

Nomination of Britt Grant to the U.S. Court Appeals for the Eleventh Circuit
Questions for the Record
May 30, 2018

QUESTIONS FROM SENATOR FEINSTEIN

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

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

It is never appropriate for a lower court to depart from Supreme Court precedent.

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?

A circuit judge may, under rare circumstances, address prior cases in a way that can call the Supreme Court's attention to issues that the Court may determine it is appropriate to address, such as a circuit split regarding a particular question or tension that has arisen with intervening or inconsistent authority. But the circuit judge of course remains bound to follow existing precedent in those instances as in any other.

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

That decision is one for the Supreme Court alone, and it would be inappropriate for me to offer my own view on what when and if it would be appropriate for the Supreme Court to overturn its own precedent.

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

Please see the response to question 1(c).

2. 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"?

I do agree that the decision in *Roe v. Wade* is a precedent of the United States Supreme Court that I will be bound to apply faithfully if confirmed. Indeed, for a lower court judge, it does not matter how a binding Supreme Court precedent is labeled—super or otherwise—each one must be fully and faithfully applied, and I will fulfil that duty if confirmed as I do today as a sitting state court judge.

b. Is it settled law?

Yes.

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

Yes.

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

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

As a nominee to a lower court, it would be inappropriate for me to provide my own views on how persuasive any dissenting opinion is in any case.

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

Heller itself specifically noted that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Heller*, 544 U.S. at 626. The Supreme Court’s opinion also explained that nothing in the decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27.

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

As a nominee to a lower court, I am bound by the Supreme Court’s own reading of its precedents, which appears to be that the question was “judicially unresolved” prior to *Heller*. *Id.* at 625.

5. Your name appeared on President Trump’s revised short list of potential Supreme Court

nominees in the event of another vacancy on the Court. When then-candidate Trump put together his first Supreme Court short list, he made clear that conservative interest groups played a significant role in choosing the names on that list. In June 2016, for instance, he stated “we’re going to have great judges, conservative, all picked by the Federalist Society,” and in September 2016, he thanked both the Heritage Foundation and the Federalist Society for their work on the list. According to a White House statement that accompanied the revised short list, the list’s “additions, like those on the original list released more than a year ago, were selected with input from respected conservative leaders.” (White House Press Statement, *President Donald J. Trump Announces Five Additions to Supreme Court List* (Nov. 17, 2017))

- a. Before the President added you to his list of potential Supreme Court nominees, did you have any contact with anyone from the Heritage Foundation, the Federalist Society, or any other interest group about your possible inclusion on that list, or your potential nomination to the U.S. Supreme Court generally?**

I have had casual conversations with a variety of friends and colleagues regarding these issues, including after a colleague of mine on the Supreme Court of Georgia was included on the initial list. I had heard speculation that there may be an updated list at some point, but was unaware that there would be a new list or that I would be included on it until the list was announced.

- b. Why do you think “conservative leaders” from interest groups like the Federalist Society and Heritage Foundation recommended you for inclusion on President Trump’s revised short list?**

I do not know whether anyone made such a recommendation for me, or why they did so if that is the case.

- c. You have been a member of the Federalist Society since 2004. Since 2004, have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court, including the Eleventh Circuit?**

I am sure that I have had casual conversations with friends, some of whom are members of the Federalist Society, over the years regarding potential court nominations.

6. According to press coverage, when President Trump revised his short list in November 2017 to include you, Catherine Glenn Foster, president of Americans United for Life, said of you and the other additions to the list: “From their known records they tend to be strong on recognizing the protections for life.” (James Oliphant & Andrew Chung, *Trump adds five conservatives to list of possible Supreme Court picks*, REUTERS (Nov. 17, 2017))

What aspects of your record show you to be “strong on recognizing the protections for life”? If you do not believe your record shows that, was Americans United for Life wrong to describe your record in this way?

I do not know whether I was included in the category of nominees who were considered by that group to have a “known record” on any issue.

7. From 2015 to 2016, you served as Georgia’s Solicitor General.
- a. **While serving in the Georgia Solicitor General’s Office, did you ever conceive of, recommend, or advocate for a particular litigation position or a specific legal argument that the state ultimately adopted? If so, please describe.**

Yes.

- b. **Did you ever recommend that the state should not take a particular litigation position or should not make a specific legal argument that the state nevertheless adopted? If so, please describe.**

Yes.

8. According to your Senate Judiciary Questionnaire, as Georgia’s Solicitor General, you “led Georgia’s efforts” in *Texas v. United States*, a challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents program, also known as DAPA. You explained that you “coordinat[ed] with Texas as the lead state in the litigation,” and that such “work included strategic planning [and] participating in briefing and editing.” The brief that Georgia joined urged a federal district court to grant a preliminary injunction against the implementation of DAPA and against the expansion of the Deferred Action for Childhood Arrivals (DACA) program, arguing in relevant part that DAPA and DACA would both cause “irreparable injuries” to Georgia and the other states on the brief. One such injury cited in the brief was to “legalize the presence of 4 million people.” (Plaintiffs’ Motion for Preliminary Injunction & Memorandum in Support, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), 2014 WL 7497774).

Please identify the “irreparable injuries” to the State of Georgia if parents of U.S.-citizen children are permitted to be legally present in this country.

In the above-quoted brief, the plaintiff states raised several legal arguments to support the second prong of the preliminary injunction standard and the plaintiffs’ standing under Article III of the U.S. Constitution. Those arguments appear on pages 25-28 of the memorandum in support of plaintiffs’ motion for a preliminary injunction, and on pages 42-65 of the reply in support of that motion. Those page ranges also include citations to the preliminary-injunction appendix, which includes additional support for the plaintiff states’ legal arguments.

9. An August 2016 article in the *Atlanta Journal-Constitution* discusses your involvement as Solicitor General in Georgia’s defense of HB 954, a law criminalizing abortions after 20 weeks except in very limited circumstances. (HB 954 (2011-2012 Regular Session)) A state trial court judge granted an injunction that prevented the law from taking effect. But two years later, a different trial court overturned that injunction and dismissed the suit. After the

physicians appealed that ruling, you said that you believed the trial court's order dismissing the suit and overturning the earlier injunction was "correct" and would be "upheld" by the state's Supreme Court. (Bill Rankin, *Judge rejects challenge to state's 'fetal pain' abortion law*, ATLANTA J.-CONST. (Aug. 13, 2016))

Before defending HB 954 as Solicitor General, did you first make any assessment and/or determination about the constitutionality of the law? If so, what was your assessment, including any circuit court precedent? If not, were you concerned with defending such a law in court without making such an assessment?

The plaintiffs in the above-referenced case challenged the statute only under Georgia law, and not under federal law, and the work that I did on the case was unrelated to the substantive merits of the question. Indeed, the case had been dismissed out of deference to a newly-decided opinion regarding sovereign immunity under the Georgia Constitution. *See Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 593, 755 S.E.2d 184, 185 (2014). The Georgia Supreme Court affirmed the trial court's order in *Lathrop v. Deal*, 301 Ga. 408 (2017).

10. In a speech you delivered in March 2017 to the State Bar of Georgia's Young Lawyers' Division, shortly after your appointment to the Georgia Supreme Court, you said of your time in the Georgia Office of Solicitor General: "We defended the State, but we also represented the State from a more federalist perspective, and that was in joining other states to fight what we saw as federal overreach."

a. Please describe what it means to represent a state as solicitor general, "from a more federalist perspective."

The State of Georgia, represented by the Attorney General, participated in litigation before the United States Supreme Court together with other states. Some of those cases involved challenges to federal actions that the States asserted were beyond federal authority, including, for example, *Georgia v. McCarthy*, No. CV 215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), *appeal held in abeyance sub nom. Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317 (11th Cir. 2016) and the associated litigation.

b. Please provide examples of the "federal overreach" that you challenged during your time as Georgia's Solicitor General.

Please see the response to question 10(a).

11. In the same March 2017 speech to the State Bar of Georgia Young Lawyers' Division, you discussed "a different perspective on the Fourteenth Amendment." You posited that "rather than a transformation of our Constitution, perhaps the Fourteenth Amendment was a fulfilment of it," adding that the Fourteenth Amendment's clauses — including its Citizenship Clause, Privileges and Immunities Clause, and Equal Protection Clause — "are a renewed assurance that the Constitution's protections do apply to ALL people, and that ALL people are created equal."

a. What is the significance of the Fourteenth Amendment as the “fulfillment” rather than the “transformation” of the Constitution?

Academics have had an interesting dialogue regarding the relationship of the Fourteenth Amendment to the text and principals contained in the unamended version of the Constitution. In the above-referenced speech I raised a perspective set out by Professor Michael W. McConnell in his article, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159 (1992). While the academic debate is interesting, for lower court judges it does not matter how a particular amendment is characterized in academic literature by various commentators; lower courts are bound to faithfully apply the precedents of the Supreme Court.

b. Is Supreme Court precedent recognizing that the right to privacy is protected by the Fourteenth Amendment a “fulfillment” of the Constitution? If so, in what way do these cases fulfill the promise of the Constitution? If not, why not?

Please see the response to question 11(a).

12. From August 2012 to December 2014, you served as the Georgia Attorney General’s Counsel for Legal Policy. According to your Senate Judiciary Questionnaire, in that capacity you “directed legislative and policy initiatives for the Office of the Attorney General” and served as the “office’s chief lobbyist, working with the General Assembly on the legislative priorities of the Attorney General.” (Senate Judiciary Questionnaire at pages 39, 62)

During your time as Counsel for Legal Policy, please identify whether or not you worked or advised on the following bills introduced in the Georgia legislature. If you did work or advise on a bill, please explain the nature of your involvement and work.

a. The Georgia Health Care Freedom and ACA Noncompliance Act (HB 707).

I have no recollection of working on or advising on that bill.

b. The Safe Carry Protection Act (HB 512).

I have no recollection of working on or advising on that bill.

c. The Georgia Firearms Freedom Act (HB 89).

I have no recollection of working on or advising on that bill.

d. The Georgia Constitutional Carry Act of 2013 (HB 26).

I have no recollection of working on or advising on that bill.

e. The Federal Abortion Mandate Opt-out Act (SB 98).

I have no recollection of working on or advising on that bill.

f. SB 284, a bill introduced in the 2013-2014 Regular Session related to the standard of proof needed to seek “a waiver of the parental notification requirement for an abortion.”

I have no recollection of working on or advising on that bill.

g. The Protecting Georgia Sovereignty Act of 2013 (HB 352).

I have no recollection of working on or advising on that bill.

13. In your Senate Judiciary Questionnaire 31 documents are identified as submitted in the United States Supreme Court that you either “drafted, reviewed, or edited.”

For each of these documents, please indicate whether you drafted, reviewed, and/or edited the document, and also describe your role and the nature of your involvement in preparing these documents.

I do not have any records reflecting my particular level of involvement in the many briefs joined by the State of Georgia. I do recall that I was not the primary drafter of any of the amicus briefs.

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

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

My interview with officials from the White House and the Department of Justice in July of 2017 covered a wide range of topics, and I do not recall the details of all of the questions and answers, including who posed each of the questions. To the best of my recollection, there was some discussion of administrative-law issues in the context of my work in the Office of the Georgia Attorney General, and also in relation to my understanding of the Supreme Court’s relevant precedents.

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

No.

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

Although I have a high level of familiarity with what could be fairly characterized as administrative-law related matters, based on my time clerking on the Court of Appeals for the District of Columbia Circuit and my time litigating regulatory matters in the Office of the Attorney General, administrative law is a vast topic, and one that it would be difficult to effectively or cogently summarize. Moreover, even if it were possible for me to summarize my views, it would not be appropriate for me to do so

as a judicial nominee according to Canon 3(A)(6) of the Codes of Judicial Conduct because administrative matters are commonly litigated. And, as in all other areas of law, I am bound by the Supreme Court's decisions in this context and would apply them faithfully.

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

No.

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

I drafted answers to each of these questions after they were forwarded to me by the United States Department of Justice. I then solicited feedback on the answers from the Department of Justice, but received none. Each of the answers is my own.

Senator Dick Durbin
Written Questions for Britt Grant, Patrick Wyrick and Jane Nitze
May 30, 2018

For questions with subparts, please answer each subpart separately.

Questions for Britt Grant

1. You say in your questionnaire that while you were Georgia’s Solicitor General, you “drafted, reviewed, or edited” an amicus brief filed by 9 states including Georgia in the Supreme Court case *Friedrichs v. California Teachers Association*. The brief you worked on argued that the Supreme Court should overrule a 40-year-old precedent, *Abood v. Detroit Board of Education*, in which the Supreme Court upheld the validity of public sector union fair share fees.

a. **In this brief you advocated for overruling a longstanding Supreme Court precedent. When in your view is it appropriate for Supreme Court precedents to be overruled?**

The above-referenced brief was filed on behalf of my client, the State of Georgia, and other states. The Supreme Court ultimately reached a split decision in the *Friedrichs* case, affirming the decision below. It is my understanding that the Court is currently considering the same question in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. In that case, as in any other, the decision about whether to overrule a prior Supreme Court precedent is one for the Supreme Court alone, and it would be inappropriate for me to offer my own view on what when and if it would be appropriate.

b. **Are there other instances in your career in which you have worked on a brief advocating for a Supreme Court precedent to be overruled? If so, please list the briefs and the cases they advocated for overruling.**

To the best of my recollection and knowledge, the following briefs, filed on behalf of 39 and 43 states respectively, both argued that *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a state to be haled into the courts of another state without its consent, should be overruled.

Franchise Tax Board of California v. Hyatt, 2015 WL 1939076, Brief of Amici Curiae State of West Virginia and 39 Other States in Support of Petitioner.

Franchise Tax Board of California v. Hyatt, 2015 WL 5345832, Brief of Amici Curiae State of West Virginia and 43 Other States in Support of Petitioner.

2. You say in your questionnaire that while you were Solicitor General you worked on a Supreme Court amicus brief filed by a number of states in the case *Friedman v. City of Highland Park*. This case involved a challenge to a municipal assault weapons ban passed by Highland Park, Illinois. The ban had been upheld by the 7th Circuit and the brief you

worked on argued for the Supreme Court to grant cert in this case and reverse the 7th Circuit. The brief claimed that if the Supreme Court did not grant cert, it would “encourage lower courts to continue their consistently narrow view of *Heller* and the Second Amendment.” The Supreme Court did not grant cert and therefore left standing the 7th Circuit’s ruling upholding Highland Park’s ban

- a. **Please explain how lower courts have consistently applied a narrow view of *Heller*, as was argued in this brief.**

As a federal court nominee, it would be inappropriate under the Canons of Judicial Conduct, specifically Canon 3(A)(6), to provide a personal opinion regarding a matter that is the subject of current or pending litigation.

- b. **If a lower court’s job is to simply follow precedent, why is there any dispute whether courts are applying a narrow view of *Heller*?**

Please see the response to question 2(a)

- c. **Do lower court judges have discretion to interpret *Heller* broadly or narrowly?**

Lower court judges are bound to faithfully and fairly interpret *Heller* and all other binding United States Supreme Court precedents.

- d. **Would you, if confirmed to the 11th Circuit, apply a narrow view of *Heller*?**

As I would for all binding Supreme Court precedents, I would apply *Heller* faithfully and fairly if confirmed to the 11th Circuit.

3. You say in your questionnaire that when you were working in the Office of the Georgia Attorney General you “drafted, reviewed or edited” a number of briefs that were filed before the Supreme Court, including amicus curiae briefs filed by states in some of the most high-profile cases in recent years. However, you do not state with specificity in your questionnaire what work you performed on these briefs.

- a. **Please discuss the work that you specifically performed in the amicus brief that Georgia joined in the *Shelby County v. Holder* case.**

As best I can recall, I reviewed and edited the brief in the above-referenced case.

- b. **Please discuss the work that you specifically performed in the amicus brief that Georgia joined in the *Sebelius v. Hobby Lobby Stores, Inc.* case.**

As best I can recall, I reviewed and edited the brief in the above-referenced case.

- c. **Please discuss the work that you specifically performed in the amicus brief that Georgia joined in the *Obergefell v. Hodges* case.**

As best I can recall, I reviewed the brief in the above-referenced case. I may have edited the brief, but I cannot recall doing so.

- d. **Please discuss the work that you specifically performed in the amicus briefs that Georgia joined in the *U.S. v. Texas* case.**

As best I can recall, I reviewed and edited the briefs in the above-referenced case.

4. You say in your questionnaire that you have been a member of the Federalist Society since 2004 and that you served on the Atlanta Chapter Executive Board from 2013-2017. You say that you continue to serve on the Federalist Society's "Federalism and Separation of Powers Practice Group Executive Committee" while you have been serving as a sitting justice on the Georgia Supreme Court.

- a. **What work do you perform for this committee?**

I have participated in several conferences calls to discuss programmatic planning. For example, the committee often plans publicly-available conference calls featuring participants from both sides of a case relating to separation of powers or federalism issues.

- b. **What message does it send to litigants about your views when you are serving in the leadership of the Federalist Society while also serving as a sitting judge?**

I have sworn an oath to "administer justice without respect to person and do equal rights to the poor and rich, and that I will faithfully and impartially discharge and perform the duties incumbent on me as a judge." That is the message that I hope litigants will understand about me, and I do my best to live up to it with each case.

5. In November 2017 an article was written about you in *Reporter Newspapers* entitled "Local state judge makes Trump's Supreme Court short list." The article says "Grant described her judicial philosophy as 'separation of powers' and change by 'democratic process rather than by judicial fiat.'"

Do you believe it is change "by judicial fiat" when the Supreme Court overrules one of its past cases?

No.

6. **In your experience as a Justice of the Georgia Supreme Court, when do you believe it is appropriate for your court to overrule one of its precedents?**

The Georgia Supreme Court largely follows federal precedents regarding stare decisis. In *Jackson v. State*, 287 Ga. 646 (2010), for example, we explained that “[s]tare decisis is an important principle that promotes the rule of law, particularly in the context of statutory interpretation, where our incorrect decisions are more easily corrected by the democratic process. . . . In considering whether to reexamine a prior erroneous holding, we must balance the importance of having the question *decided* against the importance of having it *decided right*. In doing so, we consider factors such as the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning.” (internal citations and punctuation omitted).

7. You said in a March 2017 speech to the State Bar of Georgia’s Young Lawyers’ Division that a judge should not elevate his or her “own preferences over the preferences of those who are elected to make the laws.” **Do you believe that judges should be deferential to legislatures that pass laws to regulate gun possession and use, like Highland Park, Illinois did by banning certain types of military-style assault weapons from civilian use?**

8. **What is your favorite Supreme Court dissent and why?**

As a nominee to a lower court, it would be inappropriate for me to highlight my agreement or disagreement with particular Supreme Court opinions, whether majority opinions, concurrences, or dissents.

9. **What do you think lower court judges can learn from Supreme Court dissents?**

That is a question that it is difficult to answer in the abstract; I expect that it would depend greatly on the particular writing in question.

10. In 1988, the Supreme Court held by a 7 to 1 vote in the case *Morrison v. Olson* that Congress is allowed under the Appointments Clause to limit the removal of an independent counsel to cases in which a principal officer finds good cause. Recently a number of Republican members of this Committee argued, in a debate over a bill to protect the special counsel’s Russia investigation, that we should act as if we are bound by Justice Scalia’s dissent in *Morrison v. Olson*.

- a. **Is Justice Scalia’s dissent binding?**

No.

- b. **What weight of authority should lower court judges give to Justice Scalia’s dissent in *Morrison v. Olson*?**

A dissent is never binding, but may be persuasive in rare instances if it informs a question that is not resolved by the majority opinion in the case.

- 11.

- a. **Do you believe that judges should be “originalist” and should adhere to the original public meaning of constitutional provisions when applying those provisions today?**

Lower court judges should adhere to whatever meaning the United States Supreme Court has assigned to constitutional provisions when applying those provisions today. Indeed, it is rare for a circuit court to consider a true case of “first impression” in the sense that there is no Supreme Court precedent that bears on the question at issue in the case.

- b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of 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 whatever, from any King, Prince, or foreign State.

12. You say in your questionnaire that you have been a member of the Federalist Society since 2004.

- a. **Why did you join the Federalist Society?**

I joined the Federalist Society because lawyers that I knew had been involved with the Society, and I appreciated the fact that they hosted events at my law school featuring a wide range of viewpoints from members and non-members.

- b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News’ Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

As a judicial nominee, I may not comment on political matters under Canon 5 in the Code of Conduct United States Judges.

- c. **Please list each year that you have attended the Federalist Society’s annual convention.**

To the best of my recollection, and following a review of my own records, I attended portions of the annual convention in 2015, 2011, and 2008.

- d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society’s convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the

crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I did not attend this speech, or any other part of the 2017 convention.

13.

a. **Is waterboarding torture?**

It is my understanding that waterboarding constitutes torture where it is intentionally used “to inflict severe physical or mental pain or suffering” upon a detainee. 18 U.S.C. § 2340(1).

b. **Is waterboarding cruel, inhuman and degrading treatment?**

It is my understanding that Congress amended the Detainee Treatment Act through Section 1045 of the National Defense Authorization Act for Fiscal Year 2016. The law provides that no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual. 42 U.S.C. § 2000dd-2(a)(2). It is also my understanding that waterboarding is not authorized in the Army Field Manual.

c. **Is waterboarding illegal under U.S. law?**

Please see the responses to questions 13(a) and 13(b).

14. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

I do not have any basis for evaluating the accuracy of this statement, but even if I did I would not be able to comment under Canon 5 in the Code of Conduct for United States Judges, which prohibits comments regarding political matters.

15. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees should answer questions to the best of their ability within the confines imposed by the Code of Conduct for United States Judges and any other restrictions that govern their conduct. For instance, I am also bound by the Georgia Code of Judicial Conduct.

16. **During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of**

these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting a number of President Trump's nominees.

- a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I have no knowledge of any such donations, and am not aware of the Judicial Crisis Network supporting my nomination. Because the question of whether any such donations are problematic is a question of ongoing political debate, Canon 5 in the Code of Conduct for United States Judges prohibits me from offering my own opinion on the question.

- b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

If confirmed, I will carefully apply the recusal requirements outlined in Canon 3 of the Code of Conduct for Judges, 28 U.S.C. § 455, and any other relevant materials. Beyond that, the question of disclosure or nondisclosure of any donations is a matter of ongoing political debate. Accordingly, Canon 5 of the Code of Judicial Conduct prohibits me from commenting on it.

- c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see the responses to questions 16(a) and 16(b).

17.

- a. **Can a president pardon himself?**

I have not researched this question.

- b. **What answer does an originalist view of the Constitution provide to this question?**

I have not researched this question.

18. **In your view, is there any role for empathy when a judge is considering a case?**

Empathy is an important part of any human being's character, including judges. Certain legal contexts allow empathy to be a factor in a judge's decision-making, but those contexts are more likely to be at the trial level relating to issues like criminal sentencing. At the appellate level, empathy remains meaningful as a human response, but cannot be allowed to govern decision-making, as a judge is required to "faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453. As Justice Kagan said during her 2010 testimony before this Committee, "I think it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it's true of statutory law—the question is what the law requires." The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 111th Cong., S. Hrg. 111-1044, at 103 (2010).

**Nomination of Britt Cagle Grant
United States Court of Appeals
For the Eleventh Circuit
Questions for the Record
Submitted May 30, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I do; under our constitutional framework, the role of judges is to interpret the law rather than to make it when deciding cases.

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

The practical consequences of a particular ruling should be taken into account where the governing legal doctrine demands it. Outside of that, practical considerations are more appropriately reserved to the political branches.

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

Empathy is an important part of any human being’s character, including judges. Certain legal contexts allow empathy to be a factor in a judge’s decision-making, but those contexts are more likely to be at the trial level relating to issues like criminal sentencing. At the appellate level, empathy remains meaningful as a human response, but cannot be allowed to govern decision-making, as a judge is required to “faithfully and impartially discharge and perform all the duties incumbent upon [the judge].” 28 U.S.C. § 453. As Justice Kagan said during her 2010 testimony before this Committee, “I think it’s law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it’s true of statutory law—the question is what the law requires.” The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 111th Cong., S. Hrg. 111-1044, at 103 (2010).

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

Please see the response to question 2(a). Additionally, I will note that the term “life experience” can include such things as legal education and training, which of course play a role in a judge’s decision-making process.

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

No.

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

In my current role as Justice of the Supreme Court of Georgia, I have taken the following oath:

“I swear that I will administer justice without respect to person and do equal rights to the poor and the rich and that I will faithfully and impartially discharge and perform all the duties incumbent on me as judge of the superior courts of this state, according to the best of my ability and understanding, and agreeably to the laws and Constitution of this state and the Constitution of the United States. So help me God.”

I have respected that oath as a sitting judge, and will do no less if I am confirmed to be a federal judge. In addition, as a practicing attorney I represented a wide range of clients, from large corporations, to a pro bono child-custody client, to the State of Georgia. In each instance I did my best to uphold the rights and interests of the client, big or small.

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

I do believe, regretfully, that discrimination exists today, and I would do everything possible to avoid unlawful discrimination in role as a federal judge; the United States Constitution demands nothing less.

6. Your fellow justices on the Supreme Court of Georgia have occasionally taken issue with dicta in your majority opinions. For example, they have noted that “[the] dicta in footnote two sets forth an overly broad rule;” that “[t]he judicial process is served neither by inserting unnecessary and complicated issues into a case, nor by proclaiming unwavering rules to govern such complicated issues;” and that one opinion “goes much further (mostly in dicta), and often with sweeping language that travels far beyond this case.”

- a. In what situations do you consider it appropriate to author an opinion that addresses issues beyond those presented by the facts of the case?

I respectfully disagree with the characterizations quoted above, and believe that judges should decide the issues presented by the facts of the case.

- b. Do you consider yourself to be an activist judge?

No.

- c. In retrospect and in light of the criticisms of your colleagues, would you have approached any of your previous judicial opinions differently?

I do not. As I described in the response to question 6(a), I disagree with the contention that the referenced language in the Court’s majority opinions was dicta, and the arguments in the quoted passages were adopted by only two out of nine judges in each case. Moreover, it is inevitable that colleagues on the bench will disagree from time to time; the key is to do so respectfully, a standard that I believe my colleagues and I have achieved.

7. During your time as Counsel for Legal Policy in the Office of the Attorney General, you served as “the office’s chief lobbyist, working with the General Assembly on the legislative priorities of the Attorney General.” You also “directed legislative and policy initiatives for the Office of the Attorney General.” What role, if any, did you play in the drafting and passing of the “Federal Abortion Mandate Opt-out Act,” which prohibits abortion coverage from being offered by any health plan in the State of Georgia that was created by state law or by federal law, regulation or exchange?

I do not recall playing any role in the drafting or passage of the above-referenced Act.

8. In a speech to the Marietta Rotary Club, you said, “as a judge, the first question I often ask myself is whose job it is to decide a particular question. The Legislature? The Executive? A jury? Many times, most times, the answer is not the Judiciary. So it is my job to let that other branch decide.” How does this view of separation of functions and judicial restraint correspond with the judiciary’s role in protecting minorities?

The constitutional role of the judiciary is to decide cases and controversies, and to interpret rather than make the law. Please also see my response to question 2(a).

9. During a speech to the Young Lawyer’s Division of the State Bar of Georgia, you said, “legislative history often is not a useful way to interpret [a] statute. Each member — and maybe even the staffer rather than the member in some offices — may have a different priority for the law. The way the sausage gets made, the real evidence of congressional intent is the language that got at least 218 votes, not a blurb that a particular member — or lobbyist — was able to get into a committee report.” What role, if any, should legislative history play in deciding a case?

The Supreme Court has explained that “[t]he starting point in discerning congressional intent is the existing statutory text.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). “It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Id.* (internal quotation marks omitted); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”) (internal citations and quotation marks omitted). Where the text is not plain, however, the Supreme Court has held that extrinsic materials are relevant “to the extent they shed a reliable light on the enacting

Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Such extrinsic materials include, for example, legislative history. *Id.* As a lower court judge, I would follow the dictates of the United States Supreme Court regarding statutory interpretation.

10. You led Georgia’s efforts in challenging the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) in *United States v. Texas*. This included “strategic planning, participating in briefing and editing, and coordinating with other attorneys” A brief submitted by Georgia on this issue suggested that the President had exercised “legislative powers.” When do you believe that federal courts should strike down executive orders as impermissible exercises of legislative power? When should federal courts apply the non-delegation doctrine to Congressional delegations of legislative power?

As a sitting judge, and as a federal judicial nominee, it would be inappropriate for me to offer a personal opinion on these issues, which I understand are the subject of current litigation around the country.

11. You previously challenged the constitutionality of the Clean Water Rule, the Clean Power Plan, and designations under the Endangered Species Act. How would you ensure that environmental agencies and advocates believe that they are getting a “fair shake” before you?

For environmental issues, like other issues, I have represented clients with a range of perspectives on different cases. More importantly, however, I recognize the significant difference between the role of an advocate and the role of a judge. I have already applied that distinction as a sitting Justice on the Supreme Court of Georgia, and would of course do the same if confirmed as a federal judge, as would be my constitutional responsibility.

**Nomination of Britt Cagle Grant, to be United States Circuit Judge for
the Eleventh Circuit
Questions for the
Record Submitted May
30, 2018**

QUESTIONS FROM SENATOR COONS

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

Yes. And I would faithfully apply Eleventh Circuit and United State Supreme Court precedent regarding the role that express enumeration of a particular right plays in the case at issue.

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

Yes. As required by *Washington v. Glucksberg*, 521 U.S. 702 (1997), I would consider sources including the common law, practice in the American Colonies, state statutes and judicial decisions, and long-established traditions.

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

Yes. If the right has been previously recognized by the Supreme Court or the Eleventh Circuit, then those holdings would bind me. Absent any such holding from those two courts, I could look to decisions from other courts of appeals as persuasive authority.

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

Yes.

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

Both *Casey* and *Lawrence* are binding precedent, and I would apply them in faithfully along with other binding precedents.

- f. What other factors would you consider?

I would consider any other binding precedent from the United States Supreme Court or

the Eleventh Circuit Court of Appeals, and any factors described therein.

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

The Fourteenth Amendment applies to both race and gender. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996).

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

As a lower court judge, I would respond to the argument by pointing out *United States v. Virginia* and other binding precedents on the issue.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I do not have any information on why *United States v. Virginia* was filed or resolved at the time when it was filed or resolved.

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

The Fourteenth Amendment requires that same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." *Obergefell*, 135 S. Ct. at 2607.

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

It is my understanding that this question is the subject of litigation, and Canon 3(A)(6) of the Code of Conduct for United States Judges therefore prohibits me from answering it.

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

Yes, under the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, under the Supreme Court's decisions in cases including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Yes, under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

n/a

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

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

If confirmed as a lower court judge, I would follow all binding Supreme Court precedent and all binding Eleventh Circuit precedent. Where applicable precedent from those two courts make it appropriate to consider such evidence, I would do so in accordance with that precedent.

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

The role of sociology, scientific evidence, and data depends on the nature of the judicial analysis at issue. Again, I would consider binding Supreme Court precedents and binding Eleventh Circuit precedents to determine what role each of those sources should play in a given case.

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

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

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

My understanding is that there has been a significant amount of scholarly discussion of this topic during the last several decades. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995); Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429; see also Calabresi & Perl, 2014 Mich. St. L. Rev. at 432 n.7 (collecting other academic debaters). From the perspective of a lower court judge, however, that discussion is an academic one, and does not impact the binding force of the *Brown* decision in any way.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”?
- Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited May 30, 2018).

As a sitting judge, I do not “respond to criticism of originalism.” Instead, I decide cases according to the binding legal authorities.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

For a lower court judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If, on the other hand, the Supreme Court has decided that some other mode of interpretation is appropriate in interpreting the meaning of a constitutional provision, that is dispositive. I would faithfully apply binding precedents of the Supreme Court regardless of their methodology.

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

Please see my response to question 5(c).

- e. What sources would you employ to discern the contours of a constitutional provision?
6. You authored the majority opinion in *Barnett v. Caldwell*, finding that a teacher could claim qualified immunity in a case involving the wrongful death of an unsupervised student.

- a. Why did you determine that the school’s policy requiring supervision was not “so clear, definite, and certain in directing [the teacher’s] actions that it established a ministerial duty requiring no exercise of discretion whatsoever”?

The Court unanimously concluded that

the terms “unsupervised,” “supervise,” or “supervision” are not defined or otherwise explained anywhere in the policy or handbook. See *Grammens*, 287 Ga. at 620-621, 697 S.E.2d 775 (holding teacher shielded by official immunity because school policy did not define key term, therefore requiring teacher to exercise discretion in implementation of the policy). Offering no specificity in the general duty of student supervision, the written policy cannot be read to require an absolute or definite duty of teachers to be physically present in the classroom, having their students within eyesight at all times. Cf. *Eshleman*, 297 Ga. at 367, 369, 774 S.E.2d 96. Indeed, common experience tells us that there can be a wide range of appropriate supervision in different contexts. Moreover, the policy does not state that a teacher may never leave the classroom, but allows that a teacher may do just that, so long as the students are supervised “by an APS certificated employee.”

Nor do the principal's statements to the private investigator that the policy was explained to teachers by telling them that they “should never leave students unsupervised,” and demonstrating that students should not be out of the teacher's eyesight reveal sufficient clarity. Although his explanations provide some additional direction regarding the school's expectations, the principal's instructions and examples are not enough to render the otherwise general policy sufficiently specific and definite. That fact is evidenced by the principal's acknowledgement in his deposition that a teacher could leave a classroom unsupervised “[i]f a teacher had an emergent situation and she had to run out of the classroom to a restroom or something,” and in his statement that although it “would not be the ideal situation,” it “would still constitute supervision” if a teacher was not able to see her students but could hear and have a “general understanding of what is going on in that classroom.” It is true that the principal also stated that the policy was unambiguous in its requirements, but his opinion does not make it so.

Under both the text of the handbook and the explanation of the principal, the policy calls for a teacher to exercise personal deliberation and judgment in determining whether to leave a classroom, and if so, how to go about providing for supervision of the class during the absence. That sort of room for discretion is meaningful. See, e.g., *Eshleman*, 297 Ga. at 369, 774 S.E.2d 96 (explaining that officer required to take reasonable measures to restrain police dog must exercise personal deliberation and judgment in deciding how much of a danger dog presented; if fence was sufficient; how high fence needed to be; if tether was required; whether rope or chain was strong enough; how to protect visitors; and what sort of portable kennel was sufficient to restrain dog during transport). Caldwell had to examine the facts before her—why she needed to leave her

classroom, the amount of time she contemplated being gone, the grade-level, age, and temperament of her students, and the fact that Kanu was alone on the other side of a bifold partition. She then needed to reach a conclusion based on those facts—deciding whether to leave at all, whom to ask for assistance (Kanu, the hall monitor, or someone else), and what to request that person to do. The policy requires a teacher supervising students to engage in these deliberations, but it does not supply simple answers. As a court, the wisdom of an employee's conclusion is not the question we evaluate; instead, we are tasked with discerning whether the employee had a range of options to choose from based on her own judgment. And in a situation where an official has that sort of discretion, the official is shielded from personal liability for the choices she makes, even if they are poor ones, so long as the official does not act with actual malice or intent to cause injury.

Barnett v. Caldwell, 302 Ga. 845, 849 (2018).

- b. Why did you decline to apply the dictionary definition of “supervise” or “supervision” when evaluating the clarity of the policy?

Please see my response to question 6(a).

- c. The decision states, “[T]he judgment that Georgia’s Constitution makes is that official immunity will protect those who make bad decisions in order to also protect those who make good ones, and to ensure that public officials can carry out their day-to-day service to the people of this State without fear of litigation.” Did you consider the interests of parents who rely on public school teachers to keep their classroom environments safe?

The majority opinion considered all of the factors that binding Georgia precedent requires courts to consider.

7. In a March 2017 speech to the Young Lawyers’ Division of the Georgia Bar, you noted that while working in the Attorney General’s office, you “represented the State from a more federalist perspective.” In this speech, you also stated, “The Executive Branch, whichever party is in control, often has a temptation to go beyond the bounds set out by the law, or by the constitution, and intrude on state prerogatives.”

- a. Please provide examples of representing the state “from a more federalist perspective.”

The State of Georgia, represented by the Attorney General, participated in litigation before the United States Supreme Court together with other states. Some of those cases involved challenges to federal actions that the States asserted were beyond federal authority, including, for example, *Georgia v. McCarthy*, No. CV 215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), *appeal held in abeyance sub nom. Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317 (11th Cir. 2016) and the associated litigation.

- b. Please provide examples where Republican and Democratic administrations have gone “beyond the bounds set out by the law, or by the constitution, and intrude on state prerogatives.”

My recollection of the speech in question indicates that I was discussing the positions that I had taken as an advocate for the State of Georgia. It would be inappropriate for me to offer any examples based on my personal opinion, although I will note that the text of my remarks states reflects my client's position that the Executive Branch often has a "temptation" to exceed the bounds set by law; whether the Executive Branch has actually given in to that temptation on one or more issues would be a different question.

8. When physicians appealed the dismissal of their challenge to a Georgia law criminalizing abortions performed after 20 weeks of pregnancy, HB 954, in *Lathrop v. Deal*, you reportedly stated, "We think your order was correct and we expect it will be upheld."
 - a. What was the basis for your belief that the dismissal of the case would be upheld?

While I do not recall making that particular statement, I believe that I would have been expressing the position of my client, the State of Georgia, that the trial court was correct in its conclusion that sovereign immunity barred the lawsuit; the Georgia Supreme Court affirmed the trial court's order in *Lathrop v. Deal*, 301 Ga. 408 (2017).

- b. Is it constitutional for a state to criminalize abortions performed prior to viability?

The Supreme Court has held in numerous cases, including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), that the right to privacy protects a woman's right to an abortion. The *Lathrop v. Deal* case raised only questions of state constitutional law.

9. In your Senate Judiciary Questionnaire, you indicated that you worked on *Shelby County v. Holder*, 570 U.S. 529 (2013).
 - a. Please explain in detail your role in working on this matter.

As described in my Senate Judiciary Questionnaire, I reviewed and edited the amicus brief filed by Georgia and other states.

- b. Do you believe that race discrimination continues to exist?

Yes.

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

As I understand it, that question is currently contested in litigation across the country; accordingly Canon 3(A)(6) of the Code of Conduct for United States Judges prevent me from offering an opinion on the issue.

- d. Do you believe that, since 2000, preclearance has prevented any states or localities from enacting any unconstitutional voting restrictions?

I have not studied that issue.

- e. The Supreme Court in *Shelby County* did not strike down section 5 itself, but the Court did hold that the Voting Rights Act's coverage formula was unconstitutional and could not "be used as a basis for subjecting jurisdictions to preclearance." 570 U.S. 529, 557 (2013). The Court recognized Congress's power to "draft another [coverage] formula based on current conditions." *Id.* at 557. Do you agree that Congress could craft a constitutionally permissible coverage formula based on current conditions?

Yes, under *Shelby County*, "Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'" 570 U.S. at 557 (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500-01 (2013)).

10. In your Senate Judiciary Questionnaire, you indicated that you worked on *Sebelius v. Hobby Lobby Stores, Inc.*, *sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

- a. Please explain in detail your role in working on this matter.

As described in my Senate Judiciary Questionnaire, I reviewed and edited the amicus brief filed by Georgia and other states.

- b. What is the appropriate legal analysis when a business owner's religious rights interfere with the constitutionally protected liberty interests of his/her employees?

The Supreme Court has described the appropriate legal analysis in *Hobby Lobby* and other cases, and I would apply those precedents faithfully if confirmed as a lower court judge.

- c. Is it a correct reading of your brief that the arguments set forth therein were not limited to closely held companies, but rather would, in your view, extend to publicly held companies as well?

The amicus brief to which I believe that you are referring was filed on behalf of Georgia and other states, and addressed closely-held family-owned businesses. To the best of my recollection the brief did not take a position on other types of companies.

- d. Do you agree that the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* was limited to closely held companies like Hobby Lobby?

The Supreme Court held in that case that "that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775, 189 L. Ed. 2d 675 (2014). As with other binding Supreme Court precedents, I would apply that holding faithfully.

11. In your Senate Judiciary Questionnaire, you indicated that you worked on *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

- a. Please explain in detail your role in working on this matter.

As described in my Senate Judiciary Questionnaire, I reviewed and edited the amicus brief filed by Georgia and other states.

- b. The amicus brief that Georgia filed in *Obergefell v. Hodges* argued that finding a constitutional right to marriage equality would “undermine the democratic process.” Do you agree that a purpose of enshrining rights in the Constitution is to protect those rights from infringement by the government?

As described in the question, the brief that is referenced was filed on behalf of Georgia and other states. The litigation positions were the states’ and not my own, and it would be inappropriate for me to offer a personal opinion as a judicial nominee.

- c. Objectors made the same argument about undermining the democratic process when the Supreme Court struck down laws banning interracial marriage, which a majority of states had when *Loving v. Virginia*, 388 U.S. 1 (1967), was decided. Do you agree that it is a federal court’s job to strike down laws that violate due process and equal protection?

Please see my response to question 11(b).

12. Please provide a list of all cases you have worked on that entailed challenging environmental laws and/or regulations, and explain in detail your work on these matters.

I do not have any records listing the cases that I have worked on challenging environmental laws and/or regulations. One example of such a case is *Georgia v. McCarthy*, No. CV 215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), *appeal held in abeyance sub nom. Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317 (11th Cir. 2016).

13. In your Senate Judiciary Questionnaire, you indicated that you worked on *G.G. v. Gloucester County School Board*, 136 S. Ct. 1083 (2016).

- a. Please explain in detail your role in working on this matter.

As described in my Senate Judiciary Questionnaire, I reviewed and edited the amicus brief filed by Georgia and other states.

- b. Do you agree that Title IX prohibits discrimination based on the failure to conform to gender stereotypes?

As I understand it, that question is currently contested in litigation across the country; accordingly, Canon 3(A)(6) of the Code of Conduct for United States Judges prevents me from offering an opinion on the issue.

14. In your Senate Judiciary Questionnaire, you indicated that you worked on *Glossip v. Gross* 135 S. Ct. 2726 (2015).

- a. Please explain in detail your role in working on this matter.

As described in my Senate Judiciary Questionnaire, I reviewed and edited the amicus brief

filed by Georgia and other states.

- b. The amicus brief that Georgia and 12 other states filed argued that a method of execution is unconstitutional “only if it is deliberately designed to inflict pain.” Has this standard ever been accepted by the Supreme Court as the appropriate standard under the Eighth Amendment?

As the brief describes, Justices Thomas and Scalia proposed in a concurring opinion that a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.” See *Baze v. Rees*, 553 U.S. 35 (2008) (Thomas, J., concurring).

- c. The amicus brief further argued that “the Court should strictly require offenders who are challenging a method of execution to propose a ‘feasible and readily implemented’ alternative that alleviates ‘a substantial risk of severe pain.’” Please provide an example of another context in which a constitutional violation is only found if the individual raising the challenge can cure the infirmity.

I have not had occasion to consider that question.

15. Please provide a list of all bills that you worked on as the Attorney General’s Counsel for Legal Policy, and explain in detail your work on these matters.

I do not have any records listing the bills that I worked on as the Attorney General’s Counsel for Legal Policy. In my work on legislative matters I consulted with staff from the legislature, members of the legislature, staff in the Office of the Attorney General, and the Attorney General. The specific details of my counsel within the Office of the Attorney General are subject to the attorney-client privilege.

Questions for the Record
Senator Mazie K. Hirono
Britt Cagle Grant, Eleventh Circuit

You served in senior policy roles in the Office of the Georgia Attorney General. In those roles, you helped prepare briefs in some of the most controversial cases of the past several years. I want to ask you questions about the legal and constitutional bases for the positions you argued in several of those cases.

1. While serving as Georgia’s Solicitor General, you helped draft a Supreme Court amicus brief submitted by Georgia, Louisiana, and 13 other states in *Obergefell v. Hodges*. Your brief rejected the notion that “[d]efining marriage in man-woman terms” violates the 14th Amendment’s Equal Protection Clause because doing so:

“rationally structure[s] marriage around the biological reality that the sexual union of a man and a woman — unique among all human relationships — produces children.” Your brief also argued that maintaining a “man-woman” definition of marriage: “does not violate due process because the right to marry someone of the same sex is not ‘objectively, deeply rooted in this Nation’s history and tradition.’”

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

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

Yes, under *Obergefell*, the Fourteenth Amendment requires that same-sex couples to be afforded the right to marry “on the same terms accorded to couples of the opposite sex.” *Obergefell*, 135 S. Ct. at 2607. As with all other binding Supreme Court precedent, I would faithfully apply the *Obergefell* decision.

2. While serving as Counsel for Legal Policy, you worked on an *amicus brief* submitted in the U.S. Supreme Court in *Shelby County v. Holder* on behalf of Georgia, and five other states. Your brief urged the Court to strike down Section 5 of the Voting Rights Act (VRA), because, you argued, “significant evidence of voting discrimination in the southern States,” no longer existed.

Congress made a different factual finding before reauthorizing Section 5 of the Voting Rights Act overwhelmingly in 2006. In over 20 hearings and 40,000 pages, Congress found extensive evidence showing the continuing need for Section 5 of the Voting Rights Act. In fact, after the *Shelby County* decision numerous states that were previously covered by Section 5 immediately passed onerous voter ID laws and other barriers than affected the right to vote of thousands of Americans. Courts have found that some of these laws were enacted with discriminatory purpose, not only discriminatory intent.

- a. **Do you believe that the underlying argument in your brief, that “significant evidence of voting discrimination in the southern States” no longer exists, is correct?**

Respectfully, it does not appear that the quoted language appears in the amicus brief, and I do not understand the states appearing on the brief to have made that specific argument.

- b. If you are confirmed as a judge, how can you assure us that you understand that the Voting Rights Act of 1965 enforced the guarantees of equality enshrined in the 14th and 15th Amendments, and that the law is meant to protect the right of every American to vote, regardless of race or ethnicity?**

Numerous Supreme Court precedents, including but not limited to *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803 (1966) and *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 529, 133 S. Ct. 2612 (2013), describe the meaningful purpose and positive impacts of the Voting Rights Act of 1965. As both cases explain, that law “was enacted to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *Shelby County*, 570 U.S. at 535 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 309). And as the *Shelby County* decision further explained, the Supreme Court’s decision regarding the § 5 formula “in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.” *Id.* at 557. As with other Supreme Court precedents, I would faithfully apply all binding law regarding the Voting Rights Act.

3. As Georgia’s Solicitor General, you “led Georgia’s efforts” in *Texas v. United States*, a challenge to the expansion of the Deferred Action for Childhood Arrivals (DACA) program to more people eligible including the parents of DREAMers, the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). According to your Questionnaire, you:

“coordinat[ed] with Texas as the lead state in the litigation, as well as other participating states,” and your “work included strategic planning, participating in briefing and editing, and coordinating with other attorneys in the Georgia Attorney General’s Office to ensure consistent litigation strategy and arguments in related cases.”

Will you recuse yourself if any cases regarding DACA or DAPA should come before you?

As with any case that comes before me if I am fortunate enough to be confirmed to the Eleventh Circuit, I would carefully review and apply both 28 U.S.C. § 455 and the Canons of Judicial Conduct to determine if recusal was appropriate.

**Nomination of Britt Cagle Grant to the
United States Circuit Court for the Eleventh Circuit
Questions for the Record
Submitted May 30, 2018**

QUESTIONS FROM SENATOR BOOKER

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

Yes.

2. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.¹ One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.² Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

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

As I understand it, that question is currently contested in litigation across the country; accordingly Canon 3(A)(6) of the Code of Conduct for United States Judges prevents me from offering an opinion on the issue.

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

Please see my response to question 2(a).

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

Please see my response to question 2(a).

¹ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

² Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

Questions for the Record from Senator Kamala D. Harris
Submitted May 30, 2018
For the Nomination of:

Britt Cagle Grant, to be U.S. Court of Appeals for the Eleventh Circuit (Georgia)

1. In your capacity as the Attorney General's Counsel for Legal Policy, you advised on the Attorney General's legislative priorities and initiatives. While nominees do not comment on pending litigation or confidential matters, there is substantial precedent for nominees before this Committee to confirm *whether* they worked on certain legal issues while in the service of other government officials.

a. Did you work on or advise on the following matters in any capacity?

- i. **“Georgia Health Care Freedom and ACA Noncompliance Act,” which prohibited the establishment of a healthcare exchange and barred the state’s Insurance Commissioner “from enforcing any health care insurance related provision of” the Affordable Care Act.**

I have no recollection of working on or advising on that bill.

- ii. **The “Safe Carry Protection Act,” which eliminated previous restrictions on bringing firearms into bars and places of worship.**

I have no recollection of working on or advising on that bill.

- iii. **The “Georgia Firearms Freedom Act,” which stated that any guns or ammunition “manufactured commercially or privately in Georgia and that remains within the borders of Georgia shall not be subject to federal law or regulation, including registration, under the authority of Congress to regulate interstate commerce.”**

I have no recollection of working on or advising on that bill.

- iv. **The “Georgia Constitutional Carry Act of 2013,” which eliminated restrictions on carrying guns in certain sensitive locations, including public parks.**

I have no recollection of working on or advising on that bill.

- v. **The “Federal Abortion Mandate Opt-out Act,” which prohibited abortion coverage to be provided by a qualified health plan offered within the State of Georgia except in medical emergencies.**

I have no recollection of working on or advising on that bill.

- vi. **The “Protecting Georgia Sovereignty Act of 2013,” which created a commission charged with recommending a process whereby Georgia might nullify federal laws deemed to be outside the scope of the delegated powers.**

I have no recollection of working on or advising on that bill.

2. You served as the Attorney General’s Counsel for Legal Policy and “directed legislative and policy initiatives for the Office of the Attorney General and served as a legal advisor to the Attorney General.”

You were also the office’s chief lobbyist, advancing the Attorney General’s legislative priorities. Nominees have avoided answering questions when it has involved legal advice provided within the scope of representing their client. However, I would like to explore whether you had a role in helping shape the policy position taken by the Attorney General’s Office.

- a. **At the Attorney General’s office, did your role extend beyond legal advice, such that you were advising the Attorney General on state policy?**

The Attorney General of Georgia has statutory authority, constitutional responsibility, or both, for providing opinions on legal questions to state agencies and departments; representing the State of Georgia in all capital felony appeals before the Supreme Court of Georgia; representing the State of Georgia in all civil cases before any court; representing the State of Georgia in all cases appearing before the Supreme Court of the United States; prosecuting public corruption cases where criminal charges are filed against any person or business for illegal activity when dealing with the State of Georgia; initiating civil or criminal actions on behalf of the State of Georgia; and preparing and reviewing contracts and agreements on behalf of the State of Georgia. Any advice or conversations that I had with the Attorney General related to these functions were privileged either as work product or legal advice. I did provide advice relating to legislative issues that may or may not have been privileged depending on the precise context. The positions taken by the State of Georgia or the Office of the Attorney General were always those of the State or the Attorney General.

3. **As Counsel for Legal Policy, you noted you helped “draft, review, and/or edit” an amicus brief submitted in the U.S. Supreme Court in *Shelby County v. Holder*. Did you have a role in deciding the Attorney General’s position in that amicus brief? If so, please describe it.**

No.

4. **As Counsel for Legal Policy, what was your role in deciding the Attorney General’s position in the amicus brief opposing the Affordable Care Act’s Contraceptive Coverage Requirement in *Sebelius v. Hobby Lobby Stores*?**

I did not have a role in deciding the Attorney General's position on the amicus brief in the *Sebelius v. Hobby Lobby* case.

5. **Who decided which cases Georgia would respond to as amici? What was your interaction with that individual?**

The Georgia Attorney General, who was my direct supervisor.

6. **As Georgia's Solicitor General, did you have any role in deciding the state's final policy position on the following?**

- a. **In *Texas v. United States*, the challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents program, also known as DAPA.**

No.

- b. **In *Obergefell v. Hodges*, challenging the Fourteenth Amendment's provision of a right to same-sex marriage.**

No.

- c. **In *Friedman v. City of Highland Park*, challenging an Illinois town's ban on assault weapons in the wake of *Heller* and *McDonald*.**

No.

7. **Did you have any role in deciding the state's final policy position on the following?**

- a. **Georgia's amicus brief in *Gloucester County School Board v. G.G.*, where a transgender student challenged a school board policy prohibiting transgender students from using bathrooms aligned with their gender identity.**

No.

- b. **Georgia's amicus brief in *Glossip v. Gross* urging the Court to uphold the constitutionality of Oklahoma's three-drug protocol used in executions, as it fell short of being "deliberately designed to inflict pain."**

No.

- c. **Georgia's amicus brief in *Secretary of the Indiana Family and Social Services Administration v. Planned Parenthood of Indiana* (2013), arguing that Indiana could, consistent with the federal statutes governing Medicaid, exclude certain healthcare providers — namely, Planned Parenthood — from participating in the state's Medicaid program.**

No.