Nomination of Barbara Lagoa to the U.S. Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. In January 2019, before you joined the Florida Supreme Court, the Court issued an opinion holding that the party that wins in mortgage foreclosure litigation is entitled to attorney's fees, even if the winning party is the homeowner.

   Three months after you were appointed to the Florida Supreme Court by Governor Ron DeSantis, you joined the court in withdrawing that decision. As a result, if a homeowner successfully challenges a foreclosure, that homeowner is often no longer entitled to attorney's fees. (Glass v. Nationstar Mortgage, LLC (2019))

   a. Before your appointment to the Florida Supreme Court, did you and Governor DeSantis ever discuss the Court's decision in *Glass v. Nationstar Mortgage*?

   No.

   b. Did you and Governor DeSantis otherwise discuss your views on the award of attorney's fees in foreclosure cases?

   No.

   c. Please explain to us why you joined the court in withdrawing a prior Supreme Court opinion.

   Unlike the Supreme Court of the United States, which exercises a general power to review lower court decisions by way of writ of certiorari, the Supreme Court of Florida is a court of limited appellate jurisdiction. It has the constitutional authority to review lower court decisions only if they fall within one of the grounds enumerated in Article V, Section 3(b) of the Florida Constitution, most of which provide the Court with discretionary, as opposed to mandatory, jurisdiction. *See, e.g., Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) (England, J. concurring) (discussing history of 1980 amendment to the Florida Constitution limiting the jurisdiction of the Supreme Court of Florida). Absent one of those enumerated grounds, the Supreme Court of Florida has no jurisdiction to review a lower court decision. One of the constitutionally enumerated grounds permits review of a decision by a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(2), Fla. Const.

   The Supreme Court of Florida's opinion in *Glass* issued on January 4, 2019. The dissent noted that the Court lacked constitutional authority to review the case and explained in detail the lack of an express and direct conflict between decisions of

district courts of appeal on the same question of law that could vest the court with jurisdiction to review those decisions. Because the January 4, 2019, opinion in *Glass* barred the parties from exercising their right under Florida Rule of Appellate Procedure 9.330 to file a motion for rehearing, the respondent filed a motion to recall the mandate pursuant to Florida Rule of Appellate Procedure 9.340(a) and a motion for clarification pursuant to Florida Rule of Appellate Procedure 9.330(a). That motion asserted that the court lacked jurisdiction to hear the case because the constitutional requirement of an express and direct conflict on the same question of law was lacking and further sought clarification on the January 4, 2019, opinion. The petitioner responded to the motion to recall and/or for clarification. On April 18, 2019, the Court issued its written opinion in *Glass* granting respondent's motion to recall the mandate, withdrawing the January 4, 2019, initial opinion and further explaining that the Court "initially accepted review of the decision of the Fourth District Court of Appeal in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017, based on express and direct conflict with the decision of the First District Court of Appeal in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. 1st DCA 2008). Upon further consideration we conclude that the jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this review proceeding." The term "improvidently granted" is used by the Supreme Court to mean that it lacked jurisdiction to hear the case.

Indeed, because the Supreme Court of Florida is a court of limited appellate jurisdiction, the Court through many iterations of membership on the Court has discharged jurisdiction and dismissed review after consideration of a matter. *See, e.g., U.S. Bank National Association v. Anthony-Irish*, 256 So. 3d 800 (Fla. 2018); *Dozier v. State*, 214 So. 3d 541 (Fla. 2017); *Godwin v. State*, 192 So. 3d 471 (Fla. 2016); *Miranda v. State*, 181 So. 3d 1188 (Fla. 2016); *Harris v. State*, 161 So. 3d 395 (Fla. 2015); *T.S. v. State*, 158 So. 3d 556 (Fla. 2015); *Williams v. State*, 156 So. 3d 1034 (Fla. 2015); *Smith v. Southland Suites of Ormond Beach, LLC*, 148 So. 3d 1251 (Fla. 2014); *Brantley v. State*, 115 So. 3d 360 (Fla. 2013); *Daniels v. State*, 103 So. 3d 133 (Fla. 2012); *Winslow v. School Board of Alachua County*, 88 So. 3d 112 (Fla. 2012); *Tetzlaff v. Florida Unemployment Appeals Commission*, 926 So. 2d 1267 (Fla. 2006); *Stine v. Jain*, 873 So. 2d 326 (Fla. 2004); *Henry v. State*, 590 So. 2d 419 (Fla. 1991). As with other opinions discharging jurisdiction such as those cited above, the April 18, 2019, written opinion in *Glass* is a comment on the Court's constitutionally limited appellate jurisdiction and not a comment on the merits of the party's claims.

2. In 2019, after you joined the Florida Supreme Court, you authored opinions supporting Governor DeSantis' use of executive power to suspend officials.

   In your opinion, you wrote that an earlier opinion by the Florida Supreme Court "improperly inserted the courts into a process that the Constitution leaves to the Governor and the Senate." You further stated that the prior opinion was "premised on unsound legal principles with no support in the plain and unambiguous language of the Florida Constitution." (Jackson v. DeSantis (2019))

When do you think it is appropriate for courts to review the Executive Branch's exercise of authority?

This question refers to the opinion that I authored in *Israel v. DeSantis*, 269 So. 3d 491 (Fla. 2019) and the concurring opinion I authored in *Jackson v. DeSantis*, 268 So. 3d 662 (Fla. 2019). Those two cases dealt with challenges to the governor's suspension of two constitutional officers, in the case of *Israel* a sheriff and in the case of *Jackson* a superintendent of schools. As long recognized by the Supreme Court of Florida, the Florida Constitution creates a unique process for the suspension and the removal or reinstatement of constitutional officers that limits the judiciary's role in that process. *See, e.g.*, *Israel*, 269 So. 3d at 495. As further explained in *Israel*, "the Constitution requires the Governor to issue an executive order of suspension 'stating the grounds' of the officer's suspension. While a suspended officer may seek judicial review of an executive order of suspension to ensure that the order satisfies that constitutional requirement, the judiciary's role is limited to determining whether the executive order, on its face, sets forth allegations of fact relating to one of the constitutionally enumerated grounds of suspension. [*State ex rel. Hardie v. Coleman*, 155 So. 129, 133 (Fla. 1934).] Thus, '[a] mere arbitrary or blank order of suspension without supporting allegations of fact, even though it named one or more of the constitutional grounds of suspension, would not meet the requirements of the Constitution.' *Id.* However, where the executive order of suspension contains factual allegations relating to an enumerated ground for suspension, the Constitution prohibits the courts from examining or determining the sufficiency of the evidence supporting those facts, as the 'matter of reviewing the charges and the evidence to support them is solely in the discretion of the Senate.' *Id*. at 134; *see also State ex rel. Kelly v. Sullivan*, 52 So. 2d 422, 425 (Fla. 1951) ('It is the function of the Senate, and never that of the Courts, to review the evidence upon which the Governor suspends an officer in the event the Governor recommends his removal from office.')." *Id.* at 495-96. In *Israel*, the Supreme Court concluded that the Governor's order of suspension satisfied the limited judicial inquiry authorized by the Florida Constitution.

More generally, the federal and Florida courts are regularly tasked with reviewing the Executive Branch's exercise of authority. One example that occurs frequently is the judicial review of executive agency actions. Another example arising with some regularity in Florida courts is the judicial review of the Executive Branch's exercise of authority by way of writ of quo warranto. *See, e.g.*, *Fla. House of Representatives v. Crist*, 990 So. 2d 1035 (Fla. 2008) (governor exceeded his authority when he bound Florida to a gaming contract with the Seminole Tribe of Florida); *Ayala v. Scott*, 224 So. 3d 755 (Fla. 2017) (governor did not exceed his constitutional authority when he reassigned death-penalty eligible cases from one State Attorney to another). While it is inappropriate for me to comment on particular circumstances or hypotheticals involving when a court should or should not review the Executive Branch's exercise of authority, *see* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct, if confirmed I will faithfully apply all precedents of the Supreme Court of the United States and the Eleventh Circuit as they relate to judicial review of the executive's exercise of its authority.

3. In May 2019, after your appointment to the Florida Supreme Court, you joined the court in a 5-2 opinion adopting the *Daubert* standard for expert testimony. The decision was made without following the comment and review procedure established by the court to adopt such rules. In dissent, Justice Robert Luck argued that the holding was procedurally untenable, writing that "we must follow our own rules if we expect anyone else to." (In re Amendments to Florida Evidence Code (2019))

   Why did you join this opinion amending the Florida Evidence Code without allowing for comment from the public?

   In brief response to this question, as noted in the per curiam opinion of *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019), extensive public comment to the Supreme Court of Florida regarding the adoption of the *Daubert* standard in Florida state courts already had occurred, including voluminous pages of written submissions and oral argument before the Court. The Court concluded in its per curiam opinion that, in light of the extensive briefing the Court had already received on the issue and "mindful of the resources of parties, members of The Florida Bar, and the judiciary," it would not require "the process to be repeated." *Id.* at *2-3. This same point—that the Court had already followed Florida Rule of Judicial Administration 2.140 and received extensive public comment on the question of whether or not to adopt the *Daubert* standard—was also addressed in the concurring opinion authored by Justice Lawson that more specifically addressed Justice Luck's dissent.

   In more detailed response, in 2013, the Florida Legislature amended sections 90.702 and 90.704 of the Florida Evidence Code. Those amendments rejected the *Frye* standard for admission of expert testimony, which had been used by Florida state courts until that point, and replaced it with the *Daubert* standard set forth in Federal Rule of Evidence 702. Very broadly speaking, under the separation of powers provided for in Article II, section 3 of the Florida Constitution, the Florida Legislature has the exclusive constitutional authority to enact substantive law, while Article V, section 2(a) of the Florida Constitution vests the Supreme Court of Florida with the exclusive constitutional rule-making authority regarding procedural rules of court.

   After the Legislature's amendment of the Florida Evidence Code, the Supreme Court of Florida solicited public comment, including comment from The Florida Bar, pursuant to Florida Rule of Judicial Administration 2.140. That process culminated in *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017). In addition to the volume and depth of written comments received by the Court, the Court held oral argument regarding the proposed changes to the Florida Evidence Code. In its 2017 administrative opinion, the Supreme Court of Florida declined to adopt the Legislature's *Daubert* amendments to the extent that the amendments were procedural. The Supreme Court, however, did not answer the question of whether those amendments were substantive (in which case the Legislature had the authority to enact them) or procedural (in which case the Legislature did not).

   In October 2018, in *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018), the Supreme Court of Florida held that the Legislature's amendment to section 90.702 of the Florida Evidence

Code was procedural in nature and therefore beyond the constitutional authority of the Legislature. In light of *DeLisle*'s resolution of the substantive versus procedural question, in *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019), the Supreme Court revisited its earlier administrative decision from 2017 and adopted the amendments to the extent that they were procedural.

As noted above, the per curiam portion of the 2019 decision summarized the extensive public comment the Court had received on the amendments. 2019 Fla. LEXIS 818 at *2-3. In addition, Justice Lawson's concurring opinion specifically addressed Justice Luck's dissent. As explained in the concurring opinion, "[w]ith respect to Justice Luck's contention that we are only authorized to adopt or amend a rule of court pursuant to Florida Rule of Judicial Administration 2.140, I respectfully disagree that the majority is not following the multistep process set forth in rule 2.140. As explained in the majority's per curiam opinion, that process was followed here, with the result that the Court has had the benefit of Florida Bar recommendations, oral argument, and extensive public comments, pro and con. All that this Court is doing now is reconsidering its earlier administrative (i.e., nonadjudicative) decision not to adopt the proposed *Daubert* amendments. Nothing in the text of rule 2.140 prohibits this Court from doing so." *Id*. at *8. In further response to Justice Luck's dissent, the concurring opinion noted that "the Court has already received exhaustive input on this issue from the bench, bar, and public—explaining why we need not seek additional comment now. These cases [cited earlier in the concurring opinion], therefore, demonstrate how isolated the dissent is reading rule 2.140 as stripping this Court of its constitutional authority—or as severely self-limiting that authority such that we are powerless to act now without re-consulting one of the bar committees that we recognize by rule. Not only does no other member of our current court read rule 2.140 in this self-limiting fashion, these cases and rule II.G.1 demonstrate that prior courts have not read rule 2.140 as displacing the Court's constitutional power either. Given that we have the constitutional authority to adopt or amend these rules, art. V, § 2(a), Fla. Const., and that rule II.G.1 expressly recognizes our inherent authority to do so *sua sponte*, there is no reason for (or value in) repeating the rule 2.140 process with respect to this particular rule change." *Id.* at *11-12.

4. In 2015 and 2016, while serving on the Third District Court of Appeal, you heard a set of cases where Florida circuit courts denied petitions for adjudication of dependency. These denials supported the practice of the Florida Department of Children and Families of summarily denying access to an adjudication of dependency for orphaned immigrants, solely because granting access could lead these immigrants to obtain relief in the form of Special Immigrant Juvenile Status. You affirmed circuit court denials in three cases. (*In re J.A.T.E.* (2015); *M.J.M.L. v. Dep't of Children & Family Servs.* (2015); *W.B.A.V. v. Dep't of Children & Families* (2016))

   In *W.B.A.V. v. Department of Children & Families*, Judge Salter—who sits on the Third District—wrote a dissent focusing on the need for both an evidentiary hearing on the dependency petitions and individualized findings as to the petition of each minor. You, however, affirmed the circuit court's denial without comment.

In 2017, the Florida Supreme Court overturned the practice of summarily denying adjudications of dependency, citing another dissent from Judge Salter in a case raising similar issues as those raised in *W.B.A.V.* The Florida Supreme Court "disapprove[d] of the categorical summary denial of dependency petitions filed by immigrant juveniles, and f[ou]nd no authority in the statutory scheme that allow[ed] for dismissal or denial without factual findings by the circuit court." *B.R.C.M. v. Fla. Dep't of Children & Families* (2017).

Why did you conclude that the Department of Children and Families could summarily deny orphaned immigrants an adjudication of dependency?

As noted in the question above, I was on panels that affirmed circuit court denials in the following three cases, *In the Interest of J.A.T.E.*, *M.J.M.L. v. Dep't of Children & Family Servs.*, and *W.B.A.V. v. Dep't of Children & Families*. As a judge on the Third District Court of Appeal, I was bound by existing prior panel precedent from that court, and the three cases listed above cited that precedent. Specifically, on July 15, 2015, a three-member panel of the Third District issued the following two cases on the same question of law, *In the Interest of B.Y.G.M.*, 176 So. 3d 290 (Fla. 3d DCA 2015) and *In the Interest of K.B.L.V.,* 176 So. 3d 297 (Fla. 3d DCA 2015). I was not a member of the panel that issued those cases. Those two cases were binding on subsequent panels of the Third District Court of Appeal like the panels I sat on. *See e.g.*, *State v. Washington*, 114 So. 3d 182, 188-89 (Fla. 3rd DCA 2012) ("This panel is not free to disregard, or recede from that [earlier] decision; only this Court, sitting en banc, may recede from an earlier opinion.").

5. In 2006, in *State v. Green*, the Florida Supreme Court held that criminal defendants could vacate their sentences and judgments up to two years after the judgment (or, for earlier convictions, two years after the decision in *Green*) if (1) the trial court did not warn the defendant of deportation implications of pleading guilty, and (2) the defendant would not have entered the plea if properly advised.

   In 2008, you heard an appeal implicating *Green* in a case called *State v. Sinclair*. In that case, you reversed the trial court's decision to vacate Sinclair's sentence "[b]ecause defendant's motion did not allege that his plea [wa]s the sole basis for deportation."

   a. **In *Green*, did the Florida Supreme Court address whether a defendant's sentence could be vacated *only* if a guilty plea formed the "sole basis for deportation"? If you believe the Court did, please identify the relevant portion of the Court's opinion.**

      The issues before the Supreme Court of Florida in *State v. Green*, 944 So. 2d 208 (Fla. 2006) involved resolving a conflict among the Florida district courts of appeal as to whether anything less than the initiation of deportation proceedings established a threatened deportation under *Peart v. State*, 756 So. 2d 42 (Fla. 2000) and when the two-year period for moving to withdraw a plea under Florida Rule of Criminal Procedure 3.850 began to run. Unlike the defendant in *State v. Sinclair*, 995 So. 2d 621 (Fla. 3d DCA 2008), the defendant in *Green* was not subject to deportation on a separately charged basis other than his guilty plea. The Supreme Court of Florida's

decision in *Green* was therefore silent on and did not address the issue of whether a defendant's sentence could be vacated only if a guilty plea formed the "sole basis for deportation."

b. If not, why did you add an additional factor to the test laid out by the Florida Supreme Court in *Green*?

I wrote the unanimous panel opinion in *Sinclair*. That opinion reversed the trial court's order and remanded without prejudice for Sinclair to timely file a legally sufficient motion to vacate his plea. In reaching that conclusion, I relied upon the Florida Third District Court of Appeal's prior decision in *Dumenigo v. State*, 988 So. 2d 1201 (Fla. 3d DCA 2008), which found, post-*Green*, that a defendant seeking to vacate a plea could not raise a claim of prejudice where he or she would otherwise be subject to deportation regardless of the guilty plea. As precedent from the same court, I was bound to follow the rule set forth by the prior panel in *Dumenigo*. *See e.g.*, *State v. Washington*, 114 So. 3d 182, 188-89 (Fla. 3rd DCA 2012) ("This panel is not free to disregard, or recede from that [earlier] decision; only this Court, sitting en banc, may recede from an earlier opinion."). I also relied upon persuasive authority from the Florida Fourth District Court of Appeal in *Forrest v. State*, 988 So. 2d 38 (Fla. 4th DCA 2008), which stated that a legally sufficient motion to vacate a plea must allege that the defendant "is subject to deportation based solely on the plea under attack." *Id.* at 40. The *Forrest* decision was also post-*Green*. Thus, I followed both of these post-*Green* cases, as they were factually analogous to the case at hand and constituted binding precedent and persuasive authority respectively.

6. 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 to depart from Supreme Court precedent. *See e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

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?

Although a lower court judge must always fully and faithfully follow Supreme Court precedent, in rare circumstances, a circuit court judge may respectfully suggest in an opinion that a decision of the Supreme Court is inconsistent with a prior Supreme Court precedent and/or is causing confusion in the lower courts with respect to its application. As noted above, however, the circuit judge remains bound by the existing precedent notwithstanding any issues that prompted the circuit judge to write such an opinion.

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

In the Eleventh Circuit, a panel of circuit judges may not overrule a precedent of a previous panel. *See Walker v. Mortham*, 158 F. 3d 1177, 1188-89 (11th Cir. 1998). "Under the prior precedent rule, we are bound to follow a prior binding precedent 'unless and until it is overruled by this court en banc or by the Supreme Court.'" *United States v. Vega-Castillo*, 540 F. 3d 1235, 1236 (11th Cir. 2008) (quoting *United States v. Brown*, 342 F. 3d 1245, 1246 (11th Cir. 2003).

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

The Supreme Court has emphasized that "it is this Court's prerogative alone to overrule one of its own precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), and has articulated various factors to guide its decision. As a sitting justice on the Supreme Court of Florida and a judicial nominee, it would be inappropriate for me to state my views as to when it would be appropriate for the Supreme Court to overturn its own precedent.

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

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

Roe v. Wade, 410 U.S. 113 (1973), is binding precedent of the Supreme Court and I would faithfully follow it as I would follow all precedent of the Supreme Court regardless of whether it is referred to as "super-stare decisis" or "superprecedent."

b. Is it settled law?

Yes. For lower court judges, all Supreme Court precedent, including *Roe v. Wade*, 410 U.S. 113 (1973), is settled law. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

8. 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. For lower court judges, all Supreme Court precedent, including *Obergfell v. Hodges*, 135 S. Ct. 2584 (2015), is settled law. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

9. 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 sitting justice on the Supreme Court of Florida and a judicial nominee, it would be inappropriate for me to comment on whether I agree or disagree with Justice Stevens' dissent. *See* Canon 3B(9), (10), Florida Code of Judicial Conduct; Code of Conduct for United States Judges, Canon 3(A)(6). As with all Supreme Court precedent, lower court judges are bund to fully and faithfully follow the Supreme Court's decision in *Heller*.

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

   In *Heller*, the Supreme Court stated that "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court further explained that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. As a sitting justice on the Supreme Court of Florida and a judicial nominee, it would not be appropriate for me to opine on how *Heller* may apply in a future case. See Canons 3B(9), (10), Florida Code of Judicial Conduct and Code of Conduct for United States Judges, Canon 3(A)(6).

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

   Please see my response above to question 9(a).

10. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court held that "First Amendment protection extends to corporation." *Id.* at 342. The Supreme Court further explained that "political speech does not lose First Amendment protection simply because its source is a corporation." *Id.* (quotations and citations omitted). As a sitting justice on the Florida Supreme Court and a judicial nominee, it would be inappropriate for me to state my views on this legal issue. If confirmed, I would faithfully apply *Citizens United* and all other precedents of the Supreme Court.

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

As a sitting justice on the Florida Supreme Court and a judicial nominee, it would be inappropriate for me to state my views on this legal issue.

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

As a sitting justice on the Florida Supreme Court and a judicial nominee, it would be inappropriate for me to state my views on this legal issue as it might be the subject of pending or future litigation. Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct. However, in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), the Supreme Court held that certain corporations could assert claims under the Religious Freedom Restoration Act of 1993. The Court further held that its "decision on that statutory question makes it unnecessary to reach the First Amendment claim" that had also been raised in that case. *Id.* at 736.

11. In your Questionnaire, you described your selection process for the Eleventh Circuit as including interviews with the White House Counsel's Office and the Department of Justice's Office of Legal Policy. You did not mention any communication with Senator Marco Rubio, Senator Rick Scott, or either of their offices.

At any point in the judicial selection process, did you have any communication with either Florida Senator or their offices? If so, please list the dates and describe the nature of those communications.

I did not communicate with either the office of Senator Rubio or Senator Scott during the judicial selection process. I personally met with Senator Rubio on October 15, 2019, in his office located in the Russell Senate Office Building, and discussed my legal background as well as my upcoming Senate Judiciary Committee hearing scheduled for the following day. I briefly met with Senator Scott on the morning of my October 16, 2019, Senate Judiciary Committee hearing, and I introduced him to my family and friends present at the hearing.

Senator Scott then proceeded to introduce me to the members of the Committee who were present prior to the start of the hearing.

12. It was reported in the *Tampa Bay Times* that Federalist Society Executive Vice President Leonard Leo interviewed the finalists for the Florida Supreme Court vacancies, including you. (https://www.tampabay.com/florida-politics/buzz/2019/01/24/adam-smith-desantis-puts-conservative-stamp-on-florida-supreme-court/)

    What questions did Leonard Leo ask you in his interview with you? How did you answer?

    The nomination and appointment of appellate judges and justices in Florida is governed by Article V, section 11 of the Florida Constitution. This process establishes a judicial nominating commission of nine members that nominates candidates for appointment to the Governor. The Governor then appoints one of the nominees to fill the vacancy.

    On November 27, 2018, the Florida Supreme Court Judicial Nominating Commission nominated eleven individuals, including myself, for three vacancies on the Supreme Court of Florida. On December 14 and 15, 2018, a group of eight attorneys that included Mr. Leo interviewed each of the eleven nominees in Orlando, Florida. I do not know how that group was selected. My interview was on December 15, 2018. I do not recall everything discussed in the interview or the specific questions asked by any of the eight different members of that group. I do recall being asked general questions about my personal and legal background and general questions about how I approach cases, similar to questions during the October 16, 2019, hearing before this Committee. I also recall general questions about the constitutional jurisdiction of the Supreme Court of Florida. I was not asked questions about how I might decide particular cases or issues that might come before me as a justice on the Supreme Court of Florida, nor would I have answered any such questions. As with my testimony before this Committee at the October 16, 2019, hearing and in response to these written questions, I gave general responses about my approach to cases. As a sitting judge on the Florida Third District Court of Appeal, I was bound by and followed the Florida Canons of Judicial Conduct during the interview.

13. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 1998. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Why did you join the Federalist Society in 1998?

The Federalist Society Chapter in Miami hosted interesting debates and panels of speakers with differing points of views. I enjoyed attending these debates and panel discussions and learning about different sides of an issue.

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

I did not draft this language and therefore cannot opine on what the Federalist Society meant by this statement. Additionally, I have not discussed it with anyone employed by the Federalist Society.

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

Please see my answer to Question 13(b).

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

Please see my answer to Question 13(b).

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

I have neither contacted nor been contacted by anyone at the Federalist Society about my nomination. I have, however, spoken to many individuals about my possible nomination but I did not ask the individuals I spoke to about my possible nomination if they were involved with the Federalist Society.

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

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

As indicated in my response to Question 26(a) on my Senate Judiciary Questionnaire, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice's Office of Legal Policy on August 12, 2019. I do not recall everything discussed in the interview but I was not asked about my "views on administrative law." I do recall providing a general description of the Supreme Court's governing framework for deference to administrative interpretations, including the Supreme Court's controlling decisions in *Auer v. Robbins*, 519 U.S. 452 (1997) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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, not to my recollection.

c. What are your "views on administrative law"?

I am familiar with the Administrative Procedures Act and the Supreme Court precedent concerning administrative authority, including *Auer v. Robbins*, 519 U.S. 452 (1997) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If confirmed, I would fully and faithfully apply Supreme Court precedent on administrative law.

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

As a sitting justice on the Florida Supreme Court and a judicial nominee, it would be inappropriate for me to state my views on this issue as it might be the subject of pending or future litigation. Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

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

The Supreme Court has generally instructed that judges may consider legislative history when a statute is ambiguous, but where a statute is unambiguous, resort to legislative history is not necessary. *See Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp., v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I would faithfully apply Supreme Court and Eleventh Circuit precedent on the use of legislative history and where appropriate will carefully consider any arguments that the parties may advance regarding the use of legislative history.

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

No.

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

I received the questions on October 24, 2019. After reviewing the questions, I conducted research to refresh my recollection about certain cases referenced in the questions. I then began drafting answers to the questions. I shared my draft answers with the Office of Legal Policy at the Department of Justice. After receiving feedback, I made the edits I deemed appropriate. Finally, I authorized the submission of these responses to the Senate Judiciary Committee.

Written Questions for Barbara Lagoa
Submitted by Senator Patrick Leahy
Wednesday, October 23, 2019

1. While serving on Florida's Third Circuit Court of Appeals, you have addressed the question of whether to compel arbitration between parties multiple times. In some cases you have compelled arbitration, while in others you have dissented from the majority's decision to compel arbitration. If confirmed, you may be tasked with adjudicating cases involving the Federal Arbitration Act.

   (a) Should a litigant's Seventh Amendment right to a jury be a concern when determining the enforceability of mandatory arbitration clauses?

   If I were confirmed to the Eleventh Circuit and were presented with that issue under the Seventh Amendment, I would carefully consider the litigants' arguments raised in their briefs and apply the precedent of the United States Supreme Court and of the Eleventh Circuit in deciding that issue. Both as a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate for me to comment further on a matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

2. In 2016, you concurred in a *per curiam* opinion affirming a trial court's decision to summarily deny a request for an adjudication of dependency by four orphaned immigrants. Trial courts in Florida had been summarily denying these requests for adjudication out of concern that the dependency adjudication was part of an effort to obtain Special Immigrant Juvenile Status. However, this practice was later overturned by the Florida Supreme Court, which held that trial courts were required to hold evidentiary hearings to adjudicate dependency where the petitioner had alleged sufficient facts, regardless of their motivations for seeking the hearing.

   (a) On what basis did you affirm the trial court's summary denial in this case?

   I was on panels that affirmed circuit court denials in the following three cases, *In the Interest of J.A.T.E.*, *M.J.M.L. v. Dep't of Children & Family Servs.*, and *W.B.A.V. v. Dep't of Children & Families*. As a judge on the Third District Court of Appeal, I was bound by existing prior panel precedent from that court, and the three cases listed above cited that precedent. Specifically, on July 15, 2015, a three-member panel of the Third District issued the following two cases on the same question of law, *In the Interest of B.Y.G.M.*, 176 So. 3d 290 (Fla. 3d DCA 2015) and *In the Interest of K.B.L.V.,* 176 So. 3d 297 (Fla. 3d DCA 2015). I was not a member of the panel that issued those cases.

Those two cases were binding on subsequent panels of the Third District Court of Appeal like the panels I sat on. *See e.g.*, *State v. Washington*, 114 So. 3d 182, 188-89 (Fla. 3rd DCA 2012) ("This panel is not free to disregard, or recede from that [earlier] decision; only this Court, sitting en banc, may recede from an earlier opinion.").

(b) What assurances can you provide to this committee that, if confirmed, you would fairly adjudicate whether a plaintiff had met their pleading burden and ensure that those who do receive their day in court?

If I were fortunate to be confirmed as a judge on the Eleventh Circuit, I would take an oath pledging to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform all the duties incumbent upon me" under the "Constitution and laws of the United States." I took a similar oath when I became a judge on the Florida Third District Court of Appeals and later a justice on the Supreme Court of Florida. I have taken those oaths seriously, and will continue to do so if confirmed as a judge on the Eleventh Circuit.

Perhaps the best assurance that I would fairly adjudicate any issue that comes before me—regardless of whether the appellant is a plaintiff or a defendant, an individual or a corporation, or any other status or category one could identify—is my existing judicial record. In over 13 years as an appellate jurist, I have participated in almost 12,000 cases. In those, I have written opinions or joined panel opinions that have decided cases in favor of plaintiffs and that have decided cases in favor of defendants. In each case, I have attempted to faithfully apply the law to facts contained in the record on appeal regardless of the identity of the parties, their status, or my individual preferences.

3. After your nomination to the Florida Supreme Court, your attendance at a Federalist Society conference was criticized as "highly inappropriate" by a member of the Florida House of Representatives. During that time period news reports in Florida described that your appointment would "cement a conservative majority" on the Florida Supreme Court.

(a) Do you believe that even the perception of partisan bias damages a judge's credibility as a fair and impartial adjudicator?

Yes. In further, brief response to this question, I respectfully refer to the entirety of my judicial record referenced in response to Question 2(b). I do not know whether the Florida Representative or the reporters who wrote the news reports mentioned above had the opportunity to review the entirety of that record.

(b) Do you believe that your membership in the Federalist Society, which describes itself as "a group of conservatives and libertarians" with the goal of "reordering priorities within the legal system," could lead litigants to question your impartiality?

No. Please see my responses to Questions 2(b) and 3(a).

(c) What assurances can you provide this committee that you will be able to act impartially and in a manner free from political influence?

The independence of the judiciary is one of the crown jewels of our constitutional democracy. As I mentioned during my confirmation hearing, my parents fled from a country without either judicial independence or the rule of law. Judicial independence is not an abstract concept to my family or to me. As discussed in response to Question 2(a), I have served as an appellate judge for over 13 years, first on an intermediate appellate court and now on the Supreme Court of Florida. In that time, I have participated in almost 12,000 cases and in those I have faithfully applied the law to the facts contained in the record on appeal, including applying binding precedent both from my court and from the United States Supreme Court. I have written opinions or joined in panel opinions that have decided cases for plaintiffs and for defendants, for insureds and insurers, for employees and employers, for the State and for criminal defendants. In each of these, my decision has been based on the application of the law to the record on appeal regardless of the identity of the parties or my individual preferences.

4. In response to Senator Cruz's question regarding the importance of Originalism in Constitutional Interpretation you answered that when interpreting the United States Constitution the original public understanding of a provision at the time of its enactment should bind a judge's interpretation.

(a) In an instance where the original public understanding of a provision was divided or contested by members of the public at the time of the provision's enactment, how would you determine which public understanding should bind your interpretation?

Originalism is a method of interpretation that may or may not be a permissible method to use depending on the precedent from the United States Supreme Court and the Eleventh Circuit on a particular issue. Assuming that the issue before me was one where the method of interpretation required determining the original public understanding of a provision, I would rely on the briefs filed by litigants to provide the court with the appropriate source material.

Parties often disagree about and ask judges to resolve the meaning of relevant constitutional, statutory or contractual terms. Resolution may require, for example, consideration of the context of a term in the greater structure of a text and not simply in isolation. Again, assuming this were a case where precedent required determination of the original public understanding of a provision, I would use all of the interpretive tools permitted by that precedent to reach my conclusion.

5. In 2018, in *Diocese of Palm Beach, Inc. v. Gallagher*, you joined the opinion reversing a trial court ruling that allowed a defamation suit filed by a Catholic priest against the Diocese of Palm Beach to proceed. The plaintiff priest had received a text message from the diocese's music minister stating that another priest had shown photographs containing child pornography to a 14-year-old boy. He then notified the police. When the diocese refused to promote him and reassigned him to a different parish, the plaintiff felt he was being retaliated against. In response to his complaints, the diocese called him a liar and unfit to be a priest. The plaintiff then brought a defamation suit. The opinion held that the case could not go forward because the case arose out of "an employment dispute between him and the diocese." As a result, the case could not "be resolved without the courts excessively entangling themselves in what is essentially a religious dispute."

   (a) Do you believe religious institutions can retaliate against whistleblowers without any legal recourse for whistleblowers?

   No. In further answer to the question, *Gallagher* addressed the application of the ecclesiastical abstention doctrine (sometimes referred to as the church autonomy doctrine). Grounded in both the Free Exercise and Establishment Clauses of the First Amendment, that doctrine provides that "civil courts must abstain from deciding ministerial employment disputes … because such state intervention would excessively inhibit religious liberty." *Diocese of West Palm Beach, Inc. v. Gallagher*, 249 So. 3d 657, 662 (Fla. 4th DCA 2018) (quoting *SE Conference Ass'n of Seventh-Day Adventists, Inc. v. Dennis*, 862 So. 2d 842, 844 (Fla. 4th DCA 2003)). The court in *Gallagher* noted that "[t]he subject of a priest's employment relationship with his church is not *per se* barred by the church autonomy doctrine. [C]ourts have held that the application of a neutral law that does not require inquiry into or resolution of an ecclesiastical matter may be permissible …. Simply because a church is involved as a litigant does not make the matter a religious one; instead, inquiry must be made as to the nature of the dispute and whether it can be decided on neutral principles of secular law without a court intruding upon, interfering with, or deciding church doctrine." *Id.* (quotations and citations omitted). Because resolution of the plaintiff's claims in *Gallagher* would have entangled "the courts in the diocese's ministerial staffing decisions, the interpretation and application of canons and doctrines, and Church discipline," the ecclesiastical abstention doctrine required dismissal of his claims. *Id.* at 665.

6. 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?

Analyzing the statutory context often is an important factor in interpreting a specific statutory provision, and it is considered a "fundamental canon of statutory construction." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). If confirmed, I will apply this canon and other accepted canons of statutory construction.

7. 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?

   The independence of the federal judiciary is established in Article III of the United States Constitution. Consistent with the Free Speech and Free Press Clauses of the First Amendment, judges may be subject to criticism from members of the other branches of government and the public. The same is true for judges in Florida's state court system. The protections guaranteeing judicial independence are designed to enable judges to make decisions that are grounded in law, without respect to criticisms that may follow, and I do not believe that those criticisms erode respect for the rule of law.

   (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 answer to Question 7(b).

8. 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.)

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

I have not studied this issue previously. I am aware that under United States Supreme Court precedent, courts can review decisions by the President made during times of war or other armed conflict, *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and that deference is given to the executive branch in matters implicating national security. *E.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008); *Dep't of Navy v. Egan*, 484 U.S. 518 (1988).

9. Many are concerned that the White House's denouncement 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.

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

As a judicial nominee, I do not think it would be appropriate for me to comment on this abstract and hypothetical scenario about a president's non-compliance with a court order. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct. If I am confirmed, and if such a scenario were to come before me, I would carefully examine the relevant authorities that may bear upon this question.

10. 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."

(a) 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?

Article I of the Constitution provides Congress with war powers. For example, the powers to declare war, raise and support armies, and provide and maintain a navy. Article II of the Constitution provides that the President shall be the commander in chief of the military. The Supreme Court has explained that the "proper exercise" of Congress's war power must be respected. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). The Supreme Court has reviewed the constitutionality of Presidential action in wartime. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As a judicial nominee, it would not be appropriate for me to comment further to avoid expressing views on matters that could arise in litigation. *See* Code of Judicial Conduct, Canon 3(6)(A).

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."

(b) 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 to Question 10(a). Both as a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate for me to comment on a matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

11. How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?

The Constitution creates a system of checks and balances among the three branches of our government. Courts participate in that system by exercising the judicial power outlined in Article III, which grants authority to resolve specified cases or controversies. In this, as in every area of constitutional law, I would apply the precedent of the Supreme Court of the United States and the Eleventh Circuit, including the precedent referenced in response to Question 8(a). Both as a judicial nominee and a sitting justice on the Supreme Court of Florida, it would be inappropriate for me to comment further as this matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

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

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

The Supreme Court of the United States has held that the Equal Protection Clause of the Fourteenth Amendment applies to women. *United States v. Virginia*, 518 U.S. 515, 532 (1996). This is binding precedent on all lower courts that I will apply if confirmed.

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

I am not familiar that statement or the 2011 interview with Justice Scalia. If confirmed, I will faithfully apply all precedents of the Supreme Court of the United States and the Eleventh Circuit, including all precedents relating to the Voting Rights Act.

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

The Emoluments Clause of the Constitution states that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State." U.S. Const. Art. I, § 9, cl. 8. Both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to express a view on this matter as there is active or impending litigation regarding this Clause. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

15. 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."

(a) 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 general matter, appellate courts are not factfinders and instead consider the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. *Shelby County* is binding precedent, and if confirmed, I will faithfully apply this precedent and all other precedents from the Supreme Court of the United States and the Eleventh Circuit Court of Appeals.

16. 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"?

The Thirteenth, Fourteenth, and Fifteenth Amendments, sometimes referred to as the Reconstruction Amendments, establish a constitutional commitment to counteracting racial discrimination in the wake of the Civil War. Each of these Amendments provides that Congress has the power to enforce each amendment by "appropriate legislation." U.S. Const. Amend. XIII, § 2; Amend. XIV, § 5; Amend. XV, § 2.

17. 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."

    (a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

    The Supreme Court's decision in *Lawrence v. Texas* is binding precedent. If confirmed, I will faithfully apply *Lawrence* and all other precedents from the Supreme Court of the United States and the Eleventh Circuit Court of Appeals.

18. In the confirmation hearing for Justice Gorsuch, 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.

    (a) 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?

    The doctrine of *stare decisis* is an important component of our judicial system that promotes stability and predictability in the law. The Supreme Court of the United States has held that there must be a "special justification" beyond mere disagreement to justify overturning a prior authoritative decision. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015).

    Regarding the precedent of the Supreme Court of the United States, it is never appropriate for a lower court to depart from Supreme Court precedent. The Supreme Court has held that it has the "prerogative alone to overrule one of its precedents." *State Oil v. Kahn*, 522 U.S. 3, 20 (1997). Similarly, the Eleventh Circuit has held that a three-judge panel is bound by circuit precedent on a question of federal law unless there has been an intervening decision of the Supreme Court or of the Eleventh Circuit sitting *en banc*. *See United States v. Vega-Castillo*, 540 F. 3d 1235, 1236 (11th Cir. 2008).

19. 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.

(a) 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.

The impartiality of judges, and the appearance of impartiality, are key to ensuring public confidence in our courts. A judge must recuse herself where her impartiality "might reasonably be questioned." 28 U.S.C. § 455(a); Canon 3(C)(1), Code of Judicial Conduct for United States Judges. If confirmed, I would conscientiously review and follow the standards for judicial recusal set forth in 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I would also consult with colleagues and ethics officials within the federal court system.

In terms of specific examples of the types of cases I would recuse from if confirmed, I would recuse from cases in which my husband or his law firm appeared, as well as cases involving either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either court. In addition, and as described in my responses to the Committee's Questionnaire, I currently conduct a review of each case assigned to me and apply the standards for judicial recusal under the Florida standard to determine whether I should recuse myself from a particular case. During my over 13 years on the bench, I have occasionally recused myself from cases based on that case-by-case review, for example where I knew a party or witness involved. If confirmed to the Eleventh Circuit, I would continue to conduct a review of each case assigned to me and apply the standards for judicial recusal in determining whether to recuse myself.

20. 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."

(a) 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?

As the Supreme Court of the United States recognized in footnote 4 in *Carolene Products*, the U.S. Constitution creates a governmental structure built on democratic participation by citizens. In a system of checks and balances, the courts play an essential role in ensuring the protection of individual rights, including, for example, the rights enumerated in the First Amendment that enable those democratic processes. In footnote 4 of *Carolene Products*, the Supreme Court also introduced the idea of varied levels of judicial review or scrutiny to be used in assessing constitutionality depending on the constitutional issue presented. If confirmed, I will follow all precedents of the Supreme Court and the Eleventh Circuit, including precedents arising out of *Carolene Products*.

21. 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 and the events discussed in the Mueller report we make sure that we exercise our own power properly.

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

    Yes.

22. Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims he has an "absolute right" to pardon himself. Do you agree?

I have not studied the scope of the presidential pardon power provided in Article II of the Constitution. Moreover, both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on a matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

23. 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?

The Supreme Court has held that the Commerce Clause gives Congress the power to regulate activity that "substantially affects" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). The Supreme Court has further held that Congress has the power to enforce the Fourteenth Amendment that includes "[l]egislation which deters or

remedies constitutional violations," but does not include "the power to determine what constitutes a constitutional violation." *City of Borne v. Flores*, 521 U.S. 507, 518-19 (1997). The Supreme Court has explained that, "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provision, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

24. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

    (a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

    Trump v. Hawaii is binding Supreme Court precedent that I will apply if confirmed. Both as a judicial nominee and a sitting justice on the Supreme Court of Florida, it would be inappropriate for me to comment further on this issue or how it should be applied as it could be the subject of litigation that may come before the courts in the future. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

25. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

    The "undue burden" standard articulated by the Supreme Court of the United States in *Casey* provides that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." 505 U.S. 833, 878 (1992). The Supreme Court has addressed that standard in subsequent cases. *See, e.g.*, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court and the Eleventh Circuit. Both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on particular or specific examples as this matter could be the subject of litigation or may

come before the courts in the future. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

26. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

    (a) Do you think that the qualified immunity doctrine should be reined in? Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?

    The Supreme Court of the United States has held that "the doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotations omitted). According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distractions, and liability when they perform their duties reasonable." *Id*. If confirmed, I would faithfully apply all Supreme Court and Eleventh Circuit precedent, including that relating to qualified immunity. As a judicial nominee, it is not appropriate for me to grade or opine on decisions of the Supreme Court. Moreover, both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on particular examples as this matter could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

27. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted "seismic shifts in digital technology", such as the "exhaustive chronicle of location information casually collected by wireless carriers today."

(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?

The Supreme Court of the United States has recognized that new technological developments can create serious concerns under the Fourth Amendment. As the Supreme Court has explained, new technologies in the digital era can "risk [] Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (quotations and citations omitted); *see also, e.g., Riley v. California*, 573 U.S. 373, 403 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.") (quotations and citations omitted). Both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on a matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

28. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress's constitutional duty to decide how the government spends money.

(a) With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?

I have not researched this question and presently do not have considered views on it. In addition, both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on issues that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

29. During Justice Kavanaugh's confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting "revenge on behalf of the Clintons" and warned that "what goes around comes around." The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges

making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?

As to the first question, yes. As to the second question, the independence of the judiciary is one of the crown jewels of our constitutional democracy. As I mentioned during my confirmation hearing, my parents fled from a country where neither judicial independence nor the rule of law existed. Judicial independence is not an abstract concept to me or to my family. It is one of the differences between freedom and tyranny. Article III of the United States Constitution sets forth certain protections to allow for judicial independence. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independent of the political sphere. *See, e.g.*, Code of Conduct of U.S. Judges, Canon I ("An independent and honorable judiciary is indispensable to justice in our society.") I firmly believe that an independent judiciary is a central feature of our constitutional system and that an independent judiciary promotes the rule of law.

Senator Dick Durbin
Written Questions for Lagoa and Luck
October 23, 2019

For questions with subparts, please answer each subpart separately.

Questions for Barbara Lagoa

1. On January 4, 2019, before you joined the Florida Supreme Court, the Court issued a decision in *Glass v. Nationstar Mortgage, LLC* allowing an award of attorneys' fees to a borrower who prevailed in a foreclosure dispute against the mortgage industry. However, shortly after you and two other justices were appointed to the Supreme Court by Governor DeSantis, the Court granted a request for rehearing by the lender and, on April 18, 2019, issued a one-page per curiam opinion withdrawing its January opinion. In other words, the Court changed its ruling from three months earlier so that the mortgage industry would now win. The Court's April 18 opinion simply said that "upon further consideration, we conclude that jurisdiction was improvidently granted" and provided no further explanation as to why the January opinion was withdrawn.

   This looks like the state Supreme Court was simply changing precedent—almost immediately after three justices were appointed by a Republican governor—without even discussing the reasons for making this reversal. **Why did the Florida Supreme Court not even explain its decision to reverse this precedent that helped borrowers in mortgage disputes?**

   Unlike the Supreme Court of the United States, which exercises a general power to review lower court decisions by way of writ of certiorari, the Supreme Court of Florida is a court of limited appellate jurisdiction. It has the constitutional authority to review lower court decisions only if they fall within one of the grounds enumerated in Article V, Section 3(b) of the Florida Constitution, most of which provide the Court with discretionary, as opposed to mandatory, jurisdiction. *See, e.g., Jenkins v. State*, 385 So. 2d 1356 (Fla 1980) (England, J. concurring) (discussing history of 1980 amendment to the Florida Constitution limiting the jurisdiction of the Supreme of Florida). Absent one of those enumerated grounds, the Supreme Court of Florida has no jurisdiction to review a lower court decision. One of the constitutionally enumerated grounds permits review of a decision by a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(2), Fla. Const.

   The Supreme Court of Florida's opinion in *Glass* issued on January 4, 2019. The dissent noted that the Court lacked constitutional authority to review the case and explained in detail the lack of an express and direct conflict between decisions of district courts of appeal on the same question of law that could vest the court with jurisdiction to review those decisions. Because the January 4, 2019, opinion in *Glass* barred the parties from exercising their right under Florida Rule of Appellate Procedure 9.330 to file a motion for rehearing, the respondent filed a motion to recall the mandate pursuant to Florida Rule of Appellate Procedure 9.340(a) and a motion for clarification pursuant to Florida Rule of Appellate

Procedure 9.330(a). That motion asserted that the court lacked jurisdiction to hear the case because the constitutional requirement of an express and direct conflict on the same question of law was lacking and further sought clarification on the January 4, 2019, opinion. The petitioner responded to the motion to recall and/or for clarification. On April 18, 2019, the Court issued its written opinion in *Glass* granting respondent's motion to recall the mandate, withdrawing the January 4, 2019, initial opinion, and further explaining that the Court "initially accepted review of the decision of the Fourth District Court of Appeal in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017, based on express and direct conflict with the decision of the First District Court of Appeal in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. 1st DCA 2008). Upon further consideration we conclude that the jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this review proceeding." The term "improvidently granted" is used by the Supreme Court to mean that it lacked jurisdiction to hear the case.

Indeed, because the Supreme Court of Florida is a court of limited appellate jurisdiction, the Court through many iterations of membership on the Court has discharged jurisdiction and dismissed review after consideration of a matter. *See, e.g., U.S. Bank National Association v. Anthony-Irish*, 256 So. 3d 800 (Fla. 2018); *Dozier v. State*, 214 So. 3d 541 (Fla. 2017); *Godwin v. State*, 192 So. 3d 471 (Fla. 2016); *Miranda v. State*, 181 So. 3d 1188 (Fla. 2016); *Harris v. State*, 161 So. 3d 395 (Fla. 2015); *T.S. v. State*, 158 So. 3d 556 (Fla. 2015); *Williams v. State*, 156 So. 3d 1034 (Fla. 2015); *Smith v. Southland Suites of Ormond Beach, LLC*, 148 So. 3d 1251 (Fla. 2014); *Brantley v. State*, 115 So. 3d 360 (Fla. 2013); *Daniels v. State*, 103 So. 3d 133 (Fla. 2012); *Winslow v. School Board of Alachua County*, 88 So. 3d 112 (Fla. 2012); *Tetzlaff v. Florida Unemployment Appeals Commission*, 926 So. 2d 1267 (Fla. 2006); *Stine v. Jain*, 873 So. 2d 326 (Fla. 2004); *Henry v. State*, 590 So. 2d 419 (Fla. 1991). As with other opinions discharging jurisdiction such as those cited above, the April 18, 2019, written opinion in *Glass* is a comment on the Court's constitutionally limited appellate jurisdiction and not a comment on the merits of the party's claims.

2.

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

   Originalism is a method of interpretation that may or may not be a permissible method to use depending on the precedent from the Supreme Court of the United States and the Eleventh Circuit on a particular issue. For example, the Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). Regardless of whether a precedent employs an originalist method of interpretation or another method of interpretation, lower court judges must follow the precedents of the Supreme Court. S*ee, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). If confirmed, I will faithfully follow all precedents of the Supreme Court and the Eleventh Circuit.

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?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I,

Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause 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.

Both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to express a view on this Clause as there is active or pending litigation regarding its meaning. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

3. You say in your questionnaire that you have been a member of the Federalist Society since 1998.

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

      The Federalist Society Lawyer Chapter in Miami hosted interesting debates and panels of speakers with differing points of views. I enjoyed attending these debates and panel discussions and learning about different sides of an issue.

   b. On January 24, 2019, the *Tampa Bay Times* reported that when Governor DeSantis was considering candidates for three Florida Supreme Court vacancies, the Federalist Society "screened the pool of justices DeSantis considered." The *Times* went on to note that "Federalist Society Executive Vice President Leonard Leo even flew down from Washington to Orlando to interview the 11 finalists for the three Florida vacancies." **Did you meet with Leonard Leo as you were being considered for the Florida Supreme Court vacancies?**

      The nomination and appointment of appellate judges and justices in Florida is governed by Article V, Section 11 of the Florida Constitution. Florida's Constitution establishes a judicial nominating commission of nine members that nominates candidates for appointment to the Governor. The Governor then appoints one of the nominees to fill a vacancy.

      On November 27, 2018, the Florida Supreme Court Judicial Nominating Commission nominated eleven individuals, including myself, to fill three vacancies on the Supreme Court of Florida. On December 14 and 15, 2018, a group of eight attorneys that included Mr. Leo interviewed each of the eleven nominees in Orlando, Florida. I do not know how this group was selected. My interview was on December 15, 2018. I do not recall everything discussed in the interview or the specific questions asked by any of the eight different

members of that group. I do recall being asked general questions about my personal and legal background and general questions about how I approach cases, similar to questions during the October 16, 2019, hearing before this Committee. I also recall general questions about the constitutional jurisdiction of the Supreme Court of Florida. I was not asked questions about how I might decide particular cases or issues that might come before me as a justice on the Supreme Court of Florida, nor would I have answered any such questions. As with my testimony before this Committee at the October 16, 2019, hearing and in response to these written questions, I gave general responses about my approach to cases. As a sitting judge on the Third District Court of Appeal, I was bound by and followed the Florida Code of Judicial Conduct during the interview.

c. **If the answer to (b) is yes, why did you meet with Leonard Leo?**

Please see my response to Question 3(b)

d. **If the answer to (b) is yes, was this the first time you had met with Leonard Leo?**

I met Mr. Leo in passing following a luncheon at the 2015 Florida Federalist Society Lawyer Chapters conference. To the best of my recollection, I did not meet or speak with Mr. Leo again until the December 15, 2019, meeting discussed in response to Question 3(b).

e. **If the answer to (b) is yes, did Leonard Leo ask you about any topics or cases during your interview? If so, which ones?**

Please see my response to Question 3(b).

f. **If the answer to (b) is yes, did Mr. Leo ask you about your views on any issues during your interview? If so, which ones?**

Please see my response to Question 3(b).

g. **If the answer to (b) is yes, did Mr. Leo at any point disclose who was contributing financially to his efforts to screen finalists for the Florida Supreme Court?**

No. In further response, please see my response to Question 3(b).

h. **If the answer to (b) is yes, did you at any point ask Mr. Leo whether any donors with interests before the Florida Supreme Court had helped fund his efforts?**

No. In further response, please see my response to Question 3(b).

4. On May 21, *The Washington Post* reported that Leonard Leo is at the center of millions of dollars in dark money donations that are being used to influence the selection of judicial nominations. The *Post* reported that Leo "defended the practice of taking money from donors whose identities are not publicly disclosed." The *Post* quoted Leo saying that his advocacy efforts "were all very much fueled by very wealthy people, and oftentimes wealthy people who chose to be anonymous."

   a. **Do you have any concerns about wealthy people or special interests making undisclosed donations to organizations that help choose judicial nominees?**

      I am not aware of any such donations being made in support of my nomination. As a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate for me to comment on political issues or issues that could result in litigation. See Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

   b. **Do you believe that undisclosed donors who support judicial nomination efforts should make their donations public so that judges can have full information when they make decisions about recusal in cases these donors may have an interest in?**

      Please see my response to Question 4(a).

5. On January 31, the *Orlando Sentinel* published an article entitled "Federalist Society celebrates new, conservative-leaning Florida Supreme Court with fireworks at Walt Disney World." The article noted that you and four other Florida Supreme Court justices were scheduled to attend a Federalist Society VIP reception at the Disney World Yacht and Beach Club Resort shortly after your appointment to the Florida Supreme Court.

   a. **Did you attend this event?**

      Yes. I have attended each of the annual Federalist Society Florida Chapters Conferences since they started in 2015, and I attended the 2019 conference. Each year, the conference has concluded with an evening dessert reception at a venue in the EPCOT theme park at Walt Disney World and a viewing of the nightly EPCOT firework show. It is my understanding that the newspaper article is referring to that evening dessert reception which, to my knowledge, is open to everyone who has registered for the conference. Mr. Leo was not present at the dessert reception.

   b. **If the answer to (a) is yes, did you meet any Federalist Society donors at this event?**

To the best of my recollection, I spent most of my time at the dessert reception speaking with lawyers and other judges, as well as their children, about non-legal matters (*e.g.*, our children, our day on the rides at other theme parks at Walt Disney World). I do not know if any of the people I spoke with were donors to the Federalist Society, nor do I know who the donors to the Federalist Society are.

c. **If the answer to (a) is yes, do you know if any of the attendees at this event were involved in matters pending before the Florida Supreme Court?**

I do not know if any of the attendees at the dessert reception were involved in matters pending before the Supreme Court of Florida. In further response, please see my responses to Questions 5(a) and (b).

d. **If the answer to (a) is yes, did you think it was appropriate for you to attend this conference after Leonard Leo had reportedly interviewed you for your current position?**

Yes. In further response, please see my responses to Questions 3(b), and 5(a) and (b).

6. Prior to your appointment to the Florida Supreme Court, the Court decided to grant review of a case, *City of Miami Beach v. Florida Retail Federation*, in which the intermediate appellate court had invalidated on preemption grounds a local minimum wage ordinance that set a higher wage than state law. But in February 2019, after your appointment, the Supreme Court reversed its decision and dismissed the appeal, which effectively ended the chances for workers in Miami Beach to save this higher minimum wage ordinance. **Why did the Supreme Court change its mind and reverse its decision to grant review in this case?**

Unlike the Supreme Court of the United States, which exercises a general power to review lower court decisions by way of writ of certiorari, the Supreme Court of Florida is a court of limited appellate jurisdiction. The Court has the constitutional authority to review lower court decisions only if they fall within the grounds enumerated in Article V, Section 3(b) of the Florida Constitution, most of which provide the Court with discretionary, as opposed to mandatory, jurisdiction. *See, e.g., Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) (England, J. concurring) (discussing history of 1980 amendment to the Florida Constitution limiting the jurisdiction of the Supreme of Florida).

In *Miami Beach*, the Third District Court of Appeal concluded that a municipal minimum wage ordinance was preempted by a Florida wage preemption statute. The Third District did not certify the case to be one of great public importance pursuant to Florida Rule of Appellate Procedure 9.330. The municipality sought review from the Supreme Court of Florida. Although the court initially granted discretionary jurisdiction, upon further review the Court exercised its discretion and discharged jurisdiction. It would be inappropriate for me to discuss the content of discussions among the justices of the Supreme Court of Florida. I can state that, because the Supreme Court of Florida is a court of limited appellate jurisdiction, the Court through many iterations of membership on the Court has discharged jurisdiction and dismissed review after consideration of a matter. *See, e.g., U.S. Bank*

National Association v. Anthony-Irish, 256 So. 3d 800 (Fla. 2018); *Dozier v. State*, 214 So. 3d 541 (Fla. 2017); *Godwin v. State*, 192 So. 3d 471 (Fla. 2016); *Miranda v. State*, 181 So. 3d 1188 (Fla. 2016); *Harris v. State*, 161 So. 3d 395 (Fla. 2015); *T.S. v. State*, 158 So. 3d 556 (Fla. 2015); *Williams v. State*, 156 So. 3d 1034 (Fla. 2015); *Smith v. Southland Suites of Ormond Beach, LLC*, 148 So. 3d 1251 (Fla. 2014); *Brantley v. State*, 115 So. 3d 360 (Fla. 2013); *Daniels v. State*, 103 So. 3d 133 (Fla. 2012); *Winslow v. School Board of Alachua County*, 88 So. 3d 112 (Fla. 2012); *Tetzlaff v. Florida Unemployment Appeals Commission*, 926 So. 2d 1267 (Fla. 2006); *Stine v. Jain*, 873 So. 2d 326 (Fla. 2004); *Henry v. State*, 590 So. 2d 419 (Fla. 1991). As with other opinions discharging jurisdiction such as those cited above, the opinion in *Miami Beach* is a comment on the Court's constitutionally limited appellate jurisdiction and not a comment on the merits of the parties' claims.

7. **Do you believe that a child is capable of fairly representing himself or herself in court without counsel in a legal proceeding, for example an immigration proceeding?**

Both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to express a view on matters that could result in litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

8.

a. **Is waterboarding torture?**

I have not had occasion to study this issue closely, but my understanding is that waterboarding would constitute torture when intentionally used "to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1) (defining "torture").

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

I have not had occasion to study this issue closely, but my understanding is that under 42 U.S.C. § 2000dd-2(a)(2), 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. It is also my understanding that the Army Field Manual does not authorize waterboarding.

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

Please see my responses to Questions 8(a) and (b) above.

9.

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 am not aware of any such donations in support of my nomination. Both as a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate of me to comment on such political matters. *See* Code of Conduct of U.S. Judges, Canon 5.

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?**

I am not aware of any such donations in support of my nomination. Both as a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate of me to comment on such political matters. If confirmed, I will evaluate all actual or potential conflicts under 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other applicable rules or guidelines. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system.

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

Please see my responses to Questions 9(a) and (b).

10.

a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not studied the scope of the presidential pardon power provided in Article II of the Constitution. Moreover, both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on a matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

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

I have not studied the scope of the presidential pardon power provided in Article II of the Constitution. Moreover, both as a judicial nominee and as a sitting justice of the Supreme Court of Florida, it would be inappropriate for me to comment on a matter that could be the subject of litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

Nomination of Barbara Lagoa
to the United States Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

    a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

    Yes, I have read the story and listened to the recording as requested in order to answer these questions.

    b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary?

    As a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would not be appropriate for me to opine on political matters relating to the nominations of the federal judiciary.

    c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

    As a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would not be appropriate for me to opine on political matters relating to the federal judicial selection process.

    d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

    I am not aware of any such advocacy.

    e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

As a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would not be appropriate for me to opine on political matters relating to the nominations of the federal judiciary.

2. 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?

    Yes, Chief Justice Roberts' metaphor accurately comports with my understanding of the judge's role in our constitutional system, which is to interpret the laws neutrally and to apply those laws fairly and impartially to the facts.

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

    Generally, a judge should not take into consideration the consequences of a ruling. There are circumstances, however, where the law itself requires a judge to take into account the consequences of a ruling. For example, judges must consider whether a movant for preliminary injunction has shown that irreparable harm will occur before entering a preliminary injunction or a stay.

3. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

    Rule 56 requires a court to grant summary judgment if there is no "genuine dispute as to any material fact," and the Supreme Court has held that whether there is a "genuine dispute" depends on whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Supreme Court has held that the "reasonable jury" standard is objective, not subjective. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus*., 508 U.S. 49, 61 (1993).

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

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

    A judge's decision must be governed by the law and the facts and cannot be affected by sympathy for one party or another. That obligation is embodied in the judge's oath to "administer justice without respect to persons." 28 U.S.C. § 453. Empathy does not supersede a judge's obligation to follow the law.

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

    Every human being has personal life experiences, but a judge must ensure that his or her decisions are made impartially and without regard to one's personal history or life

experience. Judges must strive to be neutral and consider a litigant's case within the facts and law not the judge's personal life experience.

5. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court's decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act's individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, "came after weeks of negotiations and trade-offs among the justices."

    a. In your view, what is the role of negotiating with other judges when deliberating on a case?

    Appellate judges act as a collegial body and must discuss the legal and factual issues presented in a case as part of the decision making process. An appellate judge should remain open-minded to a colleague's analysis of the law to the facts contained in the record on appeal and should have the ability to reconsider his or her initial conclusions based on a colleague's analysis. These discussions, however, focus on the relevant, governing law and facts and not on outside considerations.

    b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague's, in another?

    Every case must be decided on its own merits. I would not condition my vote in one case based on the outcome of another case.

    c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

    My judicial philosophy includes respect for *stare decisis*, and, if confirmed, I would view my obligation to apply binding precedent from the Supreme Court and the Eleventh Circuit Court of Appeals as non-negotiable.

6. 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.

7. The Seventh Amendment ensures the right to a jury "in suits at common law."

    a. What role does the jury play in our constitutional system?

    Juries play an important and significant role in our constitutional system. One of the pressure points in the building tension leading up to the American Revolution was the Crown's efforts to restrict and limit the right of trial by jury in the Colonies.

In 1775, the Second Continental Congress declared that the colonists had been deprived of the "accustomed and inestimable privilege of trial by jury in cases affecting both life and property." Tellingly, the Declaration of Independence includes in its bill of particulars or list of grievances against King George III that he was "depriving us, in many Cases, of the Benefits of Trial by Jury." It was one of the rights for which the signers pledged their "lives, fortunes, and sacred honor." After independence, the right to a jury trial took on a starring role in the debate over ratification of the Constitution. As initially drafted and submitted to the States for ratification, the Constitution in Article III, section 2 only provided for jury trial in criminal cases, but said nothing about civil cases. In 1789, James Madison proposed a number of amendments to the Constitution including the right of trial by jury in civil cases. The Seventh Amendment explicitly preserves the right of trial by jury in civil actions. Significantly, the Seventh Amendment identifies fact finding as the core function and province of the jury. The jury, not the judge, holds this core power and this power acts as a check on the judiciary.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

As a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would be inappropriate for me to state my views on this issue as I might be the subject of pending or future litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

As a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would be inappropriate for me to state my views on this issue as I might be the subject of pending or future litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct.

8. What do you believe is the proper role of an appellate court with respect to fact-finding?

The law provides that appellate courts are limited to reviewing the factual record brought to them and developed at the trial court and may review factual findings only under established standards of review.

9. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Yes, if the appellate court engages in fact-finding outside the record developed at the lower court or if the appellate court reviews the facts outside of the established standards of review.

10. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has addressed this question on different occasions. *See*, *e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I would faithfully apply all applicable precedent that bears on the issue of judicial deference to congressional fact-findings.

11. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

    a. Have you read Advisory Opinion #116?

    Yes, as requested in order to answer these questions.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

        If I am confirmed, I will abide by the Code of Conduct for the United States Judges and will consider any other applicable ethical guidance, including Advisory Opinion #116. That opinion requires judges to consider a series of factors before deciding whether to participate in a program sponsored by a public interest group or other organization engaged in public policy debates. The factors judges should consider include the identity of the seminar sponsor, the nature and source of seminar funding, and the subject matter of the seminar. I will consult Advisory Opinion #116 as part of making what the Opinion describes as the "case-by-case" assessment of whether it is appropriate to attend any particular seminar.

        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

        Please see my response to Question 14(b)(i).

        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

        Please see my response to Question 14(b)(i).

        iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

        Please see my response to Question 14(b)(i).

        v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

        Please see my response to Question 14(b)(i).

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 14(b)(i).

Senate Judiciary Committee
"Nominations"
Questions for the Record
Senator Amy Klobuchar

Questions for Justice Barbara Lagoa, nominee to be U.S. Circuit Judge for the Eleventh Circuit

I have led a bill with Senator Grassley for years to give federal judges the discretion to permit cameras in federal courts. While serving as a judge on Florida's Third Circuit Court of Appeals, you joined an opinion upholding a trial court's determination to deny press access to pre-trial proceedings in a high-profile murder trial.

- What were the factors you considered when determining whether the pre-trial proceedings should be open to the press?

  The opinion referenced in the question above is *Miami Herald Media Co. v. State*, 218 So. 3d 460 (Fla. 3d DCA 2017) ("*Miami Herald Media*"). I joined a unanimous panel opinion authored by one of my colleagues on the Third District Court of Appeal. *Miami Herald Media* involved a petition for a writ of certiorari relating to four trial court orders that temporarily denied access to certain pretrial discovery materials and that closed a pretrial hearing likely to include presentation of sealed evidence, including videotaped confessions. As noted in *Miami Herald Media,* the factors considered in determining whether the pretrial proceedings should be open to the press "required a balancing of the defendants' due process right to a fair trial in Miami-Dade County, where the charged offenses allegedly were committed, Art. I, § 16(a), Fla. Const. (1968), and the rights of the public and media to access records under Chapter 119, Florida Statutes (2016) [Florida's public records law] and to observe in-court proceedings under to *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 1979)." 218 So. 3d at 462.

  These competing interests were addressed by the Supreme Court of Florida's binding precedent in *Miami Herald Publishing v. Lewis*, 426 So. 2d 1 (Fla. 1982), and in addressing these competing interests the Supreme Court of Florida set forth the following three-prong test under which the trial court considers whether to close a pretrial hearing: (1) closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) no alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and (3) closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. *Miami Herald Media*, 218 So. 3d at 462-63 (citing *Lewis*). *Lewis* also drew a distinction between pretrial proceedings in criminal cases and the trials themselves. Because the issue in *Miami Herald Media* only concerned pretrial proceedings, the court noted that the "orders below and the petition here do not require us to address the higher constitutional rights of access to the courtroom and case-related records applicable to a *trial*." 218 So. 3d at 462 (emphasis in original)

As the Florida Supreme Court articulated in *Lewis*, "[e]very defendant has the right 'to have a . . . trial . . . in the county where the crime was committed.' Art. I, § 16, Fla. Const. (1968). There is no first amendment protection of the press' rights to attend pretrial hearings. We should not elevate this non-constitutional privilege of the press above the constitutional right of the defendant to be tried in the county where the crime was committed. A change of venue should not be considered as an alternative to closure." 426 So. 2d at 6.

Lastly, as discussed in *Miami Herald Media*, the trial court's denial of access "was not absolute but only temporary. Once the danger of prejudice has dissipated, discovery material will be made available." *Id.* at 463. Again, this comported with the Supreme Court of Florida's precedent in *Lewis*, 426 So. 2d 1, 8 (Fla. 1982) ("The news media have no first amendment right to attend the pretrial hearing as long as when closure is ordered, the transcript of the hearing is made available to the news media at a specified future time, when the danger of prejudice will be dissipated (for example, after the trial jury is sequestered).").

- What is your view on cameras in federal courtrooms, and can you speak to the value of transparency in our judiciary more broadly?

  I cannot speak to the issue of cameras in the federal courtroom. More broadly, however, I can discuss cameras in the appellate courtrooms in the State of Florida. All oral arguments at the Supreme Court of Florida and the intermediate appellate courts are transmitted live and archived for later viewing. The Supreme Court of Florida also live streams its oral arguments on its Facebook page. This is a particular favorite of law students, and many law students and practicing attorneys have spoken to me about the value they receive in being able to watch oral arguments, whether live or archived.

Nomination of Barbara Lagoa, to be United States Circuit Judge
for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR COONS

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

   The Supreme Court has identified several factors that help judges determine whether a right is fundamental and thus protected under the Fourteenth Amendment. *See e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Loving v. Virginia*, 388 U.S. 1 (1967). As with any case before me as a sitting jurist, I would review the parties' briefs, analyze the relevant precedent from the Supreme Court of the United States and the Eleventh Circuit Court of Appeals, and apply the appropriate legal standard to the facts in determining whether in that particular case the right asserted by the party was a fundamental right under the Fourteenth Amendment.

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

      Yes.

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

      Yes, the Supreme Court has held that history and tradition can be considered in the area of substantive due process. *See Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."). If confirmed, I would faithfully apply all applicable precedents in this area.

   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, as a lower court judge, I would be bound by precedent from the Supreme Court. Similarly, with respect to precedent from the Eleventh Circuit Court of Appeals, I would be bound by a prior panel opinion on that issue. If the issue was not settled by either of these courts, I would consider decisions from other circuits for their persuasive value.

   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*).

Yes, I would be bound and would apply the Supreme Court's decisions in *Casey* and *Lawrence* as I would be bound by all other Supreme Court precedent.

f. What other factors would you consider?

I would consider any other factors recognized by Supreme Court precedent and Eleventh Circuit Court of Appeals precedent as relevant to this type of inquiry.

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

The Supreme Court has held that the Fourteenth Amendment's Equal Protection Clause applies to gender as well as race. *United States v. Virginia*, 518 U.S. 515, 532 (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 sitting justice on the Supreme Court of Florida and a judicial nominee, it would be inappropriate for me to grade or opine on the decisions of the Supreme Court. If confirmed, I would faithfully apply *United States v. Virginia*, 518 U.S. 515 (1996).

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 know why litigation on this issue was not instituted until the 1990s or why the issue was not resolved until *United States v. Virginia*.

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that same-sex couples have a right to marry "on the same terms as accorded to couples of the opposite sex." If confirmed, I will faithfully apply *Obergefell* and all other precedents of the Supreme Court.

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

As a sitting justice on the Supreme Court of Florida and a judicial nominee, it would be inappropriate for me as a judge to opine on a matter that is the subject of pending litigation.

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

The Supreme Court has held that there is a constitutional right to privacy that includes the right of married and unmarried persons to use contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully apply these precedents, and all other precedents of the Supreme Court.

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

The Supreme Court has recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. If confirmed, I would faithfully apply these precedents, and all other precedents of the Supreme Court.

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?

The Supreme Court has recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully apply this precedent, and all other precedents of the Supreme Court.

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.

See responses to Questions 3, 3(a), and 3(b) above.

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

same-sex marriage based on the purported negative impact of such marriages on children.

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

As a sitting justice on the Supreme Court of Florida and a judicial nominee, it would be inappropriate for me to opine generally on abstract legal issues that may require consideration and application in a future case. If confirmed to the Eleventh Circuit, I would fully and faithfully apply binding precedent of the Supreme Court and the Eleventh Circuit on the question of when and how such evidence should be considered.

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

The consideration of such data and information in a particular case would likely depend upon the nature of the case and the particular legal issues raised by the parties. Rule 702 of the Federal Rules of Evidence provides that an expert may testify "[i]f the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand he evidence or determine a fact in issue." The Supreme Court has held that the rule "'establishes a standard of evidentiary reliability'" that the judge must determine. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 590 (1993)). If confirmed, I would faithfully apply the precedents of the Supreme Court and the Eleventh Circuit Court of Appeals on the question of when and how such evidence, data, and information should be considered.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

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

The decision of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is binding Supreme Court precedent. If confirmed, I will faithfully apply *Obergefell* and all other precedents of the Supreme Court.

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

As discussed in response to Questions 1 and its subparts, the Supreme Court has developed several factors to consider in analyzing substantive due process. Please also see my response to Question 5(a).

6. 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.

   a. 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?

      As I testified at my hearing, I believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided and holds a unique place in American jurisprudence as it corrected a grave racial injustice. As a lower court nominee, I am bound by and will apply all Supreme Court precedent regardless of whether a given precedent is consistent with originalism or not.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' or 'equal protection,' or 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Oct. 22, 2019).

      Determining the original public meaning of constitutional language can at times be a difficult inquiry. Justice Thomas in his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742, 854 (2010), responded to this criticism when he stated that "[t]he mere fact that the [Privileges or Immunities] Clause [of the Fourteenth Amendment] does not expressly list the rights its protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited."

   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?

      The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See*, *e.g., Crawford v. Washington*, 541 U.S. 36 (2004). Lower court judges, however, must follow the Supreme Court's precedents regardless of whether a given precedent is based on the public's understanding of a constitutional provision's meaning at the time of its adoption.

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 6(c).

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

In construing any particular provision of the United States Constitution, I would faithfully apply the applicable precedents of the Supreme Court and the Eleventh Circuit Court of Appeals.

7. In May 2019, you joined a decision of the Florida Supreme Court adopting the *Daubert* standard for expert testimony, invoking the Florida Supreme Court's rulemaking authority under the Florida Constitution.

a. Did the court follow its comment and review procedure? If not, why not?

Yes. In brief response to this question, as noted in the per curiam opinion of *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019), extensive public comment to the Supreme Court of Florida regarding the adoption of the *Daubert* standard in Florida state courts already had occurred, including voluminous pages of written submissions and oral argument before the Court. The Court concluded in its per curiam opinion that, in light of the extensive briefing the Court had already received on the issue and "mindful of the resources of parties, members of The Florida Bar, and the judiciary," it would not require "the process to be repeated." *Id.* at *2-3. This same point—that the Court had received extensive public comment on the question of whether or not to adopt the *Daubert* standard—was also addressed in the concurring opinion authored by Justice Lawson that more specifically addressed Justice Luck's dissent.

In more detailed response, in 2013, the Florida Legislature amended sections 90.702 and 90.704 of the Florida Evidence Code. Those amendments rejected the *Frye* standard for admission of expert testimony, which had been used by Florida state courts until that point, and replaced it with the *Daubert* standard set forth in Federal Rule of Evidence 702. Very broadly speaking, under the separation of powers provided for in Article II, section 3 of the Florida Constitution, the Florida Legislature has the exclusive constitutional authority to enact substantive law, while Article V, section 2(a) of the Florida Constitution vests the Supreme Court of Florida with the exclusive constitutional rule-making authority regarding procedural rules of court.

After the Legislature's amendment of the Florida Evidence Code, the Supreme Court of Florida solicited public comment, including comment from The Florida Bar, pursuant to Florida Rule of Judicial 2.140. That process culminated in *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017). A review of the list of counsel who

filed appearances with the Court reflects the volume and depth of public comment on the proposed rule changes being considered by the Court. In addition to the written comments received by the Court, the Court held oral argument regarding the proposed changes to the Florida Evidence Code. In its 2017 administrative opinion, the Supreme Court of Florida declined to adopt the Legislature's *Daubert* amendments to the extent that the amendments were procedural. The Supreme Court, however, did not answer the question of whether those amendments were substantive (in which case the Legislature had the authority to enact them) or procedural (in which case the Legislature did not).

In October 2018, in *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018), the Supreme Court of Florida held that the Legislature's amendment to section 90.702 of the Florida Evidence Code was, in fact, procedural in nature and therefore beyond the constitutional authority of the Legislature. In light of *DeLisle*'s resolution of the substantive versus procedural question, in *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019), the Supreme Court revisited its earlier administrative decision from 2017 and adopted the amendments to the extent that they were procedural.

As noted above, the per curiam portion of the 2019 decision summarized the extensive public comment the Court had received on the amendments. 2019 Fla. LEXIS 818 at *2-3. In addition, Justice Lawson's concurring opinion specifically addressed Justice Luck's contention that the Court was not following its own rules. As explained in the concurring opinion, "[w]ith respect to Justice Luck's contention that we are only authorized to adopt or amend a rule of court pursuant to Florida Rule of Judicial Administration 2.140, I respectfully disagree that the majority is not following the multistep process set forth in rule 2.140. As explained in the majority's per curiam opinion, that process was followed here, with the result that the Court has had the benefit of Florida Bar recommendations, oral argument, and extensive public comments, pro and con. All that this Court is doing now is reconsidering its earlier administrative (i.e., nonadjudicative) decision not to adopt the proposed *Daubert* amendments. Nothing in the text of rule 2.140 prohibits this Court from doing so." *Id*. at *8. In further response to Justice Luck's concern, the concurring opinion noted that "the Court has already received exhaustive input on this issue from the bench, bar, and public—explaining why we need not seek additional comment now. These cases [cited earlier in the concurring opinion], therefore, demonstrate how isolated the dissent is reading rule 2.140 as stripping this Court of its constitutional authority—or as severely self-limiting that authority such that we are powerless to act now without re-consulting one of the bar committees that we recognize by rule. Not only does no other member of our current court read rule 2.140 in this self-limiting fashion, these cases and rule II.G.1 demonstrate that prior courts have not read rule 2.140 as displacing the Court's constitutional power either. Given that we have the constitutional authority to adopte or amend these rules, art. V, § 2(a), Fla. Const., and that rule II.G.1 expressly recognizes our inherent authority to do so *sua sponte*, there is no reason for (or value in) repeating the rule 2.140 process with respect to this particular rule change." *Id.* at *11-12.

b. Justice Luck asserted in his dissenting opinion that "the majority opinion adopts the amendments . . . as procedural rules without following our procedure for adopting rules," stating "we must follow our own rules if we expect anyone else to." Under what circumstances is it appropriate for a court to act in ways that are contrary to its own procedural limitations?

Please see my response to Question 7(a).

8. In *Norona v. State*, 137 So.3d 1096 (Fla. 3d DCA 2014), you dissented from the majority's opinion upholding the trial court's decision to disallow the use of a peremptory challenge. The trial court rejected the purported race-neutral and gender-neutral explanation that the defense provided for striking the juror, given that several jurors had comparable or greater connections to law enforcement. What degree of deference is appropriate when evaluating a trial court's decision to reject a purported race-neutral or gender-neutral basis for striking a prospective juror?

The Supreme Court of Florida in *Melbourne v. State*, 679 So. 2d 759, 764-65 (Fla. 1996), has stated that a "trial court's decision [on whether a peremptory challenge is genuine] turns on an assessment of credibility and will be affirmed on appeal unless clearly erroneous."

9. In *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So.3d 938 (Fla. 3d DCA 2016), you joined the court of appeals decision reversing the trial court after withdrawing its prior opinion. The dissenting opinion stated that the majority's "two holdings [were] inconsistent with each other," and, "when taken together, these holdings effectively rewrite Florida statute of limitations jurisprudence in foreclosure cases."

a. Please explain when it is appropriate for a court to withdraw its prior opinion to overrule a trial court and a unanimous panel opinion.

In *Beauvais*, the Third District Court of Appeal sat *en banc*, meaning that all members of the court participated rather than simply a three-member panel of the court, in order to rehear the earlier decision of a three-judge panel in that case. Florida Rule of Appellate Procedure 9.331 establishes when it is appropriate for a court to hear or rehear a proceeding *en banc*. Specifically, Rule 9.331(a) provides that *en banc* "hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions." The Third District Court of Appeal determined that *Beauvais* met the criteria set forth in Rule 9.331 when it granted the motion for rehearing *en banc*. Contrary to the dissent's characterization, the *en banc* majority opinion in *Beauvais* did not "rewrite Florida statute of limitations in foreclosure cases," and the holding of the *en banc* majority in *Beauvais* subsequently was affirmed by the Supreme Court of Florida in *Bartram v. U.S. Bank, N.A.*, 211 So. 3d 1009 (Fla. 2016).

The same standard—maintaining uniformity of the court's decisions or consideration of a question of exceptional importance—governs the grant of *en banc* consideration by the Eleventh Circuit. *See* Federal Rule of Appellate Procedure 35; Eleventh Circuit Rule 35-3. If confirmed, I would be governed by and would faithfully apply the standards set forth in the Federal Rules of Appellate Procedure, the Eleventh Circuit's Rules, and the Internal Operating Procedures of the Eleventh Circuit.

b. In general, should a court attempt to reconcile existing precedents, rather than read a precedent broadly to overturn decades of jurisprudence?

As an intermediate appellate court, the Eleventh Circuit is bound by and must follow the precedents of the Supreme Court of the United States and of the Eleventh Circuit. Three-judge panels of the Eleventh Circuit are bound by prior panel decisions unless the court recedes from those decisions via *en banc* consideration or the decision has been overturned by the Supreme Court. *See, e.g., United States v. Vega-Castillo*, 540 F. 3d 1235, 1236 (11th Cir. 2008). As a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate for me to comment on specific examples or hypotheticals of how a court should go about the task of reconciling precedent. *See* Canon 3(A)(6), Code of Conduct for United States Judges; Canons 3B(9), (10), Florida Code of Judicial Conduct. Please also see my response to Question 9(a).

Questions for the Record for Barbara Lagoa
From Senator Mazie K. Hirono

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

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

      No.

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

      No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

   a. **Do you agree that training on implicit bias is important for judges to have?**

      Yes.

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

      Yes, as a judge on the Third District Court of Appeal I participated in training related to diversity and bias.

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

      Yes, to the extent that such training is offered to federal judges through the Administrative Office of the Courts or another officially sanctioned educational program.

3. After you were appointed as a Florida Supreme Court Justice in January 2019, you withdrew a prior Florida Supreme Court opinion that had been issued just a few days before your appointment. In *Glass v. Nationstar Mortgage, LLC*, the prior composition of the Supreme Court had held that a borrower who was the prevailing party in a foreclosure action was entitled to attorney's fees. But merely four months later, you decided to change Florida Supreme Court precedent in favor of the mortgage industry, by joining an opinion that withdrew the prior precedent without explanation. According to Law.com, an attorney in Florida who has practiced foreclosure defense and real estate law for 32 years, and who had filed an amicus brief in this case, described your withdrawal of precedent as follows: "I have never in my lifetime seen a Supreme Court do what this Supreme Court is doing in *Glass*." He added, "For the new judges to undo what the old judges have done is very unusual and, I would say, disturbing. . . . They effectively put into question the integrity of the process, and they should never, ever do that."

a. Do you believe undoing prior state Supreme Court precedent is a significant decision that warrants explanation? If so, why did you fail to explain the reasoning behind your decision to withdraw the prior precedent in *Glass*?

Unlike the Supreme Court of the United States, which exercises a general power to review lower court decisions by way of writ of certiorari, the Supreme Court of Florida is a court of limited appellate jurisdiction. It has the constitutional authority to review lower court decisions only if they fall within one of the grounds enumerated in Article V, Section 3(b) of the Florida Constitution, most of which provide the Court with discretionary, as opposed to mandatory, jurisdiction. *See, e.g., Jenkins v. State*, 385 So. 2d 1356 (Fla 1980) (England, J. concurring) (discussing history of 1980 amendment to the Florida Constitution limiting the jurisdiction of the Supreme of Florida). Absent one of those enumerated grounds, the Supreme Court of Florida has no jurisdiction to review a lower court decision. One of the constitutionally enumerated grounds permits review of a decision by a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(2), Fla. Const.

The Supreme Court of Florida's opinion in *Glass* issued on January 4, 2019. The dissent noted that the Court lacked constitutional authority to review the case and explained in detail the lack of an express and direct conflict between decisions of district courts of appeal on the same question of law that could vest the court with jurisdiction to review those decisions. Because the January 4, 2019, opinion in *Glass* barred the parties from exercising their right under Florida Rule of Appellate Procedure 9.330 to file a motion for rehearing, the respondent filed a motion to recall the mandate pursuant to Florida Rule of Appellate Procedure 9.340(a) and a motion for clarification pursuant to Florida Rule of Appellate Procedure 9.330(a). That motion asserted that the court lacked jurisdiction to hear the case because the constitutional requirement of an express and direct conflict on the same question of law was lacking and further sought clarification on the January 4, 2019, opinion. The petitioner responded to the motion to recall and/or for clarification. On April 18, 2019, the Court issued its written opinion in *Glass* granting respondent's motion to recall the mandate, withdrawing the January 4, 2019, initial opinion and further explaining that the Court "initially accepted review of the decision of the Fourth District Court of Appeal in *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017, based on express and direct conflict with the decision of the First District Court of Appeal in *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. 1st DCA 2008). Upon further consideration we conclude that the jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this review proceeding." The term "improvidently granted" is used by the Supreme Court to mean that it lacked jurisdiction to hear the case.

Indeed, because the Supreme Court of Florida is a court of limited appellate jurisdiction, the Court through many iterations of membership on the Court has discharged jurisdiction and dismissed review after consideration of a matter. *See, e.g., U.S. Bank*

National Association v. Anthony-Irish, 256 So. 3d 800 (Fla. 2018); *Dozier v. State*, 214 So. 3d 541 (Fla. 2017); *Godwin v. State*, 192 So. 3d 471 (Fla. 2016); *Miranda v. State*, 181 So. 3d 1188 (Fla. 2016); *Harris v. State*, 161 So. 3d 395 (Fla. 2015); *T.S. v. State*, 158 So. 3d 556 (Fla. 2015); *Williams v. State*, 156 So. 3d 1034 (Fla. 2015); *Smith v. Southland Suites of Ormond Beach, LLC*, 148 So. 3d 1251 (Fla. 2014); *Brantley v. State*, 115 So. 3d 360 (Fla. 2013); *Daniels v. State*, 103 So. 3d 133 (Fla. 2012); *Winslow v. School Board of Alachua County*, 88 So. 3d 112 (Fla. 2012); *Tetzlaff v. Florida Unemployment Appeals Commission*, 926 So. 2d 1267 (Fla. 2006); *Stine v. Jain*, 873 So. 2d 326 (Fla. 2004); *Henry v. State*, 590 So. 2d 419 (Fla. 1991). As with other opinions discharging jurisdiction such as those cited above, the April 18, 2019, written opinion in *Glass* is a comment on the Court's constitutionally limited appellate jurisdiction and not a comment on the merits of the party's claims.

b. Do you think it is proper, for justices to undo, without explanation, prior precedent decided by a different composition of justices?

Please see my answer to Question 3(a).

c. In your view, what factors or criteria are relevant in determining whether to reverse or undo prior precedent?

The Supreme Court of Florida's April 18, 2019 written *Glass v. Nationstar Mortgage, LLC* opinion granted Respondent's Motion to Recall the Mandate based on the Court's lack of jurisdiction to hear the matter. A court cannot hear or entertain matters that it does not have jurisdiction to consider.

d. In your view, how important is it for a judge to avoid putting the integrity of the judicial process in question?

While a judge should never put the integrity of the judicial process in question, a judge should also not exceed his or her jurisdiction to entertain a case. Because the Supreme Court of Florida is a court of limited jurisdiction, the Court at times accepts jurisdiction, receives merits briefs, hears arguments and realizes after further consideration that jurisdiction was improvidently granted. Please see for example the cases cited in response to Question 3(a).

4. In *City of Miami Beach v. Florida Retail Federation Inc.*, you also summarily reversed course by denying review of a case that the prior composition of the Supreme Court had agreed to review. The lower court had ruled in favor of the state retail association and other parties that had challenged a city ordinance that increased the minimum wage. In August 2018, the Florida Supreme Court accepted jurisdiction to review this decision. A month after your appointment to the Florida Supreme Court, you joined a decision dismissing review of this case without explanation. The decision simply stated, "Upon further consideration, we exercise our discretion and discharge jurisdiction. Accordingly, we hereby dismiss this review proceeding."

a. Do you think it is proper for justices to "exercise [their] discretion and discharge jurisdiction," without explanation, in a case for which a prior composition of justices had granted review?

Unlike the Supreme Court of the United States, which exercises a general power to review lower court decisions by way of writ of certiorari, the Supreme Court of Florida is a court of limited appellate jurisdiction. The Court has the constitutional authority to review lower court decisions only if they fall within the grounds enumerated in Article V, Section 3(b) of the Florida Constitution, most of which provide the Court with discretionary, as opposed to mandatory, jurisdiction. *See, e.g., Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) (England, J. concurring) (discussing history of 1980 amendment to the Florida Constitution limiting the jurisdiction of the Supreme of Florida).

In *Miami Beach*, the Third District Court of Appeal concluded that a municipal minimum wage ordinance was preempted by a Florida wage preemption statute. The Third District did not certify the case to be one of great public importance pursuant to Florida Rule of Appellate Procedure 9.330. The municipality sought review from the Supreme Court of Florida. Although the court initially granted discretionary jurisdiction, upon further review the Court exercised its discretion and discharged jurisdiction. It would be inappropriate for me to discuss the content of discussions among the justices of the Supreme Court of Florida. I can state that because the Supreme Court of Florida is a court of limited appellate jurisdiction, the Court through many iterations of membership on the Court has discharged jurisdiction and dismissed review after consideration of a matter. *See, e.g., U.S. Bank National Association v. Anthony-Irish*, 256 So. 3d 800 (Fla. 2018); *Dozier v. State*, 214 So. 3d 541 (Fla. 2017); *Godwin v. State*, 192 So. 3d 471 (Fla. 2016); *Miranda v. State*, 181 So. 3d 1188 (Fla. 2016); *Harris v. State*, 161 So. 3d 395 (Fla. 2015); *T.S. v. State*, 158 So. 3d 556 (Fla. 2015); *Williams v. State*, 156 So. 3d 1034 (Fla. 2015); *Smith v. Southland Suites of Ormond Beach, LLC*, 148 So. 3d 1251 (Fla. 2014); *Brantley v. State*, 115 So. 3d 360 (Fla. 2013); *Daniels v. State*, 103 So. 3d 133 (Fla. 2012); *Winslow v. School Board of Alachua County*, 88 So. 3d 112 (Fla. 2012); *Tetzlaff v. Florida Unemployment Appeals Commission*, 926 So. 2d 1267 (Fla. 2006); *Stine v. Jain*, 873 So. 2d 326 (Fla. 2004); *Henry v. State*, 590 So. 2d 419 (Fla. 1991). As with other opinions discharging jurisdiction such as those cited above, the opinion in *Miami Beach* is a comment on the Court's constitutionally limited appellate jurisdiction and not a comment on the merits of the parties' claims.

b. In your view, what factors or criteria are relevant in determining whether to deny review of a case after a prior composition of a court has granted review?

Please see my responses to Question 4(a) and Question 3(d).

c. In your view, do you believe denying review of a case, without explanation, after a prior composition of the Florida Supreme Court had granted review, increases or decreases public trust in the Court? Please explain the basis for your answer.

Please see my responses to Question 4(a) and Question 3(d).

5. When you were appointed to the Florida Supreme Court in January 2019, the president of the Florida Family Policy Council issued a statement praising your judicial appointment as a "home run" and describing you as having "a conservative judicial philosophy that appreciates the limited role of the court." According to its website, the Florida Family Policy Council is a state-based policy council that has, among other things, organized a statewide campaign to defund Planned Parenthood, and encouraged attendance at "pro-life events" that are "mourning Roe v. Wade," with the assertion, "We are winning this battle but the pro-life abolitionist movement needs your help and support."

   a. In your view, did the president of the Florida Family Policy Council describe you accurately when he said you have "a conservative judicial philosophy that appreciates the limited role of the court"?

   As I stated in my January 9, 2019, speech following the Governor's announcement of my appointment, "I am particularly mindful of the fact that under our constitutional system, it is for the Legislature, and not the courts, to make the law. It is the role of judges to apply, not to alter, the work of the people's representatives. And it is the role of judges to interpret our constitution and statutes as they are written. In the country my parents fled, the whim of a single individual could mean the difference between food or hunger, liberty or prison, life or death. In our great country and our great State, we are governed by the rule of law—the consistent and equal application of the law to all litigants regardless of a judge's personal preferences. Unlike the country my parents fled, we are a nation of laws not of men."

   b. Have you been involved with the Florida Family Policy Council in any capacity? If so, please describe your involvement.

   I have not been involved with the Florida Family Policy Council in any capacity.

6. When a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records do not matter, that as judges they will simply "follow the law." Cases, however, are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

   a. Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?

   All people including judges bring their personal experiences to work. Judges, however, unlike other professionals, are obligated to decide cases based on the law enacted by the political branches or based on the common law regardless of their personal preferences or personal experiences.

   b. What do you view as the work of "judging"? If cases were as easy and clear-cut as simply "following the law," why would we need judges at all?

I agree that "judging" or "following the law" is not always clear cut and requires analysis, care, and thoughtful deliberation. The work of judging may require several steps depending on the case presented to the court. For example, in a case involving a contract, a judge should construe and analyze the applicable contractual provision, review the arguments and case law presented by the parties, and review and analyze existing precedent to determine if that precedent is applicable. Regardless of the type of case before a court, it is the judge's obligation and duty to analyze the governing law and determine the proper interpretation of that law to the facts of the case before the court.

7. **Why do you want to be a federal judge? What in your personal or professional background has most motivated you to want to serve?**

I have spent the last sixteen years of my professional career dedicated to public service. It has been an honor and privilege for me to serve the citizens of the United States as an Assistant United States Attorney and subsequently to serve the citizens of the State of Florida as an appellate judge. Prior to my decision to become a public servant, I spent eleven years in private practice helping clients in commercial litigation matters. If I were fortunate to be confirmed, it would be an incredible privilege for me to uphold the Constitution of the United States and the laws of this nation by serving on the federal bench.

8. **What do you believe is the fundamental role of a federal judge?**

The fundamental role of any judge is to follow and apply the rule of law by ensuring a neutral, impartial and fair application of the law to the facts of the case before the court.

Nomination of Barbara Lagoa
United States Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR BOOKER

1. In his inaugural address earlier this year, Governor Ron DeSantis—who appointed you the Supreme Court of Florida—said:

> I also understand that the role of the judiciary, while important, must be limited. It is a self-evident truth that in our constitutional system, courts lack the authority to legislate, but for far too long Florida has seen judges expand their power beyond proper constitutional bounds and substitute legislative will for dispassionate legal judgment, damaging the constitutional separation of powers, reducing the power of the people and eroding individual liberty.
>
> To my fellow Floridians, I say to you: judicial activism ends, right here and right now. I will only appoint judges who understand the proper role of the courts is to apply the law and Constitution as written, not to legislate from the bench. The Constitution, not the judiciary, is supreme.[1]

   a. Do you agree with Governor DeSantis's statement that "for far too long Florida has seen judges expand their power beyond proper constitutional bounds and substitute legislative will for dispassionate legal judgment, damaging the constitutional separation of powers, reducing the power of the people and eroding individual liberty"? Please explain your answer.

      Both as a judicial nominee and as a sitting justice on the Supreme Court of Florida, it would be inappropriate to comment on political matters such as remarks made by the Governor during his inaugural address. *See, e.g.*, Canon 5, Code of Conduct of United States Judges.

   b. In the U.S. Supreme Court's landmark decision in *Marbury v. Madison*, Chief justice Marshall famously declared more than two centuries ago, "It is emphatically the province and duty of the judicial department to say what the law is."[2] How do you understand the meaning of Governor DeSantis's statement that "[t]he Constitution, not the judiciary, is supreme," in light of the judiciary's mandate to interpret the Constitution and "say what the law is"?

      It would be inappropriate for me to comment on political matters such as remarks made by the Governor during his inaugural address. *See, e.g.*, Canon 5, Code of Judicial Conduct of United States Judges.

      In further response regarding *Marbury*, that case, of course, established the principle of judicial review and, on that foundation, the American judicial system. Under that principle, all of the branches of our government are subordinate to the requirements of the Constitution, including the constitutional requirement of separation of powers.

By saying "what the law is" in the context of a Case or Controversy properly before it, a federal court exercises the judicial power reserved to it under Article III of the Constitution.

2. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

   Judicial restraint is a central feature of the rule of law and reflects the notion that judges must follow the law, rather than make the law. Judges demonstrate judicial restraint by addressing the issues before them through an impartial application of the law regardless of their personal views.

   a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[3] Was that decision guided by the principle of judicial restraint?

      The decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee and a sitting justice on the Supreme Court of Florida, it would not be appropriate for me to grade or to opine on whether the majority decision or the dissent in *Heller* was correct.

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[1] Ed Whelan, *Transforming the Florida Supreme Court*, NAT'L REV. (Jan. 11, 2019), https://www.nationalreview.com/bench-memos/transforming-the-florida-supreme-court.
[2] 5 U.S. 137, 177 (1803)
[3] 554 U.S. 570 (2008).

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[4] Was that decision guided by the principle of judicial restraint?

The decision in *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee and a sitting justice on the Supreme Court of Florida, it would not be appropriate for me to grade or to opine on whether the majority decision or the dissent in *Citizens United* was correct.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[5] Was that decision guided by the principle of judicial restraint?

The decision in *Shelby County v. Holder,* 570 U.S. 529 (2013), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee and a sitting justice on the Supreme Court of Florida, it would not be appropriate for me to grade or to opine on whether the majority decision or the dissent in *Shelby County* was correct.

3. In a case you handled on the state appellate court, you joined an opinion affirming a trial court's decision to keep media out of a pretrial hearing in a high-profile murder case.[6] The *Miami Herald* reported at the time, "The decision upends decades of press access to Miami criminal court . . . . Florida is generally known as having one of the most transparent criminal-court systems in the country, and hearings are rarely, if ever, closed to the public."[7]

a. As an appellate judge reviewing a trial court's decision, what factors do you take into account in determining whether a judicial proceeding should be closed to the public?

The opinion referenced in the question above is *Miami Herald Media Co. v. State*, 218 So. 3d 460 (Fla. 3d DCA 2017) ("*Miami Herald Media*"). I joined a unanimous panel opinion authored by one of my colleagues on the Third District Court of Appeal. *Miami Herald Media* involved a petition for a writ of certiorari relating to four trial court orders that temporarily denied access to certain pretrial discovery materials and that closed a pretrial hearing likely to include presentation of sealed evidence, including videotaped confessions. As noted in *Miami Herald Media,* the factors considered in determining whether the pretrial proceedings should be open to the press "required a balancing of the defendants' due process right to a fair trial in Miami-Dade County, where the charged offenses allegedly were committed, Art. I, § 16(a), Fla. Const. (1968), and the rights of the public and media to access records under Chapter 119, Florida Statutes (2016) [Florida's public records law] and to observe in-court proceedings under to *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 1979)." 218 So. 3d at 462.

These competing interests were addressed by the Supreme Court of Florida's binding precedent in *Miami Herald Publishing v. Lewis*, 426 So. 2d 1 (Fla. 1982), and in addressing these competing interests the Supreme Court of Florida set forth the following three-prong test under which the trial court considers whether to close a

pretrial hearing: (1) closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) no alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and (3) closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. *Miami Herald Media*, 218 So. 3d at 462-63 (citing *Lewis*). *Lewis* also drew a distinction between pretrial proceedings in criminal cases and the trials themselves. Because the issue in *Miami Herald Media* only concerned pretrial proceedings, the court noted that the "orders below and the petition here do not require us to address the higher constitutional rights of access to the courtroom and case-related records applicable to a *trial*." 218 So. 3d at 462 (emphasis in original).

As the Florida Supreme Court articulated in *Lewis*, "[e]very defendant has the right 'to have a . . . trial . . . in the county where the crime was committed.' Art. I, § 16, Fla. Const. (1968). There is no first amendment protection of the press' rights to attend pretrial hearings. We should not elevate this non-constitutional privilege of the press above the constitutional right of the defendant to be tried in the county where the crime was committed. A change of venue should not be considered as an alternative to closure." 426 So. 2d at 6.

Lastly, as discussed in *Miami Herald Media*, the trial court's denial of access "was not absolute but only temporary. Once the danger of prejudice has dissipated, discovery material will be made available." *Id.* at 463. Again, this comported with the Supreme Court of Florida's precedent in *Lewis*, 426 So. 2d 1, 8 (Fla. 1982) ("The news media have no first amendment right to attend the pretrial hearing as long as when closure is ordered, the transcript of the hearing is made available to the news media at a specified future time, when the danger of prejudice will be dissipated (for example, after the trial jury is sequestered).").

b. How do you assess the values of judicial transparency and press access in making such a determination?

See my response to Question 3(a).

4. Before adopting a new rule of evidence, the Supreme Court of Florida is required to follow established comment and review procedures. Earlier this year, you joined a majority opinion changing a rule of evidence on expert testimony to the *Daubert* standard.[8] This decision was made without following the established procedures for amending Florida's rules of legal practice. A dissenting member of your court—in fact, your fellow Eleventh Circuit nominee, Justice Luck—stated, "[W]e must follow our own rules if we expect anyone else to."[9]

a. In your view, when can a court depart from its established procedures for amending its own rules?

In brief response to this question, as noted in the per curiam opinion of *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019), extensive public comment to the Supreme Court of Florida regarding the adoption of the *Daubert* standard in Florida state courts already had occurred, including voluminous pages of written submissions and oral argument before the

Court. The Court concluded in its per curiam opinion that, in light of the extensive briefing the Court had already received on the issue and "mindful of the resources of parties, members of The Florida Bar, and the judiciary," it would not require "the process to be repeated." *Id.* at *2-3. This same point—that the Court had received extensive public comment on the question of whether or not to adopt the *Daubert* standard—was also addressed in the concurring opinion authored by Justice Lawson that more specifically addressed Justice Luck's dissent.

In more detailed response, in 2013, the Florida Legislature amended sections 90.702 and 90.704 of the Florida Evidence Code. Those amendments rejected the *Frye* standard for admission of expert testimony, which had been used by Florida state courts until that point, and replaced it with the *Daubert* standard set forth in Federal Rule of Evidence 702. Very broadly speaking, under the separation of powers provided for in Article II, section 3 of the Florida Constitution, the Florida Legislature has the exclusive constitutional authority to enact substantive law, while Article V, section 2(a) of the Florida Constitution vests the Supreme Court of Florida with the exclusive constitutional rule-making authority regarding procedural rules of court.

After the Legislature's amendment of the Florida Evidence Code, the Supreme Court of Florida solicited public comment, including comment from The Florida Bar, pursuant to Florida Rule of Judicial 2.140. That process culminated in *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017). A review of the list of counsel who filed appearances with the Court reflects the volume and depth of public comment on the proposed rule changes being considered by the Court. In addition to the written comments received by the Court, the Court held oral argument regarding the proposed changes to the Florida Evidence Code. In its 2017 administrative opinion, the Supreme Court of Florida declined to adopt the Legislature's *Daubert* amendments to the extent that the amendments were procedural. The Supreme Court, however, did not answer the question of whether those amendments were substantive (in which case the Legislature had the authority to enact them) or procedural (in which case the Legislature did not).

In October 2018, in *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018), the Supreme Court of Florida held that the Legislature's amendment to section 90.702 of the Florida Evidence Code was, in fact, procedural in nature and therefore beyond the constitutional authority of the Legislature. In light of *DeLisle*'s resolution of the substantive versus procedural question, in *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019), the Supreme Court revisited its earlier administrative decision from 2017 and adopted the amendments to the extent that they were procedural.

As noted above, the per curiam portion of the 2019 decision summarized the extensive public comment the Court had received on the amendments. 2019 Fla. LEXIS 818 at *2-3. In addition, Justice Lawson's concurring opinion specifically addressed Justice Luck's contention that the Court was not following its own rules. As explained in the concurring opinion, "[w]ith respect to Justice Luck's contention that we are only authorized to adopt or amend a rule of court pursuant to Florida Rule of Judicial Administration 2.140, I respectfully disagree that the majority is not following the

multistep process set forth in rule 2.140. As explained in the majority's per curiam opinion, that process was followed here, with the result that the Court has had the benefit of Florida Bar recommendations, oral argument, and extensive public comments, pro and con. All that this Court is doing now is reconsidering its earlier administrative (i.e., nonadjudicative) decision not to adopt the proposed *Daubert* amendments. Nothing in the text of rule 2.140 prohibits this Court from doing so." *Id*. at *8. In further response to Justice Luck's concern, the concurring opinion noted that "the Court has already received exhaustive input on this issue from the bench, bar, and public—explaining why we need not seek additional comment now. These cases [cited earlier in the concurring opinion], therefore, demonstrate how isolated the dissent is reading rule 2.140 as stripping this Court of its constitutional authority—or as severely self-limiting that authority such that we are powerless to act now without re-consulting one of the bar committees that we recognize by rule. Not only does no other member of our current court read rule 2.140 in this self-limiting fashion, these cases and rule II.G.1 demonstrate that prior courts have not read rule 2.140 as displacing the Court's constitutional power either. Given that we have the constitutional authority to adopt or amend these rules, art. V, § 2(a), Fla. Const., and that rule II.G.1 expressly recognizes our inherent authority to do so *sua sponte*, there is no reason for (or value in) repeating the rule 2.140 process with respect to this particular rule change." *Id.* at *11-12.

b. Would your analysis differ if you were making this determination as a federal appeals judge, rather than as a member of a state's highest court?

Please see my response to Question 4(a). In further response, the issue in *In re Amendments to the Florida Evidence Code* involved a constitutional power exclusively reserved to the Supreme Court of Florida by the Florida Constitution, as well as that Court's precedent involving that authority. I am not aware of similar authority provided to federal appeals courts, although I have not had occasion to consider the matter closely.

5. You became a member of the Federalist Society in 1998.[10] Why did you join the Federalist Society at that time?

The Federalist Society Chapter in Miami hosted interesting debates and panels of speakers with differing points of views. I enjoyed attending these debates and panel discussions and learning about different sides of an issue.

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

Originalism is method of interpretation that focuses on the words of a legal text and seeks to ascertain the original public meaning of that provision. As Justice Kagan said during the 2015 Antonin Scalia Lecture Series at Harvard Law School, "we are all originalists now," and indeed the Supreme Court of the United States has considered the original public meaning of constitutional provisions when construing them. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004). Regardless of whether a precedent employs an originalist method of interpretation or another method of interpretation, however, lower courts must follow the precedent of the Supreme Court. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477,

484 (1989). If confirmed, I will faithfully follow all precedents of the Supreme Court and the Eleventh Circuit.

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

Textualism is also a method of interpretation that is similar to originalism and that is generally associated with statutes. The Supreme Court has held that "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If "that examination yields a clear answer, judges must stop." *Id.* Textualism can also employ accepted canons of construction to aid in the interpretation of a text. As I stated in response to Question 6, regardless of the method employed by a precedent, lower courts must follow the precedent of the Supreme Court. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). If confirmed, I will faithfully follow all precedents of the Supreme Court and the Eleventh Circuit.

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[4] 558 U.S. 310 (2010).
[5] 570 U.S. 529 (2013).
[6] *Miami Herald Media Co. v. State*, 218 So.3d 460 (Fla. 3d Dist. Ct. App. 2017).
[7] David Ovalle, *Hearing in Machete-Murder Case Can Be Secret, Miami Appeals Court Rules*, MIAMI HERALD (Apr. 26, 2017), https://www.miamiherald.com/news/local/community/miami-dade/article146877304.html.
[8] *In re Amendments to the Fla. Evidence Code*, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019) (per curiam).
[9] *Id.* at *8 (Luck, J., dissenting).
[10] SJQ at 7.

8. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

    a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

    The Supreme Court has generally instructed that judges may consider legislative history when a statute is ambiguous, but where a statute is unambiguous, resort to legislative history is not necessary. *See Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp., v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I would faithfully apply Supreme Court and Eleventh Circuit precedent on the use of legislative history and where appropriate will carefully consider any arguments that the parties may advance regarding the use of legislative history.

    b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

    Please see my response to Question 8(a).

9. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[11] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[12]

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

    Because this question is being and will continue to be litigated in courts, it would be inappropriate for me to express an opinion on this matter. *See* Canon 3(A)(6) and Canon 5 of the Code of Conduct for Unites States Judges.

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

    Please see my response to Question 9(a).

    c. Do you agree with the statement that voter ID laws are the twenty-first-century

equivalent of poll taxes?

Please see my response to Question 9(a).

10. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[13] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[14] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more

[11] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[12] *Id.*
[13] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[14] *Id.*

likely than whites to be incarcerated in state prisons.[15] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[16]

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

I have not studied this issue but I recognize that both implicit and explicit racial bias exists everywhere, including in some parts of our criminal justice system.

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

Yes. It is my understanding that racial minorities are statistically more likely to be incarcerated than whites and that racial minorities comprise a greater percentage of the incarcerated population than they do of the overall population.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not studied this issue.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[17] Why do you think that is the case?

As a judicial nominee, it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[18] Why do you think that is the case?

Please see my response to Question 10(d).

f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Federal district judges have an essential role to play in ensuring the fair administration of law to the cases brought before them. District judges must apply the law without regard to a person's race and take steps to eliminate any potential implicit racial bias.

11. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[19] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[20]

a. Do you believe there is a direct link between increases in a state's incarcerated

population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue to be able to offer an informed view on it.

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

Please see my response to Question 11(a).

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[15] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[16] *Id.*
[17] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.
[18] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).
[19] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[20] *Id.*

12. 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.

13. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

    Yes.

14. Do you believe that *Brown v. Board of Education*[21] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    As I testified at my hearing, although it is not appropriate to opine as a justice on the Supreme Court of Florida or as a judicial nominee on whether a Supreme Court decision is correct, I believe that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided and holds a unique place in American jurisprudence as it corrected a grave racial injustice.

15. Do you believe that *Plessy v. Ferguson*[22] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    No, and as I stated at my hearing *Brown v. Board of Education*, 347 U.S. 483 (1954), corrected that grave racial injustice.

16. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    No.

17. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[23] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    As a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would be inappropriate for me to opine on a political matter or an issue that could result in pending litigation.

18. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[24] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful,

temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will faithfully apply the applicable precedents in this area. To the extent this question asks me to opine on a political matter, as a sitting justice on the Supreme Court of Florida and as a judicial nominee, it would not be appropriate for me to do so.

[21] 347 U.S. 483 (1954).
[22] 163 U.S. 537 (1896).
[23] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[24] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted October 23, 2019
For the Nomination of

Barbara Lagoa, to be United States Circuit Judge for the Eleventh Circuit

1. At your nominations hearing, Senator Grassley and Senator Cruz asked you to describe the role of legislative history when interpreting a statute. You responded that a judge must start with the text of the statute. If the statute is unambiguous, the inquiry is at an end and the judge is required to apply the law as written. You also noted that, in your 13 years as an appellate judge, you found most statutes unambiguous and never considered legislative history in order to reach a decision.

    a. **In your view, is it ever appropriate for a judge to consider legislative history?**

    The Supreme Court has generally instructed that judges may consider legislative history when a statute is ambiguous, but where a statute is unambiguous, resort to legislative history is not necessary. *See Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp., v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I would faithfully apply Supreme Court and Eleventh Circuit precedent on the use of legislative history and where appropriate will carefully consider any arguments that the parties may advance regarding the use of legislative history.

    b. **If confirmed, would you be open to considering legislative history when interpreting the meaning of a statute? If yes, under what circumstances?**

    Please see my answer to Question 1(a).

    c. **Do you believe it is ever appropriate for a judge to consider the impact of a potential ruling when deciding a case? Why or why not?**

    Judges should understand the facts and circumstances of the cases brought before them so that they understand the impact or consequences of their decisions. I have been an appellate judge for over thirteen years. First, as a sitting judge on Florida's Third District Court of Appeal and presently as a justice on the Supreme Court of Florida. I understand and fully appreciate that appellate cases involve real people with real issues and that the decision rendered by my court will impact the litigants. However, judicial decisions should be dictated by the application of the rule of law to the facts of the case and not based on a particular outcome or a judge's personal preferences.

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

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

Yes, judges play a critical role in ensuring the fairness of our justice system.

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

If confirmed, I will perform my role consistent with the requirements imposed by law and the Code of Conduct for United States Judges. For the past thirteen years, I have striven as a judge to ensure that both the litigants and the lawyers feel that they have been heard, that the issues raised by the parties have been fairly and impartially considered, and that all the parties and lawyers are treated with respect.

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

Yes. It is my understanding that racial minorities are statistically more likely to be incarcerated than whites and that racial minorities comprise a greater percentage of the incarcerated population than they do of the overall population.