory evidence was disclosed—and Thompson's execution stayed—he sued the District Attorney's (DA's) Office. A jury awarded Thompson $14 million on the theory that the DA had been "deliberately indifferent" to training prosecutors on their *Brady* obligations. The Fifth Circuit upheld the jury's award, and Fifth Circuit, *en banc*, affirmed the panel decision.

You urged the Supreme Court to reverse, and argued that the DA's office could not be held liable on this failure-to-train theory "absent a history of violations." You also argued that as "trained professionals," prosecutors in the DA's Office were already "subject to a licensing and ethical regime designed to reinforce their duties as officers of the court," and "absent powerful evidence to the contrary, a district attorney is entitled to rely on prosecutors' adherence to these standards." In a 5-4 opinion, the Court sided with you. In dissent, Justice Ginsburg wrote, "What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the [DA's] Office bears responsibility under § 1983."

a. If you are confirmed as a judge serving on the Fifth Circuit, you will consider appeals by individuals who allege that prosecutors committed *Brady* violations. What evidence can you offer the Committee that you take *Brady* violations seriously?

A prosecutor's failure to disclose material exculpatory or impeaching evidence as required by the Supreme Court's landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963), is a grave violation of a prosecutor's ethical duties and seriously compromises an accused's due process rights under the Constitution. There is no question that the facts of *Connick v. Thompson* were "quite troubling"—indeed, in the opening moments of my oral argument to the Supreme Court, I noted that Mr. Thompson had suffered "terrible injuries" because of prosecutorial misconduct. Tr. of Oral Arg. in *Connick v. Thompson*, No. 09-571 (U.S. Oct. 6, 2010), at 3:14. As your question points out, however, the *Brady* violation was not the legal issue before the Supreme Court, and the Court ultimately ruled in my client's favor.

Connick was an extremely difficult case, and my experience in that case only reinforced for me the importance of a prosecutor's *Brady* obligations to the fair administration of our criminal justice system. Since *Connick*, I have taught a Continuing Legal Education course to Louisiana prosecutors emphasizing the importance of *Brady* obligations, and I have provided those materials to the Committee. If confirmed as a judge, I would conscientiously apply *Brady* to claims that prosecutors may have failed in their constitutional obligations to disclose all material exculpatory and impeaching evidence to the accused.

b. **The full Fifth Circuit upheld the jury's award to Thompson, yet Louisiana chose to appeal that decision to the Supreme Court. Did you make the decision to seek Supreme Court review even after the Fifth Circuit had affirmed en banc? If so, what was your rationale? If not, whose decision was it?**

The decision to seek certiorari in *Connick* was made by my client, the Orleans Parish District Attorney's Office, in conjunction with my employer, the Louisiana Attorney General.

c. **A brief filed on behalf of the respondent in the case on behalf of former DOJ civil rights officials from both Democratic and Republican Administrations stated that "Petitioners' suggestion that no training is necessary because prosecutors are educated professionals blinks reality." Do you still believe that prosecutors' offices should <u>not</u> be required to train prosecutors specifically in the requirements of *Brady*, simply because prosecutors are officers of the court?**

My client's argument in *Connick* was never that a district attorney's office has no obligation to provide its prosecutors with *Brady* training. Rather, the argument was that, where a rogue prosecutor deliberately buries obviously exculpatory evidence, the district attorney's office cannot be vicariously liable for that malfeasance unless a pattern of similar *Brady* violations puts the office on notice. The Supreme Court agreed with my client's argument. But the arguments I made on behalf of my clients in this case, like any other case, do not necessarily reflect my own personal views. Nor would they have any bearing on my role as a judge. If confirmed, I would fully and fairly apply *Brady*, *Connick*, and any other binding precedents of the Supreme Court.

d. **On what basis did you conclude that the New Orleans District Attorney's Office did not have a "history of [*Brady*] violations"?**

I argued on behalf of my client that the record evidence in the case did not reveal the requisite pattern of previous *Brady* violations by the office required to put the district attorney on notice of a deficient training regime, an argument which the Supreme Court accepted in ruling for my client.

e. **The miscarriage of justice in *Connick* very nearly led the state to execute a man who had not in fact committed murder. In your view, is it appropriate to provide financial remuneration for those who face such a monumental miscarriage of justice at the hands of a prosecutor's office?**

That is a policy question on which it would be inappropriate for me to comment as a nominee to federal judicial office. I am aware of a Louisiana statute providing compensation in such circumstances, and my understanding is that Mr. Thompson received compensation under the version of that statute in force at the time.

f. **If you are confirmed, what steps will you take to ensure that all prosecutors understand—and fulfill—their obligations under *Brady*?**

Please see my response above to Question 10(a).

11. At your nomination hearing, I asked you about your defense of Texas and Louisiana laws severely limiting women's access to reproductive healthcare. Our exchange focused on those statutes' admitting privileges provision, and I asked how admitting privileges enhance the safety of women. But the Louisiana law also had provisions concerning informed consent and reporting requirements for medication abortions. In defending this statute, you argued that these provisions also made clear the law "focused on enhancing the safety of women seeking abortion."

a. **How do these informed consent and reporting requirement provisions enhance the safety of women seeking access to reproductive healthcare?**

The litigation to which your question refers is still pending in federal court, and so it would be inappropriate for me to comment on it given that I remain counsel to a party in the case.

12. Beginning in 2016, you represented the North Carolina General Assembly in *United States v. North Carolina*, defending the state's anti-transgender bathroom bill, known as HB2. In a brief that you submitted in that case, you made a number of claims about the dangers posed by allowing transgender individuals to use the restroom that corresponds to their gender identity. You wrote, for instance, that preventing HB2 from taking effect "would inflict upon North Carolina's citizens a substantially increased risk of privacy violations and sex crimes that, in various ways, would invade their legitimate expectations of privacy and bodily security."

a. **How does allowing transgender individuals to use the bathroom that corresponds to their gender identity cause an increased risk of sex crimes?**

The litigation to which your question refers is still pending in federal court, and so it would be inappropriate for me to comment on it given that I remain counsel

to a party in the case.

b. What evidence did you rely on to support this argument?

Please see my response above to Question 12(a).

c. Do you continue to hold this belief?

Please see my response above to Question 12(a). In addition, I am acting as counsel for a party in that case, advancing not my own personal beliefs but legal arguments on behalf of my client's interests, just as I have done in every case to the best of my ability.

13. You also represented the Gloucester County School Board before the U.S. Supreme Court after it implemented a discriminatory policy that required transgender individuals to use separate facilities—a policy that was struck down by the Fourth Circuit. In your brief, one of the rationales you provided for interpreting Title IX to prohibit treating transgender individuals in accordance with their gender identity is to preserve sex separation in athletics; your brief argued that "[s]ex separation in athletics only works, however, if 'sex' means physiological sex; if it means 'gender identity,' nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women." **Are you aware of any cases where an individual has pretended to be transgender for the purpose of obtaining a competitive advantage?**

Because the litigation to which your question refers is still pending in federal court, it would be inappropriate for me to comment on it given that I remain counsel to a party in the case. However, I can state that the sentence you quote from the Supreme Court brief in that case referenced a CBS news story from 2016 reporting that an "18-year old runner … [who] was born male and identifies as female" competed in "Class 3A girls' sprints." Petitioner's Br. in *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273 (U.S. Jan. 3, 2017), at 41 (citing *Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships*, CBS New York, June 8, 2016).

14. As Louisiana Solicitor General, you filed amicus briefs in *Graham v. State of Florida*, in which the Supreme Court considered the constitutionality of life without the possibility of parole (LWOP) sentences for juvenile offenders who commit non-homicide crimes, and *Schwarzenegger v. Entertainment Merchants Association*, which concerned a California law prohibiting the sale or rental of "violent video games" to minors. You also submitted amicus briefs in *Davenport v. American Atheists*, which urged the Court to decide whether to abandon the "endorsement test," used to determine violations of the Establishment Clause, and joined an amicus brief in *Brown v. Plata*, arguing that a three-judge panel had violated the Prison Litigation Reform Act (PLRA) by ordering the release of prisoners form California's overcrowded prisons. In short, you have submitted many amicus briefs that pertained to other states' statutes, or to matters that

did not directly implicate Louisiana.

a. As a general matter, how did you decide which amicus briefs to join or lead as Solicitor General of Louisiana?

The decision to join or lead in any multi-state amicus brief was ultimately made by the Louisiana Attorney General, based on his assessment of whether the issues presented in a particular case could potentially implicate the institutional interests of the State. As I recall, the briefs that Louisiana filed or joined during my tenure were virtually always joined by many other states and often by attorneys general from across the political spectrum. For instance, the amicus brief your question references in the *Brown v. Plata* case involving the California prison system was joined by five Democrat Attorneys General, including Delaware Attorney General Joseph Biden, III, Massachusetts Attorney General Martha Coakley, and Ohio Attorney General Richard Cordray. Similarly, the amicus brief your question references in the *Schwarzenegger* case involving California's violent video games law was joined by six Democrat Attorneys General, including Senator Blumenthal when he was Connecticut Attorney General.

b. Why did you decide to file or join amicus briefs in each of the cases listed in this question?

Please see my response above to Question 14(a).

15. You were the lead lawyer for Hobby Lobby when it challenged the Affordable Care Act's contraceptive coverage requirement. Your Supreme Court brief argued, in part, that the requirement ran afoul of the Religious Freedom Restoration Act (RFRA), as applied to your clients, in part because the federal government had created an accommodation for other religious entities. Your brief stated that "the exceptions for the religious exercise of other groups and grandfathered plans are devastating to the government…. They are devastating because RFRA itself demands that the government consider the feasibility of making exceptions to otherwise general rules in order to accommodate religious exercise." Shortly thereafter, you represented the Eternal Word Television Network in *Zubik v. Burwell*, where you claimed that the accommodation itself was a violation of RFRA.

a. Do you see any tension between the position you advanced in *Hobby Lobby* and the position you advanced in *Zubik*?

No. RFRA requires an analysis of the burden imposed by the government on the religious exercise of the specific religious adherent. To my recollection, as a for-profit corporation my client in *Hobby Lobby* was never offered an accommodation with respect to the mandate, and so whether any accommodation would have removed the burden on its religious exercise was never presented or decided in that case. By contrast, my client in the *Zubik* litigation was offered an accommodation by the federal government, but had a religious objection to that specific

accommodation and, accordingly, took the position that RFRA required something different.

b. Do you dispute that women's access to preventative health services—including contraception—is a compelling state interest?

This is an open question. In *Hobby Lobby* the Supreme Court assumed without deciding that the federal government has a compelling interest in furthering women's access to contraceptives through the mandate. Given that the issue is one that could come before me if confirmed as a judge, it would be inappropriate for me to express an opinion.

c. The *Zubik* petitioners advocated a very broad theory of RFRA. As the Government's brief stated, "Under petitioners' view of RFRA, all such accommodations—indeed, any systems that require religious objectors to register their objections—could be reframed as substantial burdens on religious exercise. A conscientious objector to the draft could claim that 'the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then 'trigger' the draft of a fellow selective service registrant in his place. An employee who objects to working on the Sabbath could object to a requirement that he request time off in advance because the request would 'facilitate… someone else working in his place.'" Do you disagree that the arguments you advanced in *Zubik* would have allowed virtually any religious accommodation to be reframed as a substantial burden on religious exercise?

I do not agree with that characterization of the RFRA arguments made on behalf of my clients in that case. In any event, regardless of the arguments I made on behalf of clients concerning RFRA (or any other statute), as a judge I would follow all binding precedents of the Supreme Court and the Fifth Circuit concerning RFRA (or any other statute).

16. At your hearing, you told Senator Leahy that you were not on any of the Supreme Court shortlists that President (or candidate) Trump have issued. Of course, the President also issued an updated Supreme Court shortlist on November 17, 2017, adding five new judges to the original list of 20 judges or justices that were on his 2016 shortlists.

a. Has anyone at the White House or the Department of Justice spoken with you about potentially naming you to a Supreme Court vacancy?

No.

b. Has anyone at the White House or the Department of Justice spoken with you about adding your name to a subsequent shortlist?

No.

c. Have you spoken with anyone at the Federalist Society or the Heritage Foundation about being named to a Supreme Court vacancy, or adding your name to a subsequent shortlist?

No.

17. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

Without disclosing specific advice by any attorneys, it was my understanding that the instructions were to disclose responsive material truthfully and to the best of my ability.

b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did <u>not</u> need to disclose certain material, including material "published only on the Internet," as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

c. Have you ever posted commentary—under your own name or a pseudonym— regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what

edits were made.

No.

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

My understanding is that, according to governing Supreme Court precedent, courts may have recourse to legislative history when the relevant statutory text is ambiguous. As a judge, I would fully and faithfully follow any binding precedents that relied on legislative history to construe a statutory provision.

19. According to your Senate Questionnaire, you have been a member of the Federalist Society since 2012. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I did not author that statement and am not aware of what its author meant by it. When I was in law school at Louisiana State University and Columbia University, and when I subsequently taught at the University of Mississippi Law School, I encountered a broad array of viewpoints on a variety of subjects from both law professors and students.

b. **As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."**

I did not author that statement and am not aware of what its author meant by it. My understanding is that the Federalist Society takes no position on specific issues but rather serves as a forum to encourage the informed presentation of a variety of viewpoints on matters such as the rule of law, the role of judges in our Constitutional system, and the separation of powers.

c. **As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.**

I did not author that statement and am not aware of what its author meant by it. In my experience, the Federalist Society takes no position on specific issues but instead encourages informed debate and discussion of matters such as the rule of law, the role of judges in our Constitutional system, and the separation of powers.

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

I received the questions from the Justice Department in the evening of Wednesday, November 6. I personally drafted answers to all of the questions, solicited comments from the Justice Department attorneys working on my nomination, and revised my draft answers as I deemed appropriate in light of those comments.

Written Questions for Stuart Kyle Duncan
Submitted by Senator Patrick Leahy
December 6, 2017

1. **Chief Justice Roberts wrote in *King v. Burwell* that**

> **"oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions?'"**

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

I agree with the Chief Justice that well-accepted rules of statutory construction require judges to read statutory provisions in the context of their overall place in the statutory scheme and not as isolated provisions. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (explaining this approach to statutory interpretation). If confirmed as a judge, I would fully and faithfully follow all binding precedents of the Supreme Court and the Fifth Circuit concerning the rules of statutory interpretation, including *King v. Burwell*.

2. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

   (a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

   As a judicial nominee, it would be inappropriate for me to comment on a political matter under the canons of judicial ethics. As a general matter, I strongly believe that an independent federal judiciary is critical to preserving our constitutional system of individual rights and separation of powers, and provides an indispensable check on legislative and executive power at both the Federal and State levels.

   (b) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

   Please see my response above to Question 2(a).

3. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and*

will not be questioned." (Emphasis added.)

(c) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

I am not aware of any such provision or precedent, but one should be extremely cautious in offering general statements about the complex area of national security law. No one, not even the President, is above the law. If confirmed, I would decide cases implicating national security like all other cases—namely by carefully considering the arguments of both sides, by listening to my judicial colleagues, and by fully and faithfully applying all applicable laws and precedents.

4. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

My understanding is that litigation concerning these kinds of issues remains pending in the federal courts, and so it would be inappropriate for me to comment on them under the canons of judicial ethics. If confirmed, I would decide cases concerning the First Amendment and immigration like all other cases—namely by carefully considering the arguments of both sides, by listening to my judicial colleagues, and by fully and faithfully applying all applicable laws and precedents.

5. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

(d) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?

The question is a grave one, but impossible to answer outside the context of a specific legal dispute. Generally speaking, if such a situation presented itself in federal litigation, a court would be bound to fully and faithfully apply any applicable precedent to resolve the situation within the bounds of its jurisdiction, including all applicable tools available to federal courts to enforce compliance with their orders. Full and prompt compliance with federal court orders is indispensable to the proper functioning of our legal system.

6. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(e) **Do you agree that the Constitution provides Congress with its own war**

powers and Congress may exercise these powers to restrict the President– even in a time of war?

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

The Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States[.]" U.S. Const., art. II, § 2 cl. 1. But the Constitution also vests Congress with powers concerning war, such as the power "[t]o declare War," *id.* art. I, § 8, cl. 11, "[t]o raise and support Armies," *id.* art. I, § 8, cl. 12, "[t]o provide and maintain a Navy," *id.* art. I, § 8, cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14. If called upon to decide an issue in litigation concerning the relationship between Congress's and the President's authority in this area, I would fully and faithfully apply all applicable precedent, including *Hamdan*.

(f) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

Please see my response above to Question 6(e).

7. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(g) Do you agree with that view? Does the Constitution permit discrimination against women?

I am not familiar with the referenced statement and so cannot comment on what was meant by it. The Supreme Court has long held that laws discriminating on the basis of sex are subject to "intermediate" scrutiny under the Equal Protection Clause and therefore demand an "exceedingly persuasive justification" to survive judicial review. *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

8. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

I am not familiar with the referenced statement and so cannot comment on what was meant by it. If a case involving the Voting Rights Act came before me, I would fully

and faithfully apply applicable Supreme Court and Fifth Circuit precedent.

9. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

   The Constitution provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind what ever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. My understanding is that the meaning of this Clause is the subject of pending federal litigation (*see, e.g., Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. 2017), and I therefore am precluded from any further comment.

10. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

    (h) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

    As a nominee to a lower federal court, it would be inappropriate for me to offer any opinion on how the Supreme Court should treat Congress's factual findings. If confirmed, I would fully and faithfully follow *Shelby County* and all other binding precedent.

11. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

    Those amendments grant Congress the "power to enforce [them] by appropriate legislation." *See* U.S. Const. amend. XIII, § 2; *id.* amend. XIV, §5; *id.* amend. XV, § 2. If faced with an issue in litigation concerning the extent of Congress's authority to enforce those amendments, I would fully and faithfully follow any applicable Supreme Court and Fifth Circuit precedent.

12. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

    (i) Do you believe the Constitution protects that personal autonomy as

a fundamental right?

Lawrence v. Texas, 539 U.S. 558 (2003), is a binding precedent of the Supreme Court and, if confirmed, I would follow it fully and faithfully.

13. In the confirmation hearing for Justice Gorsuch earlier this year, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(j) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

This matter could not be clearer: lower federal judges, include circuit judges, are bound to fully and faithfully follow *all* binding Supreme Court precedent. That obligation does not vary whether the question is one of statutory or constitutional interpretation. Additionally, if confirmed as a Fifth Circuit judge, I would be bound to follow all binding circuit precedent.

14. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(k) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

I would follow the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. For instance, pursuant to those rules I would be required to recuse myself "[w]here in private practice [I] served as lawyer in the matter in controversy, or a lawyer with whom [I] previously practiced law served in such association as a lawyer concerning the matter[.]" 28 U.S.C. § 455(b)(2). Furthermore, as a safeguard against acting "in any proceeding in which [my] impartiality might reasonably be questioned," *id.* § 455(a), I would voluntarily recuse myself for a period of time in any matter in which my current law partners will serve as lawyers, even if I would not be otherwise recused from the matter under section 455(b)(2), *supra*.

15. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the

constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

(l) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Federal courts have a solemn obligation to vindicate the civil rights of individuals protected by the Constitution or federal statutes**.** As a lawyer in private practice, I have repeatedly advocated for the civil rights of individual litigants—including the poor, minorities, and prisoners—on the basis of the First Amendment and federal civil rights statutes such as the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. If confirmed as a judge, I would be vigilant in protecting the civil rights of all persons, and in doing so fulfill my oath to "administer justice without respect to persons, and do equal right to the poor and the rich." 28 U.S.C. § 453.

16. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

(m) **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

I agree that our constitutional system of checks and balances is an indispensable means of ensuring that all three branches of the Federal government remain in their appropriate spheres of authority. That system provides a critical protection for all Americans' freedom from the arbitrary abuse of government power.

17. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Article I, section 8 of the Constitution enumerates Congress's powers in seventeen separate

clauses and additionally grants Congress authority "[t]o make all laws which shall be necessary and proper for carrying into Execution [those] Powers[.]" U.S. Const. art. I, § 8, cl. 1-17, 18. The interpretation of the scope of those powers has been perennially addressed by the Supreme Court, going back to Chief Justice Marshall's seminal opinion in *M'Culloch v. Maryland*, where in discerning whether Congress had the authority to charter a national bank, he famously remarked that "we must never forget that it is a *constitution* we are expounding." 17 U.S. 316, 407 (1819). The Court has often had occasion to interpret the scope of Congress's authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian tribes," U.S. Const. art. I, § 8, cl. 3, in decisions such as *Gibbons v. Ogden*, 22 U.S. 1 (1924); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 898 (1964); *United States v. Lopez*, 514 U.S. 549 (1995); and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Finally, the Court has held that Section 5 of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzebach v. Morgan*, 384 U.S. 641, 651 (1966). The Court has subsequently interpreted the scope of Section 5 in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); and *Tennessee v. Lane*, 541 U.S. 509 (2004). I would fully and faithfully follow these precedents of the Supreme Court and any applicable precedents of the Fifth Circuit, if confirmed.