

**Nomination of Kathryn Kimball Mizelle to the United States District Court for the Middle
District of Florida
Questions for the Record
September 16, 2020**

QUESTIONS FROM RANKING MEMBER FEINSTEIN

1. You have been a licensed attorney for only eight years. It appears that you have spent a very small portion of your practice trying cases in court. In addition, a substantial portion of your clerkship experience has been in appellate courts, rather than trial courts. This lack of experience is, in large part, why the American Bar Association rated you “Not Qualified” to be a federal district court judge.

a. How many cases have you tried to verdict?

Two.

b. Please explain your role in these cases. Did you serve as sole or lead counsel?

In one case, I served as co-lead counsel. In that capacity, I helped select the jury, presented opening statements to the jury, and conducted the direct examinations of half of the State’s witnesses. My co-counsel presented closing arguments and did the direct examinations for the other half of the State’s witnesses. In the other case, I served as associate counsel to the lead counsel. In that capacity, I helped select the jury, helped prepare the State’s central witness for his direct examination, and assisted with the presentation of the State’s exhibits.

c. Had you graduated from law school when you tried each of these cases?

No.

d. Were you a licensed attorney when you tried each of these cases?

At the time I tried the above-referenced jury trials, I was serving as a “certified legal intern” at the State Attorney’s Office, which means that under the Florida Bar Rules, I was authorized to represent the State of Florida in criminal proceedings in state trial court.

e. Have you been admitted to practice before any federal district courts? If so, please explain why you omitted this information from your Senate Judiciary Questionnaire.

Under each district’s local court rules, I was authorized to represent the United States as a career federal prosecutor in multiple federal district courts across the Southeast United States. However, under those local rules, I was not admitted in my personal capacity, and thus did not list them on the questionnaire.

2. In a 2020 interview with *The View* magazine, you indicated that you have spent little time practicing in court. You stated: “The average day of a lawyer looks different than what people see portrayed on television. Being a lawyer, especially an appellate one, consists mostly of reading, writing, and editing. And even when I was a trial attorney at the Department of Justice, most of my time was spent reviewing documents and preparing for witness interviews or grand jury.”

a. When you were a trial attorney at the Department of Justice, what percentage of your practice involved appearances in court?

As a career federal prosecutor with the U.S. Department of Justice, I frequently appeared in federal court. By my recollection, I have appeared and argued in federal court on behalf of the United States approximately 40 times. The above quote was intended to explain that, by percentage of my working hours and that of most white-collar prosecutors, most of my time was spent in preparation of court appearances and grand jury appearances.

b. When you were a trial attorney at the Department of Justice, what percentage of your practice involved document review?

As a white-collar federal prosecutor, a large portion of my responsibilities involved understanding the facts underlying the prosecution. When prosecuting sophisticated tax defendants, those facts tend to be captured in financial documents, such as tax records and bank statements. As such, I spent a fair amount of time reviewing complex tax and bank records as well as working with IRS special agents and revenue agents in properly calculating the tax owed based on those records.

3. According to your Questionnaire, you discussed whether you were interested in being considered for the judicial vacancy on the U.S. District Court for the Middle District of Florida with a lawyer in the White House Counsel’s Office in June 2020. You subsequently submitted your resume to Senator Rubio’s office, Senator Scott’s office, and the White House Counsel’s Office.

Was your June 2020 conversation with an attorney in the White House Counsel’s Office the first time you discussed your interest in a district court judgeship with a member of the White House Counsel’s Office or other White House staff? If not, please elaborate on any other such conversations.

Yes.

4. You filed an amicus brief in the D.C. Circuit Court of Appeals supporting the Department of Labor’s decision not to issue mandatory safety rules to protect workers from contracting or spreading COVID-19. (Amicus Brief, *In re: AFL-CIO* (D.C. Cir. 2020))

- a. **Do you believe that the federal government cannot or should not impose basic safety rules—such as requiring businesses to provide workers with personal protective equipment, to reconfigure operations to allow for social distancing, or to establish universal testing for employees—during a global pandemic?**

The views expressed in the above-mentioned amicus brief were those of the clients for whom I was an advocate. My client was of the view that the existing OSHA regulations and guidance adequately protected American workers. As a judicial nominee, it would be improper for me to offer my personal view on any issue that is likely to come before a court, including the authority of the federal government to impose safety standards on businesses. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. **Would clear, federal standards allow businesses to show that they are not liable for the spread of COVID-19 because they followed federal safety guidelines?**

Please see my response to Question (4)(a).

5. From 2017 to 2018, you served as Counsel to then-Associate Attorney General Rachel Brand under then-Attorney General Jeff Sessions. According to your Senate Judiciary Questionnaire, you advised on litigation handled by the Justice Department’s Civil and Civil Rights Divisions.

The following questions are meant to clarify what you worked on during this time. Please note that you are not being asked to describe any substantive advice you gave to Attorney General Sessions, Associate Attorney General Brand, or others in the Justice Department or federal government. You are being asked to confirm what topics you worked on and what your role was.

- a. **Did you work or advise on the Department of Justice’s (DOJ) “zero tolerance” policy that led to the separation of families at the border?**

No, not to my recollection.

- b. **Did you work or advise on DOJ’s decision to stop defending the constitutionality of the Affordable Care Act?**

No, not to my recollection.

- c. **Did you work or advise on DOJ’s defense of President Trump’s Executive Order 13,780, commonly referred to as the “Muslim ban” or “travel ban?”**

No, not to my recollection.

- d. Did you work or advise on the decision to limit DOJ's ability to enter into consent decrees that allow oversight over local law enforcement agencies?**

No, not to my recollection.

- e. Did you work or advise on DOJ's withdrawal of guidance stating that Title IX gives students access to sex-segregated facilities that correspond to students' gender identity?**

The withdrawal of the letter to which you refer occurred in February 2017, before I began serving in the Associate Attorney General's Office, and I was therefore not involved in any manner with that event. Upon joining the Associate Attorney General's Office, I worked on DOJ's Regulatory Reform task force where I generally advised the Associate Attorney General on de-regulatory efforts at the Department. As such, I was aware of de-regulatory actions that the Department was taking. However, I was not the decision maker on any particular rescission decisions.

- f. Did you work or advise on DOJ's withdrawal of guidance interpreting Title VII as prohibiting employment discrimination based on gender identity or transgender status?**

Please see my response to Question (5)(e).

- g. Did you work or advise on DOJ's decision to reverse its position on a 2011 Texas voter identification law in the case *Veasey v. Abbott*?**

No, not to my recollection.

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?**

Never.

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

It is generally not appropriate for inferior court judges to criticize Supreme Court precedent, and if confirmed as a district judge, I would have little occasion to write a concurring or dissenting opinion.

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

District court decisions are not precedential, although they can be persuasive. Federal Rules of Civil Procedure 59(e) and 60 provide standards for when a district court should set aside its prior rulings in a specific case. A district court should revisit its decisions when they conflict with a decision from a superior court.

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

It is only for the Supreme Court to decide when a precedent should no longer be followed, and the Court has recently and repeatedly articulated the factors it considers when determining whether stare decision requires adherence to precedent. *See, e.g., Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020) (considering “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision” (internal quotation marks omitted)). If confirmed, I would faithfully apply all Supreme Court precedent.

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

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

All Supreme Court precedents are binding on lower courts, including *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny.

b. Is it settled law?

Please see my response to Question (7)(a).

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?**

Like all Supreme Court precedent, *Obergefell* is settled law that is binding on lower courts, and if confirmed, I would apply it faithfully.

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 judicial nominee, it would not be appropriate for me to comment on the merits or demerits of any Supreme Court opinion. If confirmed, I would faithfully apply the Court's *Heller* opinion and its progeny.

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

The Supreme Court in *Heller* noted that the "right secured by the Second Amendment is not unlimited," and 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." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

The Justices in *Heller* disagreed on the implications of prior precedent.

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?

The Supreme Court has held that "First Amendment protection extends to corporations." *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). If confirmed, I would faithfully apply that precedent.

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

Please see my response to Question (10)(b).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014), the Supreme Court held that the Religious Freedom Restoration Act applies to closely-held corporations. That precedent is binding and, if confirmed, I would apply it. As a judicial nominee, it would not be appropriate to opine further on an issue that could be the subject of pending or impending litigation.

11. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Together, these constitutional provisions restrict the government from denying a person the equal protection of the laws and from prohibiting a person’s free exercise of religion. Both are fundamental, important rights protected by our Constitution, and I would faithfully apply all Supreme Court precedent governing the interplay of the two amendments.

12. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

The Supreme Court has long-held that state laws prohibiting interracial marriage violate the Fourteenth Amendment. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). Please also see my response to Question 11.

13. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

Please see my response to Question 12.

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

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

I was not involved in drafting that statement nor do I presume to speak on behalf of the Federalist Society.

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

Please see my response to Question 14(a).

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

Please see my response to Question 14(a).

- d. **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.**

Since I was first contacted by the White House Counsel’s Office in June 2020, I have had conversations about the possible nomination with lawyers at the Department of Justice and with friends, family, and professional colleagues. Some of those individuals are members of the Federalist Society.

- e. **Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?**

No.

- f. **When you joined the Federalist Society in 2012—when you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary? Please answer either “yes” or “no.”**

No.

1. **If your answer is “no,” then why did you decide to join the Federalist Society in 2012, when you began practicing law?**

During law school, I was able to attend events hosted by the Federalist Society and other student organizations where I heard competing viewpoints being debated. I joined the Federalist Society upon graduation because I wanted to continue to have the opportunity to grow as a lawyer by being exposed to events where speakers would advocate for opposing views.

15. In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct].” (*Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

- a. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?**

Yes, I was aware of the since-rescinded draft opinion. No, I did not consider withdrawing membership from the Federalist Society because my participation, to the best of my knowledge, has not involved any conduct that Canon 4 or Canon 5 of the Code of Judicial Conduct proscribes.

- b. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?**

Canon 4 of the Code of Conduct for United States Judges instructs that a “judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.” That same canon states that such participation should not “detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.” As far as I am aware, the Federalist Society has never taken a particular policy or legal position; has never filed an amicus brief in support of any litigant; and has never endorsed a political candidate. Based on my current understanding and experience with the organization, membership in the Federalist Society is fully consistent with the Code of Conduct for United States Judges, including both Canon 4 and Canon 5. I will, of course, continue to evaluate any membership or participation in any organization in light of the Code of Conduct and the factors outlined in Advisory Opinion #116.

16. 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 different than judicial selection in past years...”

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

so, by whom, what was asked, and what was your response?

I do not recall being asked any question during the nomination selection process about my views regarding administrative law. When I was serving at the Department of Justice in the Office of the Associate Attorney General, I provided legal advice in response to requests about general de-regulatory policies.

- 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. However, since 2016, I have provided legal advice to clients on regulatory and administrative matters, but I cannot disclose the contents of my communications.

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

As an inferior court nominee, my view is that all Supreme Court and Eleventh Circuit precedent regarding administrative law is binding and I would faithfully apply it.

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

I am generally aware that literature exists which attributes climate change to human activity, but I have not studied any particular scientific reports. It is not appropriate for me to comment further, however, as this issue has been and will likely continue to arise in litigation and is part of a national political debate. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

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

The Supreme Court has held that the text of a statute is the starting place for construing it and that it is appropriate to consider legislative history only when the statutory text is ambiguous. *See, e.g., Milner v. Dep’t of Navy*, 562 U.S. 562, 569, 572 (2011). If confirmed, I will follow all Supreme Court and Eleventh Circuit precedent on the use of legislative history.

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

No.

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

I received these questions from the Office of Legal Policy and drafted my responses to the questions, reviewing my previous speeches or litigation if the question referred to them. I then submitted them to the Office of Legal Policy, which made some recommended edits that I reviewed and then reverted the final versions to the Office of Legal Policy for submission. All answers are my own.

Written Questions for Kathryn Kimball Mizelle
Submitted by Senator Patrick Leahy
September 16, 2020

1. The ABA Standing Committee on the Federal Judiciary gave you a “not qualified” rating due to insufficient experience. The letter stated your “one clerkship in the trial court . . . plus 10 months at a reputable law firm and approximately three years in government practice translates into five years of experience in the trial courts.” The committee says ordinarily federal judicial nominees should have at least 12 years of practice experience and “substantial courtroom and trial experience as a lawyer or trial judge is important.

(a) Do you believe the ABA provides a valuable service to the Senate Judiciary Committee in evaluating judicial nominees?

The Constitution provides that the Senate will give its “Advice and Consent” to the President’s nominees to federal courts. I do not presume to speak as to the ABA’s usefulness to the Senate Judiciary Committee as a whole or to individual Senators’ evaluations of nominees.

(b) Do you think there is a minimum amount of courtroom and trial experience a lawyer should have before becoming a federal district judge?

Many different experiences could prepare an individual to become an effective district court judge. Trial-level litigation and in-court experience are two of such experiences that could develop the skills and judgment of an individual seeking to become a federal district court judge.

(c) Please cite to the experiences you have had that would assure this Committee you are capable of performing the duties of a District Court Judge?

I served as a career federal prosecutor with the U.S. Department of Justice, both in the U.S. Attorney’s Office for the Eastern District of Virginia and in the Department of Justice’s Tax Division. In those capacities, I frequently argued in federal district court and prosecuted individuals for federal offenses ranging from sex trafficking by force, fraud, and coercion, to tax evasion and money laundering. By my recollection, I have appeared and argued in federal court on behalf of the United States approximately 40 times. While at Jones Day, I have represented companies in both high stakes civil litigation as well as significant criminal defense cases, including the defense of two companies in a \$3 billion healthcare fraud prosecution. These experiences, along with my service in the Associate

Attorney General's Office and as a law clerk at every level of the federal judiciary, have prepared me to be a fair and effective federal district court judge.

(d) Do you believe your level of trial experience has prepared you to oversee the innumerable issues that can arise during criminal and civil trials as a District Court Judge?

As a career federal prosecutor, I have had the opportunity to litigate numerous different kinds of court proceedings on behalf of the federal government, from arraignment and detention hearings to motions *in limine* to plea hearings to sentencing hearings. I think these experiences will serve me well if confirmed. I have not had as many opportunities to litigate civil matters in federal court; however, in my work at Jones Day, the Associate Attorney General's Office, and as a law clerk, I have handled dozens of civil matters and those experiences have provided me with a broad understanding of the federal law applicable to civil cases that would ordinarily arise in federal district court.

2. During your confirmation hearing on September 9, Senator Durbin asked if you think incidents of racism are more than sporadic in the administration of law enforcement and our system of justice. You refused to answer citing the possibility that a claim could come before you as a judge on this matter.

(a) If confirmed, what specific steps will you take as a federal judge to ensure race is not a factor in the adjudication of justice in your courtroom?

I will fairly and impartially apply the law to all litigants who would appear before me, regardless of race or any other protected characteristic. As a federal prosecutor at the Department of Justice, I endeavored to make sure that race never played a part in the charging decisions, plea negotiations, or sentencing recommendations that I made, and I would apply that same vigilance to ensure racial discrimination did not occur in the courtroom, if I were fortunate enough to be confirmed.

3. In your Senate Judiciary Questionnaire you stated you served as Counsel to then-Associate Attorney General (AAG) Rachel Brand under then-Attorney General Jeff Sessions and "advised on litigation" handled by DOJ's Civil Division and Civil Rights Division. Please state what role you had in the matters listed below. If you had no role please state that.

- (a) **In February 2017, DOJ withdrew a 2016 “Dear Colleague” letter stating that Title IX allows students to access sex-segregated facilities—including restrooms—that correspond to the student’s gender identity.**

The withdrawal of the letter to which you refer occurred in February 2017 before I began serving in the Associate Attorney General’s Office, and I was therefore not involved in any manner with that event. Upon joining the Associate Attorney General’s Office, I worked on DOJ’s Regulatory Reform task force where I generally advised the Associate Attorney General on de-regulatory efforts at the Department. As such, I was aware of de-regulatory actions that the Department was taking. However, I was not the decision maker on any particular rescission decisions.

- (b) **In February 2017, DOJ reversed its opposition to a restrictive voter ID law adopted by the Texas Legislature in 2011.**

I had no role to the best of my recollection.

- (c) **In May 2017, President Trump’s Executive Order 13,780, which temporarily suspended entry to the United States for foreign nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia.**

I had no role to the best of my recollection.

- (d) **In August 2017, DOJ reversed its position and supported Ohio’s decision to purge individuals who had not participated in recent elections from the voter rolls.**

I had no role to the best of my recollection.

- (e) **In October 2017, DOJ withdrew a 2014 memorandum that interpreted Title VII as prohibiting employment discrimination based on gender identity or transgender status.**

Please see my response to Question 3(a).

- (f) **April 2018, DOJ “zero-tolerance” policy for illegal entry on the U.S. border with Mexico.**

I was no longer at the Department of Justice in April 2018.

- (g) June 2018, DOJ refusal to defend the constitutionality of the Affordable Care Act. Specifically, Sessions informed Congress that DOJ would no longer defend the constitutionality of the ACA’s individual mandate and protections for preexisting conditions in court. In a brief filed in the Supreme Court, DOJ argued that the ACA’s individual mandate was unconstitutional because it was no longer a valid tax after the Republican-controlled Congress removed the individual mandate penalty in the 2017 Tax Cuts and Jobs Act.**

I was no longer at the Department of Justice in June 2018.

- (h) November 2018, Sessions issued a memorandum that “drastically limited” DOJ’s ability to enter into consent decrees with local law enforcement agencies.**

I was no longer at the Department of Justice in November 2018.

4. 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.’”

- (a) 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?**

Yes. I will follow all Supreme Court precedent on how to interpret the meaning of text.

5. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

- (b) 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?**

It would be improper for me to comment on political rhetoric from an elected official as a nominee to serve on the federal district court. *See* Canon 5(C) of the Code of Conduct for the United States Judges.

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

Please see my response to Question 5(c).

6. 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?

The reviewability and level of deference to executive branch decisions concerning national security as well as their interplay with congressional authorization are questions that have and will likely continue to arise in federal court litigation. Accordingly, it would be improper for me to opine further other than to commit to applying all relevant Supreme Court precedent. See Canon 3(A)(6) of the Code of Conduct for United States Judges.

7. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

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

Federal courts retain power to enter traditional equitable relief and other legal remedies to ensure that litigants before the court comply with lawful judgments.

8. 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?

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

The Constitution in Article I, Section 8, clearly grants Congress the power “[t]o declare War.” *Hamdan*, along with other Supreme Court opinions, is binding precedent interpreting Congress’s war powers and the President’s powers, and I would faithfully apply it.

- (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?**

The Supreme Court has stated that the “Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). The Supreme Court has therefore held that the President’s actions are limited in that manner. I would faithfully apply that precedent—and any other relevant Supreme Court precedent on wartime powers—if I were confirmed.

- (c) 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 8(b).

- 9. 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 Supreme Court has analyzed a President’s power in this sphere under “the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part). The first category involves the President acting “pursuant to an express or implied authorization of Congress,” and thus, at the zenith of his authority. *Youngstown*, 343 U.S. at 636. The second category involves the President acting “in absence of either a congressional grant or denial of authority,” wherein he must rely on his own powers. *Id.* Lastly, the President could act contrary to congressional will and his “power is at its lowest ebb” there. *Id.* at 637-38. I would faithfully follow this framework as explained by the Supreme Court.

10. 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 has held that state action discriminating on the basis of gender is subject to a heightened level of scrutiny—referred to as “intermediate scrutiny”—under the Equal Protection Clause. *See generally United States v. Virginia*, 518 U.S. 525 (1996). Gender-based government action is therefore unconstitutional absent “an ‘exceedingly persuasive justification’ for that action.” *Id.* at 531. I would faithfully apply this precedent if confirmed.

11. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”

I would faithfully apply Supreme Court precedent concerning the Voting Rights Act, if I were confirmed.

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

Article I, Section 9, of the Constitution provides that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” The application of this provision to the President has been the subject of ongoing litigation and it would therefore be inappropriate for me to comment. *See* Canon 3(A)(6).

13. 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 a court to substitute its own factual findings for those made by Congress or the lower courts?

In general, courts of appeal rely on the factual record as developed in the lower courts. *See* Federal Rule of Appellate Procedure 10. Courts of appeal also ordinarily apply a clearly erroneous standard of review for determinations of fact made by lower courts. Federal district courts receive admissible evidence proffered by the parties, which can at times include congressional findings of fact. The Supreme Court has instructed that courts “must review legislative ‘factfinding under a deferential standard.’” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). I would follow and faithfully apply all Supreme Court and Eleventh Circuit precedent regarding congressional fact-finding.

14. 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 Constitution provides Congress with the power to enforce the protections of those three amendments through “appropriate legislation.” U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. The Supreme Court has held that “there must be a congruence between the means used and the ends to be achieved” in legislation enacted through the enforcement clause of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

15. 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?

I will faithfully apply the Supreme Court’s holding in *Lawrence v. Texas*, 539 U.S. 558 (2003), if I were confirmed.

16. 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?

It is only for the Supreme Court to decide when its precedent should no longer be followed, and the Court has recently and repeatedly articulated the factors it considers when determining whether stare decisis requires adherence to precedent. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (considering “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision” (internal quotation marks omitted)). If confirmed, I would faithfully apply all Supreme Court and Eleventh Circuit precedent, whether it concerns statutory or constitutional interpretation.

17. 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.**

Recusal is warranted "in any proceeding in which [a judge's] impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

In particular, I plan to recuse in any case in which, while serving at the U.S. Department of Justice, I had participated as counsel, adviser, or material witness or expressed an opinion concerning the merits of the particular case in controversy. 28 U.S.C. § 455(b)(3). I would also recuse myself from matters that I served as counsel while at Jones Day and from matters where my husband is acting as the lawyer in the proceeding. *Id.* § 455(b)(2)-(5).

There will inevitably be cases that arise that I cannot anticipate now, but I will evaluate every situation under the standards set forth in § 455 and Canon 3C of the Code of Conduct for United States Judges and in consultation with the chief judge of the district and, if necessary, the Administrative Office of the U.S. Courts.

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

- (b) 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?**

Based in part on the famous footnote from which you quote, the Supreme Court later articulated that there are tiered levels of scrutiny applied by the judiciary to assess the constitutionality of certain governmental action. If confirmed as a lower court judge, it is important that I faithfully apply the binding precedents of the Supreme Court, including *Carolene Products* and precedent expounding on that footnote.

19. 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. 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 administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

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

Yes, one of the strengths of our constitutional structure is the separation of powers between the branches that serves as an important check on the aggrandizement of power to any particular branch.

20. Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?

I have not studied this question and am not familiar with Supreme Court precedent addressing this precise issue. If you are referring to a particular statement by the President, I cannot comment on public statements by elected officials concerning the scope of his or her authority.

21. 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 on many occasions addressed the scope of congressional power to enact legislation under Article I, Section 8 and Section 5 of the Fourteenth Amendment. Indeed, much of the United States Code has been enacted based on those congressional powers.

22. 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? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

The Supreme Court has set forth in various contexts when and how executive factual findings and reasons should be given weight in

evaluating the lawfulness of particular actions. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). If confirmed, I will follow the Supreme Court's precedent in determining when to give appropriate weight to executive findings.

23. **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.**

Because that is an issue that is routinely litigated in the federal courts, *see, e.g., June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020), it would be inappropriate for me to comment as a nominee about what future situations may or may not be an “undue burden,” *see* Canon 3(A)(6) of the Code of Conduct for United States Judges. I can, however, commit to following all relevant Supreme Court precedent on the issue.

24. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, 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 other startling cases.

- (a) **Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?**

I am generally aware of the political and academic debate surrounding the origins and continued validity of qualified immunity. However, as a nominee, it would be improper for me to comment on that debate. *See* Canon 5(C) of the Code of Conduct for United States Judges. As a legal matter, if I am confirmed, I will apply all Supreme Court and Eleventh Circuit precedents concerning qualified immunity.

25. 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 Chief Justice 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?

In light of the relatively recent technological expansion that invades much of everyday life for Americans, the scope of the Fourth Amendment's protection against unreasonable searches and seizures has become even more prominent on the national stage and in litigation. I will faithfully follow *Carpenter* and all other relevant Supreme Court precedent interpreting the Fourth Amendment's application to these new developments, but it would be improper for me to comment further about future situations. See Canon 3(A)(6) of the Code of Conduct for United States Judges.

26. Last 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 Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

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

As a judicial nominee, it would be improper for me to comment as to when the President could reallocate funds as that issue could likely to be the subject of impending litigation. See Canon 3(A)(6).

27. Can you discuss the importance of judges being free from political influence or the appearance thereof?

The Constitution was designed to protect Article III judges from political influence through lifetime appointment and continued compensation throughout their service. See Const. Art. III, § 1. The Founders provided these measures to ensure that the judiciary remained independent from outside pressures and impartial to litigants who appeared in those courts. The Code of Conduct for United States Judges likewise provides for an independent judiciary through canons that outline how to avoid the appearance of impropriety or partiality to particular views so that the federal courts remain places where the law is applied free from bias or political persuasion. These measures are extremely important for the flourishing of our Republic.

**Nomination of Kathryn Kimball Mizelle
to the United States District Court for the Middle District of Florida
Questions for the Record
Submitted September 16, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

1. In Justice Thomas’s concurrence in *Gamble v. United States*, he wrote: “We should not invoke stare decisis to uphold precedents that are demonstrably erroneous.” Do you agree with that statement”? Why or why not?

All inferior Article III courts are bound to follow the precedent of the Supreme Court. It is only for the Supreme Court to decide when a precedent should no longer be followed, and the Court has recently and repeatedly articulated the factors it considers when determining whether stare decisis requires adherence to precedent. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (considering “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision” (internal quotation marks omitted)). If confirmed, I would faithfully apply all Supreme Court precedent.

- a. How should a judge assess whether a precedent is “demonstrably erroneous”?

As a lower court judge, I would not have occasion to assess whether precedent should be followed under stare decisis regardless of whether it is “demonstrably erroneous.”

- b. If, as a district court judge, you are bound to apply a precedent that you deem “demonstrably erroneous,” would you apply it?

I would apply all precedent. It is not the place for lower courts to determine what precedent deserves adherence to stare decisis; that inquiry is solely for the Supreme Court.

- c. When, if ever, is it appropriate for a lower court judge to question the correctness of controlling precedent from a higher court?

Lower court judges must always follow controlling precedent. If confirmed, I would faithfully apply the precedent of both the Eleventh Circuit and the Supreme Court.

2. You recently filed an amicus brief on behalf of the U.S. Chamber of Commerce and the National Federation of Independent Businesses opposing a request from the AFL-CIO that OSHA implement emergency standards to protect millions of vulnerable workers. The brief cited Secretary of Labor Scalia in opposition to the AFL-CIO’s request for greater protectors for workers, saying that “Guidelines allow flexibility and responsiveness to ... change, in a way a rule would not.”

- a. Do you believe that the Chamber of Commerce and NFIB employed your firm to file your brief because they felt an urgency to protect the interests of workers in the most effective way possible?

As explained in the brief, it was the position of the Chamber of Commerce and the other business associations that retained Jones Day that the flexible and up-to-date guidance issued by the Department of Labor best served the evolving workplace situations due to the novel coronavirus and its unprecedented impact on American workers and businesses.

- b. In an exchange with Senator Hirono, you defended the brief's opposition to the request by the AFL-CIO by saying that a "one-size-fit-all approach was maybe not the best for workers." As a judge, how would you evaluate the credibility of a litigant who claimed to act in the interest of workers, but who has continually acted to shield major corporations from liability for harm done to their workers?

If I were confirmed as a judge and a matter arose that required me to be the factfinder instead of a jury, I would evaluate the credibility of each litigant based on the record before the court.

3. You joined your law firm, Jones Day, following your Supreme Court clerkship with Justice Thomas. Signing bonuses with large law firms for Supreme Court clerks now run upwards of \$400,000, and often include clawback agreements requiring lawyers to pay back a prorated share of the bonus if they leave the firm in under two years. If confirmed to this judgeship, you will be leaving the firm less than two years after your arrival post-clerkship.

- a. Did you receive a Supreme Court bonus from Jones Day?

The compensation terms of my employment with Jones Day are confidential per the terms of my offer. However, as indicated in my Senate Judicial Questionnaire, I would recuse myself consistent with my obligations under 28 U.S.C. § 455.

- b. Did your bonus include a clawback agreement requiring you to pay back a prorated share of the bonus if you leave the firm in under two years?

Please see my response to Question 3(a).

- c. If confirmed, do you plan to reimburse Jones Day for the prorated share of your bonus? If not, why not?

Please see my response to Question 3(a).

4. 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?

I had not reviewed the story or recording beforehand, but have done so now.

- 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? Please explain your answer.

The Canons of the Code of Conduct for United States Judges prohibit me from opining on political matters.

- 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?

Please see my response to Question 4(b).

- 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.

Carrie Severino, who is the President of the Judicial Crisis Network, wrote a piece dated September 9, 2020, in the National Review supporting my nomination.

- 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?

Please see my response to Question 4(b).

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

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

I agree to the extent that the metaphor intends to convey the limited role of the judiciary to say what the law is and how it applies to case or controversies before Article III courts.

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

The practical consequences of a judicial decision matter when the law calls for them to play a role in the legal standard that the court applies. A good example is the standard for a preliminary injunction, which requires a court to consider, among other factors, whether the plaintiff “is likely to suffer irreparable harm in the absence of preliminary relief.” *Winter v. Nat. Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008).

6. 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?

No, the law governing Rule 56 motions requires the court to apply an objective standard.

7. 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 federal judge must apply the law impartially to all litigants. However, a federal judge should be mindful of how he or she interacts with litigants and the public and should always be respectful of those who come before the court.

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

A judge’s background can help inform him or her about the virtues of kindness, patience, and humility, and that kind of character can be displayed in how he or she treats litigants in the courtroom and writes decisions.

8. 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.

9. 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?

The jury plays a key role in our constitutional system as the finder of fact in many instances, both under the Seventh Amendment as well as the Sixth Amendment.

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

The Supreme Court has interpreted the Federal Arbitration Act on many occasions, and I would faithfully apply all of the Court’s precedents on arbitration clauses while taking into consideration all relevant constitutional provisions that bear on a particular litigant’s claims.

- 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?

Please see my response to Question 9(b).

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

The Supreme Court has instructed that courts “must review legislative ‘factfinding under a deferential standard.’” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). I would follow and faithfully apply all Supreme Court and Eleventh Circuit precedent regarding legislative fact-finding.

11. The Federal Judiciary’s Committee on the Codes of Conduct recently 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.

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.
- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
- 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.

The independence of Article III courts is foundational to our constitutional structure. The Code of Conduct for United States Judges and Advisory Opinion #116 are designed to ensure that the judiciary remains independent and avoids appearances of impropriety or partiality. If confirmed, I will evaluate any invitation to participate in an educational seminar consistent with the factors outlined in that Advisory Opinion and take into account its admonition that each invitation should be assessed “on a case-by-case basis.”

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 11(b).

12. Earlier this year, the Federal Judiciary’s Committee on the Codes of Conduct drafted a proposed advisory opinion concluding that a judge’s ongoing “membership in. . . the Federalist Society is inconsistent with obligations imposed by the Code [of Conduct.]” After an aggressive lobbying campaign by Federalist Society-affiliated judges, the Committee ultimately voted to table the proposed opinion. In doing so, the Committee observed: “The nation depends on a judiciary that is impartial and independent. Consistent with the judge’s oath, each individual judge should take care to make all membership decisions in a way that is consistent with the highest ideals of the profession as expressed in the Code of Conduct.” (emphasis added.)

- a. If confirmed, do you plan to continue your membership in the Federalist Society?

Yes.

- b. In the draft of Advisory Opinion #117, the Committee concluded that official affiliation with ACS or the Federalist Society “could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge’s impartiality on subjects as to which the organization has taken a position; and generally frustrates the public’s trust in the integrity and independence of the judiciary.”

- i. Do you think the Federalist Society is an organization “that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency”? Why or why not?
- ii. Do you think the Federalist Society “is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations”? Why or why not?
- iii. Do you believe that a judge’s membership in the Federalist Society may reasonably be seen by the public as engendering indirect advocacy of the organization’s political, social, or civic objectives? Why or why not?
- iv. Do you believe that reasonable members of the public would perceive a judge who has membership in the Federalist Society, a self-described group of conservatives and libertarians, to be partial or impartial? Why?
- v. The draft opinion notes “the Federalist Society’s funding comes substantially from sources that support conservative political causes.” Do you believe that membership in an organization tied to such funding could give rise to the appearance of impropriety or partiality? Why or why not?

Canon 4 of the Code of Conduct for United States Judges instructs that a “judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.” That same canon states that such participation should not “detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.” Canon 5 of the Code forbids judges from joining or contributing to a “political organization,” but “does not prevent a judge from engaging in activities described in Canon 4.” As far as I am aware, the Federalist Society has never taken a particular policy or legal position; has never filed an amicus brief in support of any litigant; and has never endorsed a political candidate. Based on my current understanding and experience with the organization, membership in the Federalist Society is fully consistent with the Code of Conduct for United States Judges, including both Canon 4 and Canon 5. I will, of course, continue to evaluate any membership or participation in any organization in light of the Code of Conduct and the factors outlined in Advisory Opinion #116.

**Nomination of Kathryn Kimball Mizelle, to be United States District Court Judge for the
Middle District of Florida
Questions for the Record
Submitted September 16, 2020**

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 evaluated whether a right is fundamental in a series of cases, including *Washington v. Glucksberg*, 521 U.S. 702 (1997), and its progeny. I would follow the Supreme Court's precedents as well as any applicable Eleventh Circuit precedent, if confirmed.

- 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 stated in *Glucksberg* that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. at 720-21 (internal citations omitted). I would faithfully apply that precedent.

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

Yes. If the right has been recognized by the Supreme Court or the Eleventh Circuit, I would faithfully apply that precedent. While not binding, I would also consider precedent from other courts of appeals.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

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*).

The Supreme Court considered this factor in the cases you cited above, and I would apply those cases faithfully.

f. What other factors would you consider?

I would consider the factors articulated by the Supreme Court in *Glucksberg* and its progeny, or any other Supreme Court or Eleventh Circuit precedent.

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 held in *United States v. Virginia*, 518 U.S. 515 (1996), that the Equal Protection Clause of the Fourteenth Amendment applies to both race and gender. If confirmed, this precedent would be binding on me and I would apply it faithfully.

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

Please see my response to Question 2.

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?

Please see my response to Question 2.

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*, 576 U.S. 644 (2015), the Supreme Court held that the Fourteenth Amendment protects the right of same-sex couples to marry "on the same terms accorded to couples of the opposite sex." *Id.* at 680. If confirmed, I would faithfully apply this precedent.

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

This issue is the subject of pending or impending litigation and therefore, under the Code of Conduct for United States Judges, I cannot express an opinion. See Canon(A)(6).

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 such a right exists. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully apply that precedent.

- 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 held that such a right exists. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully apply that precedent.

- 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 held that such a right exists. *See Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully apply that precedent.

- 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.

Please see my above responses.

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

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

The Supreme Court has instructed that societal changes can be relevant to a lower court's analysis in a variety of contexts. If confirmed, I will follow the Supreme Court's holdings on this issue, including *Obergefell* and *Virginia*.

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

Please see my response to Question 4 (a). When a district court is sitting as the fact finder, scientific data might be relevant to support an element of a litigant's claim. In addition, scientific evidence and data can play an important role in trial evidence when the district court judge is acting as the gatekeeper for expert testimony. See Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

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 Supreme Court has stated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018).

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

Please see my response to Question 5 (a).

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have testified that *Brown* was correctly decided and continue to adhere to that position. Regarding whether *Brown* is consistent with the original meaning of the Constitution, it is generally not appropriate for a nominee to evaluate the merits of the Supreme Court's reasoning. Nonetheless, on that question, some scholars have argued that *Brown* is

consistent with the original meaning of the Fourteenth Amendment. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- 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 Sept. 10, 2020).

If confirmed, I would faithfully apply Supreme Court and Eleventh Circuit precedent, including precedent defining the terms “freedom of speech,” “equal protection,” and “due process of law.”

- 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 looked to the text, structure, and history of a constitutional provision, including how the provision was originally understood, in interpreting it. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would follow all precedents from the Supreme Court and the Eleventh Circuit.

- 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?

Please see my response to Question 6 (c).

7. The American Bar Association Standing Committee on the Federal Judiciary concluded that you are not qualified to serve as a district court judge on the U.S. District Court for the Middle District of Florida. Since you began practicing law in 2014:

- a. What motions have you argued under the Federal Rules of Civil Procedure?

As a career federal prosecutor, I did not have an occasion to argue any motions in civil proceedings in federal district court.

- b. What motions have you argued under the Federal Rules of Criminal Procedure?

I have appeared and argued numerous motions and other hearings in criminal proceedings in federal district court, including: arraignments and initial appearances; detention hearings; plea hearings; motions *in limine*; violation of supervised release and violation of probation hearings; and sentencing hearings.

- c. Have you presented argument in a federal court on an evidentiary issue governed by the Federal Rules of Evidence?

Yes.

- d. Have you taken a deposition in a federal court proceeding?

As a former federal prosecutor, I have not had occasion to conduct a deposition in a federal court proceeding because they are not ordinarily permitted in criminal prosecutions. I have, however, conducted examinations of numerous witnesses in federal grand jury proceedings. And I have also taken depositions in state court proceedings.

- e. Have you defended a deposition in a federal court proceeding?

As a former federal prosecutor, I have not had occasion to defend a deposition in a federal court proceeding because they are not ordinarily permitted in criminal prosecutions.

- f. Have you argued a discovery motion in federal court?

I have on many occasions produced discovery in criminal cases, including complex white-collar prosecutions, although I have not had occasion to argue a civil discovery motion.

- g. Have you argued a motion in limine in federal court?

Yes.

- h. Have you participated in a federal court mediation?

As a former federal prosecutor, I have not had occasion to participate in a mediation because they are not part of the federal criminal process. However, I have engaged in numerous plea negotiations with opposing counsel.

- i. Have you participated in a pre-trial conference in federal court?

Yes.

- j. Have you participated in voir dire in federal court?

I have prepared and reviewed jury questionnaires in federal court and I have participated in voir dire in state court, but I have not participated in voir dire for federal court. .

- k. Have you examined a fact witness in federal court?

Yes.

l. Have you examined an expert witness in federal court?

Yes.

m. Have you tried a case in state or federal court?

I have tried two jury trials. In addition, I conducted violation of supervised release hearings, where I was required to put on evidence and witnesses to allow the judge to make findings of fact, similar to a bench trial.

8. The American Bar Association Standing Committee on the Federal Judiciary wrote in its letter regarding your nomination, "Since her admission to the bar Ms. Mizelle has not tried a case, civil or criminal, as lead or co-counsel." During the hearing on your nomination, you stated that you had in fact tried a case to verdict as co-lead counsel.

a. Had you been admitted to the bar when you tried the case you were referring to?

I tried as co-lead counsel that jury trial under Florida Bar rules that authorized me to represent the State of Florida in criminal proceedings in state trial court. The program gives law students who meet specific criteria permission to speak in Florida state court and represent the State of Florida as "certified legal interns."

b. What was your job title when you tried this case?

Please see my response to Question 8 (a).

c. Have you tried a case as lead counsel or co-counsel since the date that you were admitted to the bar?

No, I conducted the two jury trials in 2012, before I was admitted to the Florida Bar. Since then, I have argued as lead counsel on behalf of the federal government contested hearings that required me to put on evidence and conduct direct examinations of witnesses, after which the district court made findings of fact and imposed judgments, similar to bench trials.

9. The American Bar Association Standing Committee on the Federal Judiciary wrote in its letter regarding your nomination that your professional experiences "translate[] into 5 years of experience in the trial courts." Is the American Bar Association wrong?

While I am familiar with the ABA's letter, I do not fully understand its methodology or why they omitted discussion of my litigation as a federal prosecutor where I appeared and argued in federal district court.

10. In your Senate Judiciary Committee Questionnaire, you wrote that from 2017-18, you served

as Counsel to the Associate Attorney General at the Department of Justice and that you “advised on litigation” as well as on “projects for the Department’s Regulatory Reform Task Force, the Department’s efforts to promote free speech on college campuses, and the Department’s religious liberty working group.” Please provide a complete list of matters you have worked on during your one year of service in this position.

During my time as Counsel to the Associate Attorney General, I daily advised the Associate Attorney General on a number of important matters arising within the Department. As such, it would be nearly impossible for me to develop a comprehensive list of every matter upon which I provided legal advice. My primary responsibility was to oversee significant litigation arising from the Tax Division, including strategic litigation, major settlements, and legal positions. I also led the Department’s efforts to promote free speech on college campuses and managed related litigation arising from the Civil Division and the Civil Rights Division. I also developed the Department’s litigation strategy for appealing adverse rulings in federal district courts for social security cases. Lastly, I testified before the Administrative Conference of the United States about procedural rule proposals concerning social security cases in federal district court.

Nominations
Hearing before the Senate Committee on the Judiciary
Questions for the Record
September 9, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Ms. Kathryn Kimball Mizelle

- 1. The ABA Standing Committee on the Federal Judiciary has conducted independent evaluations of nominees to the federal bench since 1953. These evaluations are based only on professional qualifications—specifically, their integrity, professional competence, and judicial temperament. According to the ABA Standing Committee, professional competence “encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience.”¹**
 - a. Do you agree with the ABA Standing Committee that, in addition to qualities such as intellectual capacity, writing and analytical abilities, and knowledge of the law, professional competence encompasses judgment and breadth of professional experience?**

Yes.

The ABA Standing Committee “believes that a nominee to the federal bench ordinarily should have at least 12 years’ experience in the practice of law” with a particular emphasis on “substantial courtroom and trial experience as a lawyer or trial judge.” While, in evaluating nominees for professional competence, “[d]ue consideration [is] given to distinguished accomplishments in the field of law or experience that is similar to in-court trial work,”² the ABA Standing Committee still rated you “Not Qualified” to serve on the United States District Court for the Middle District of Florida, concluding that you “presently [do] not meet the requisite minimum standard of experience necessary to perform the responsibilities required by the high office of a federal trial judge.”³

- b. Do you disagree with the ABA Standing Committee’s conclusion that you “presently [do] not meet the requisite minimum standard of experience necessary to perform**

¹ *Standing Committee on the Judiciary: What It Is and How It Works*, AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/backgrounder-8-19-2020.pdf.

² *Standing Committee on the Judiciary: What It Is and How It Works*, AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/backgrounder-8-19-2020.pdf.

³ *Nomination of Kathryn Kimball Mizelle to the United States District Court for the Middle District of Florida*, AMERICAN BAR ASSOCIATION (Sep. 8, 2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2020-09-08chair-rating-letter-to-graham-and-feinstein-re-nomination-of-kathryn-kimball-mizelle.pdf?logActivity=true.

the responsibilities required by the high office of a federal trial judge”? If so, please explain why.

I believe I have the requisite professional experience to be an effective district court judge, including my service as a federal prosecutor both in the U.S. Attorney’s Office for the Eastern District of Virginia and in the Department of Justice’s Tax Division. In both positions, I routinely argued on behalf of the United States in federal district court.

- c. Are you aware that, if you are confirmed by the United States Senate, that you would be the eighth “Not Qualified” nominee nominated by President Trump to be confirmed to the federal bench?**

I am aware that other nominees have received a similar rating from the ABA.

- 2. At your hearing, you were asked about your limited experience in the practice of law that formed the basis of the ABA Standing Committee’s aforementioned “Not Qualified” rating. You testified, “I think my experience in court as a federal prosecutor is what makes me qualified to do this job,” specifically pointing to your “in-court litigation experience.”⁴**

At your hearing, Senator Lee asked if you had tried a case to verdict as counsel or co-counsel. You testified, “Yes, Senator. Twice, I have tried a jury trial to verdict. The first case is noted in my Senate Judicial Questionnaire. I was actually co-lead counsel on that case. Under the Florida bar rules, I was authorized to practice and represent the State of Florida in criminal proceedings. . . . In the other case, I was second chair to an Assistant State Attorney. Those are the two cases I’ve tried in front of a jury to verdict.”⁵

Question 17 of your Senate Judiciary Questionnaire asks you to “[d]escribe the ten (10) most significant litigated matters which you personally handled.” Of the 10 “most significant litigated matters” that you described, you only listed one of the two cases that you have ever tried to verdict—*State v. Covington*.⁶

- a. Please identify and describe the second case you tried to verdict, in which, as you noted in your testimony, you were “second chair to an Assistant State Attorney,” including the charges, the factual, evidentiary, and legal issues addressed in the case, and the outcome of the case. Please also describe the scope and extent of your involvement in the trial proceedings.**

The second jury trial I conducted involved the prosecution of an individual that was charged with driving while intoxicated. Ultimately, the jury acquitted that individual. As

⁴ *Nominations Before the S. Comm. On the Judiciary*, 116th Cong. (2020), available at <https://www.judiciary.senate.gov/meetings/09/09/2020/nominations>.

⁵ *Nominations Before the S. Comm. On the Judiciary*, 116th Cong. (2020), available at <https://www.judiciary.senate.gov/meetings/09/09/2020/nominations>.

⁶ Senate Judiciary Questionnaire at p. 25.

second chair to the Assistant State Attorney, my role in the trial included assisting with jury selection, helping our central witness prepare for his direct examination, and assisting with the presentation of the State's exhibits.

- b. Please explain why the second of the only two cases you have ever tried to verdict (Question 2(a)) is not listed in your Senate Judiciary Questionnaire as one of your 10 most significant litigated matters.**

I have handled a number of significant matters in my time as a lawyer, including the largest sex trafficking case ever prosecuted in the Eastern District of Virginia, the prosecution of a \$10 million dollar fraudulent tax preparer, and the defense of two companies in a \$3 billion healthcare fraud criminal prosecution. The drinking while intoxicated case did not seem as significant in comparison to the complexity and importance of the cases that I selected, which I thought best represented the depth and breadth of my experience as a career federal prosecutor and as a lawyer at a major law firm.

- c. Did you try either of the aforementioned cases—*State v. Covington* and the case you identified and described in response to Question 2(a)—as a “federal prosecutor”? If not—**

- i. Please state when you tried the aforementioned cases and identify your employer and your position at the time you tried them.**

- **At the time you tried the aforementioned cases (Question 2(c)(i)), had you received your J.D. from the University of Florida Levin College of Law?**
 - **Have you tried any cases to verdict since receiving your J.D.?**
- **At the time you tried the aforementioned cases (Question 2(c)(i)), had you been admitted to the Florida bar?**
 - **Have you tried any cases to verdict since being admitted to the Florida bar?**

I tried the above-referenced cases in the spring of 2012. At the time, I was serving as a “certified legal intern” at the State Attorney’s Office, which means that under the Florida Bar rules, I was authorized to represent the State of Florida in criminal proceedings in state trial court. I received my J.D. and became a member of the Florida Bar later in 2012. Other than these two cases, I have not tried any other jury trial.

- ii. Have you ever tried a case to verdict, judgment, or final decision (rather than settled) as a “federal prosecutor”? If not, please summarize your “in-court litigation experience” as a “federal prosecutor” that you testified “makes [you] qualified” to be a district court judge.**

I believe I have the requisite professional experience to be an effective district court judge, including my service as a federal prosecutor both in the U.S. Attorney's Office for the Eastern District of Virginia and in the Department of Justice's Tax Division. In both positions, I routinely argued on behalf of the United States in federal district court. By my count, I have appeared and argued in federal court approximately 40 times. For example, on behalf of the federal government, I have argued the following kinds of criminal hearings in federal court: arraignments, detention hearings, motions *in limine*, plea hearings, violation of supervised release and violation of probation hearings, and sentencing hearings. Additionally, I have investigated or prosecuted approximately 30 defendants for federal crimes, and I have conducted the direct examination of dozens of witnesses.

3. In response to Question 16(c)(ii) of your Senate Judiciary Questionnaire, you indicated that only “10%” of your practice has involved “civil proceedings.”⁷ At your hearing, Senator Lee asked if you had ever drafted a civil complaint. You testified, “I don’t believe I’ve ever drafted a civil complaint.”⁸

a. Please confirm whether your oral testimony, that you have never drafted a civil complaint, is correct.

As a former federal prosecutor, the bulk of my experience is in criminal proceedings. As such, I have not had occasion to draft and file a civil complaint.

b. Please state whether, acting as counsel to one of the parties to a civil litigation, you have ever—

i. Drafted and filed any of the pleadings listed in Rule 7(a) of the Federal Rules of Civil Procedure.

ii. Participated in a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure.

iii. Drafted and filed or argued in court a motion under any of the following Rules of the Federal Rules of Civil Procedure:

- Rule 12;
- Rule 50;
- Rule 56;
- Rule 59; and,
- Rule 60.

iv. Sought or opposed class certification under Rule 23 of the Federal Rules of Civil Procedure.

⁷ Senate Judiciary Questionnaire at p. 17.

⁸ *Nominations Before the S. Comm. On the Judiciary*, 116th Cong. (2020), available at <https://www.judiciary.senate.gov/meetings/09/09/2020/nominations>.

- v. **Propounded, responded to, or objected to discovery requests under any of Rules 26, 30, 31, 33, 34, 35, or 36 of the Federal Rules of Civil Procedure.**
- vi. **Drafted a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure.**

As a former federal prosecutor, the bulk of my experience is in criminal proceedings. As such, I have not had occasion to participate in the above-referenced civil proceedings. However, while at Jones Day and in the Associate Attorney General's Office at the Department of Justice, much of my work focused on civil litigation matters, including working on Rule 12(b) motions.

4. **In response to Question 8 of your Senate Judiciary Questionnaire, which asks you to “[l]ist any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement, you listed that you were a 2017 John Marshall Fellow at the Claremont Institute for the Study of Statesmanship and Political Philosophy.**

- a. **Please describe when and how you first learned of the Claremont Institute and the John Marshall Fellowship.**

I learned of the Claremont Institute in approximately 2015 through friends who had participated in the fellowship program.

The John Marshall Fellowship is awarded following an application process. According to the Claremont Institute, to apply for the fellowship, applicants must, in part, submit “2-3 recommendations.”⁹

- b. **Please state when you applied for the John Marshall Fellowship.**

I applied in early 2017.

- c. **Please identify who recommended you for the John Marshall Fellowship.**

To the best of my recollection, Chief Judge William Pryor and Professor Dennis Calfee each submitted a letter of recommendation on my behalf.

In 2016, prior to your fellowship, *The Atlantic* questioned why the Claremont Institute was “flirting with alt-right authoritarianism?”¹⁰ pointing to, as evidence, an essay

⁹ *John Marshall Fellowship*, CLAREMONT INSTITUTE (2020), <https://www.claremont.org/page/john-marshall-fellowship/>.

¹⁰ Conor Friedersdorf, *An Attack on Founding Principles at the Claremont Institute*, THE ATLANTIC (Sep. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/09/an-attack-on-founding-principles-at-the-claremont-institute/499094/>.

published in the *Claremont Review of Books* in September 2016 that blamed the political losses of the “Right,” in part, on “the ceaseless importation of Third World foreigners with no tradition of, taste for, or experience in liberty” that has made “the electorate grow[] more left, more Democratic, less Republican, less republican, and less traditionally American with every cycle.”¹¹

d. At the time you applied for the John Marshall Fellowship (Question 4(b))—

- i. Were you aware that the Claremont Institute had a reputation for “flirting with alt-right authoritarianism”? If not, had you been aware that the Claremont Institute had this reputation, would you still have applied to be a John Marshall Fellow in 2017?

The Claremont Institute has a serious reputation as a deeply intellectual think tank that is dedicated to the principles of the American Founding and the legacy of Abraham Lincoln. At the time I applied to be a John Marshall Fellow, I was not familiar with *The Atlantic* article referenced above and I would not knowingly be part of any organization associated with “alt-right authoritarianism.”

- ii. Were you aware that the Claremont Institute had published the aforementioned essay that blamed the political losses of the “Right,” in part, “the ceaseless importation of Third World foreigners”? If not, had you been aware that the Claremont Institute published this essay, would you still have applied to be a John Marshall Fellow in 2017?

I was not aware of this article at the time I applied nor am I aware of whether those views represent the views of the Claremont Institute as an organization.

The Claremont Institute describes the John Marshall Fellowship as one of its “flagship program[s].” The fellowship purportedly consists of “seven days of intensive seminars in American political thought and jurisprudence.”¹²

- e. Please list the seminars you attended during your fellowship, including the names of the names of your instructors, and summarize the topics covered in each seminar.

I do not recall each of the seminars that I attended, who taught which session, or the precise topics covered. According to the Claremont Institute website, the topics ordinarily include:

- Chief Justice John Marshall
- Prerogative & Executive Power
- Positivism: Left & Right

¹¹ Publius Decius Mus, *The Flight 93 Election*, CLAREMONT REVIEW OF BOOKS (Sep. 5, 2016), <https://claremontreviewofbooks.com/digital/the-flight-93-election/>.

¹² *John Marshall Fellowship*, CLAREMONT INSTITUTE (2020), <https://www.claremont.org/page/john-marshall-fellowship/>.

- Originalism
- Natural Rights & Natural Law
- Living Constitutionalism

To the best of my recollection, the instructors included: Michael Uhlmann, John Eastman, Steven Hayward, John Yoo, Vincent Munoz, and Michael Greve.

- f. Did you encounter any alt-right or otherwise white nationalist views – whether from other fellows or instructors – in any of the seminars you listed in response to Question 4(e)? If so, please describe the views you encountered and explain whether they reflect your own beliefs.**

No.

The Claremont Institute also states that the John Marshall Fellowship is “intended for prospective clerks and legal scholars who will have opportunities to educate the judges and Justices with whom they work, and the legal community at large.”¹³ Following your fellowship, you left the Office of the Associate Attorney General at the Department of Justice to clerk for Judge Gregory G. Katsas on the Court of Appeals for the District of Columbia Circuit and then Justice Clarence Thomas on the Supreme Court of the United States.

- g. Please explain how the John Marshall Fellowship prepared you to “educate” Judge Katsas and Justice Thomas.**

The Claremont Institute provided instruction on the history and principles of the American founding, including studying the Declaration of Independence and the legacy of Abraham Lincoln.

- h. Please describe how and on what constitutional, legal, evidentiary, or policy matters you “educate[d]” Judge Katsas and Justice Thomas.**

It would be inappropriate to discuss any communications I had with Judge Katsas or Justice Thomas while I was serving as a law clerk in their chambers.

Since your fellowship, the Claremont Institute has continued to peddle alt-right and white nationalist philosophies. For instance, in 2018, a Senior Fellow of the Claremont Institute and member of the Claremont Institute’s Board of Directors remarked that “diversity is a solvent that dissolves the unity and cohesiveness of a nation” and that it “is a bastion of intolerance.”¹⁴ In 2020, the Chairman of the Board of Directors of the Claremont Institute authored an essay in which he argued that “multiculturalism . . .

¹³ *John Marshall Fellowship*, CLAREMONT INSTITUTE (2020), <https://www.claremont.org/page/john-marshall-fellowship/>.

¹⁴ Edward J. Erler, *Does Diversity Really Unite Us? Citizenship and Immigration*, HILLSDALE COLLEGE (2018), <https://imprimis.hillsdale.edu/does-diversity-really-unite-us-citizenship-immigration/>.

aims to destroy the American way of life.”¹⁵ In August 2020, a Senior Fellow and the Founding Director of the Claremont Institute’s Center for Constitutional Jurisprudence argued that Senator Kamala Harris is “not a ‘natural born citizen’—and therefore ineligible for the office of the president, and, hence, ineligible for the office of the vice president.”¹⁶

i. Do you agree—

i. That “diversity is a solvent that dissolves the unity and cohesiveness of a nation”?

I am not familiar with those remarks and cannot comment on them. However, I believe that diversity of views and thought is important for productive debate in our society and that the First Amendment protects individuals’ rights to hold diverse views.

ii. That diversity “is a bastion of intolerance”?

Please see my response to Question 4(i)(i).

iii. That “multiculturalism . . . aims to destroy the American way of life”?

Please see my response to Question 4(i)(i).

iv. That Senator Harris is “not a ‘natural born citizen’—and therefore ineligible for the office of the president, and, hence, ineligible for the office of the vice president”?

I am not familiar with those remarks and cannot comment on them. Further, given that this comment involves an issue that may one day be litigated in federal court, it would be inappropriate for me as a judicial nominee to express an opinion on this matter. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

¹⁵ Thomas D. Klingenstein, *Fight the Mob*, THE AMERICAN MIND (Aug. 19, 2020), <https://americanmind.org/essays/fight-the-mob/>.

¹⁶ John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020), <https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483>.

**Questions for the Record for Kathryn Kimball Mizelle
From Senator Mazie K. Hirono**

1. At the hearing, I asked you about your May 2020 amicus brief you filed on behalf of the U.S. Chamber of Commerce opposing a mandatory emergency temporary standard by OSHA to protect workers from COVID-19 exposure. In your brief, you had argued that OSHA's existing "flexible" guidance "is far more effective at protecting workers from the coronavirus" than a mandatory emergency temporary standard. In making this point, you pointed to OSHA's guidance for meatpacking plants and other industries. But as I noted at the hearing, in the month before your filed brief, there were major reports of serious COVID-19 outbreaks at meatpacking plants affecting at least 6,500 meatpacking workers, and at least 20 workers had died from the virus.

At the hearing, when I asked you about the claims in your brief, you stated there were mandatory OSHA standards existing at the time to protect these meatpacking workers. Please identify what those mandatory OSHA standards were that referenced meatpacking workers.

It was the position of the Chamber of Commerce and the other business associations that were the clients of Jones Day that the flexible and up-to-date guidance issued by the Department of Labor best served the evolving workplace situations due to the novel coronavirus and its unprecedented impact on American workers and businesses. *See Interim Guidance by CDC and OSHA, Meat and Poultry Processing Workers and Employers.* Those clients' views were that guidance and the existing OSHA regulations, including the OSHA rules regarding respiratory protection, personal protective equipment, eye and face protection, sanitation, and hazard communication, along with the OSH Act's "general duty clause," adequately provided protections for American workers.

2. At a Federalist Society event this year, you claimed "there is no human being better suited to serve on" the D.C. Circuit than Trump Judge Greg Katsas, for whom you clerked only two years ago. You said Judge Katsas "gave me a clear example of what kind of lawyer I want to be."

Judge Katsas cast the deciding vote to uphold a Trump administration rule that undermined protections for preexisting conditions in the Affordable Care Act. He opposed presidential accountability by dissenting from the full D.C. Circuit's decision recognizing Congress's authority to subpoena the President's tax records. As a lawyer, Judge Katsas worked to rollback protections for transgender individuals in the military and at schools. Is it your view that this is the type of judge and lawyer you want to be?

In the remarks I provided at the above-mentioned event, I stated that it was Judge Katsas's "character" that stood out to me. I described him as follows: "He is earnest to a fault; eager to engage with the law; a spirited debater; a generous listener; and a gracious mentor."

Those are the qualities I was referencing when I concluded that he “gave me a clear example of what kind of lawyer I want to be.”

3. In your Senate Judiciary Questionnaire, you noted that you worked at the Department of Justice (DOJ) in a political appointee position as Counsel to the Associate Attorney General under Attorney General Jeff Sessions from 2017 to 2018. You listed that your work included advising on litigation handled by the Justice Department’s Civil and Civil Rights Divisions.

- a. **Please answer yes or no: Were you involved in any way in DOJ’s efforts to undermine the use of consent decrees in civil rights policing cases, including trying to walk back DOJ’s consent decree with the Baltimore Police Department and the issuance of Attorney General Sessions’ consent decree memo?**

No, not to my recollection.

If yes, what was your involvement?

- b. **Please answer yes or no: Were you involved in any way in DOJ’s efforts to withdraw its enforcement against certain voter suppression efforts, including dropping a discriminatory intent claim against Texas’s strict voter ID law and reversing position to support Ohio’s voter purge that removed thousands of voters for its rolls?**

No, not to my recollection.

If yes, what was your involvement?

- c. **Please answer yes or no: Were you involved in any way in the Trump administration’s family separation policy that was implemented by DOJ as the zero tolerance policy?**

No, not to my recollection.

If yes, what was your involvement?

- d. **Please answer yes or no: Were you involved in any way in DOJ’s efforts to reverse protections for LGBTQ individuals, including withdrawing guidelines that had ensured transgender students had access to bathrooms and other facilities of their choice and arguing that Title VII does not prohibit employment discrimination against LGBTQ individuals?**

The withdrawal of the letter concerning Title IX and the use of bathrooms to which you refer occurred in February 2017, before I began serving in the Associate Attorney General’s Office, and I was therefore not involved in any manner with that withdrawal. Upon joining the Associate Attorney General’s Office, I worked on DOJ’s Regulatory Reform task force where I generally advised the Associate Attorney General on de-

regulatory policy at the Department. In that capacity, I was aware of de-regulatory actions that the Department was taking. However, I was not the decision maker on any particular rescission decisions, including the one regarding Title VII.

If yes, what was your involvement?

Please see my above response.

- e. **Please answer yes or no: Were you involved in any way in the Trump administration's Executive Order 13769 and related subsequent Executive Orders (the Muslim Ban)?**

No, not to my recollection.

If yes, what was your involvement?

4. In your political appointee position at DOJ, you said you advised on projects for the Trump administration's Regulatory Reform Task Force, efforts to promote free speech on college campuses, and the religious liberty working group.

- a. **During your involvement with the Trump administration's Regulatory Reform Task Force, which DOJ regulations did you review for repeal, replacement, or modification?**

Please see my response to Question 3(d).

- b. **In advising on religious liberty working group projects at DOJ, what steps did you take to ensure they respected the constitutionally required separation of church and state?**

As part of the religious liberty working group, I provided legal advice on particular litigation matters that arose implicating the Establishment Clause and the Free Exercise Clause. In that capacity, I provided advice to my client consistent with the Supreme Court and relevant circuit precedent.

- c. **President Trump issued an executive order that threatened to withhold federal aid to colleges if they did not comply with the Trump administration's standards for free speech. The American Association of University Professors and others called the proposal "a dangerous solution to a largely nonexistent problem." Senator Alexander said he did not "want to see Congress or the President or the department of anything creating speech codes to define what you can say on campus." How much DOJ resources went into regulating speech on college campuses compared to current pressing issues on college campuses such as sexual assault?**

I served in the Associate Attorney General's Office as counsel on a detail from the Tax Division from 2017 to 2018. My role did not include budgetary or human resource

responsibilities for the Department, and I therefore am not able to quantify the amount of DOJ resources that were spent on promoting the First Amendment on college campuses.

5. In a two-week course on religious liberty that you teach with Justice Thomas, you note that the “goal of the course is to begin to understand the original meaning of” the Religion Clauses of the First Amendment – the Establishment Clause and Free Exercise Clause.

- a. **Under this originalist view of the Establishment Clause and the Free Exercise Clause, do you believe that religious liberty protections override the civil rights protections of the Equal Protection Clause and Due Process Clause under the Constitution?**

The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Together, these constitutional provisions restrict the government from denying a person the equal protection of the laws and from prohibiting a person’s free exercise of religion. Both are fundamental, important rights protected by our Constitution, and I would faithfully apply all Supreme Court precedent governing the interplay of the two amendments. It is not appropriate for me to comment further, however, as this issue has been and will likely continue to arise in litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. **How do you reconcile these rights when these clauses conflict?**

Please see my response to Question 5(a).

6. 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?**

I agree it can be helpful.

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

As I testified during the hearing, I took implicit bias training while at the Department of Justice.

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

If confirmed, I welcome the opportunity to take training of all sorts from the Federal Judicial Center and the Administrative Office of the United States Courts.

Nomination of Kathryn Kimball Mizelle
United States District Court for the Middle District of Florida
Questions for the Record
Submitted September 16, 2020

QUESTIONS FROM SENATOR BOOKER

1. The American Bar Association Standing Committee on the Federal Judiciary (ABA) rates nominees to the federal bench and states in its backgrounder that “a nominee to the federal bench ordinarily should have at least twelve years’ experience in the practice of law.”¹ You have only been practicing law for eight years since you graduated from law school—four of which you spent as a law clerk to various federal judges. Based on your lack of experience in the practice of law, a substantial majority of the ABA rated you as “Not Qualified” to be a district judge.² The ABA found that in total, only five of your eight years of legal experience was in the trial courts.³ The ABA also pointed out that you have “not tried a case, civil or criminal, as lead or co-counsel.”⁴
 - a. Do you believe it is important for a district court nominee to have tried a case as lead or co-counsel or to have a minimum requisite number of years practicing in the field in order to be qualified to be a district judge? If not, please explain why.

As reflected in my Senate Judiciary Questionnaire, I have tried two jury trials to verdict, one as co-lead counsel and another as associate counsel. I have also, as a career federal prosecutor, argued dozens of times in federal district court as lead counsel on behalf of the United States. Trial-level litigation and in-court experience are certainly two kinds of experiences that could help develop the skills and judgment of a nominee, although many different experiences could prepare an individual to become an effective district court judge. But I recognize that it is solely within the Senate’s purview to evaluate the qualifications of a federal judge when performing its advice and consent role.

- b. Do you believe the ABA was incorrect in rating you as “Not Qualified” to be a district judge? If so, explain why.

I served as a career federal prosecutor with the U.S. Department of Justice, both in the U.S. Attorney’s Office for the Eastern District of Virginia and in Department of Justice’s Tax Division. In those capacities, I frequently argued in federal district court and prosecuted individuals for federal offenses ranging from sex trafficking by force, fraud, and coercion, to tax evasion and money

¹ AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WHAT IT IS AND HOW IT WORKS 3 (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/backgrounder-8-19-2020.pdf.

² Letter from Randall D. Noel, Chair, Standing Comm. on the Federal Judiciary, American Bar Ass’n, to Senator Lindsey Graham, Chairman, Senate Comm. on the Judiciary, regarding the Nomination of Kathryn Kimball Mizelle to the United States District Court for the Middle District of Florida (Sept. 8, 2020) (on file with the Comm.).

³ *Id.*

⁴ *Id.*

laundering. By my recollection, I have appeared and argued in federal court on behalf of the United States approximately 40 times. In addition to my in-court experience, I also conducted dozens of direct examinations of witnesses before federal grand juries, prosecuted or investigated approximately 30 defendants for federal offenses, and led the prosecutions of sophisticated, white-collar defendants. While at Jones Day, I have represented companies in both high stakes civil litigation as well as significant criminal defense cases, including the defense of two companies in a \$3 billion healthcare fraud prosecution. These experiences, along with my service in the Associate Attorney General's Office and as a law clerk at every level of the federal judiciary, have prepared me to be a fair and effective district court judge.

- c. What is the most difficult experience you have had making an oral argument before a federal district court, and why?

I have encountered many difficult instances during oral arguments before federal district court judges. For example, I argued the motions *in limine* in the largest sex trafficking conspiracy ever prosecuted in the Eastern District of Virginia. I, along with my co-counsel, had filed motions requesting that the defendant be prevented under Federal Rule of Evidence 412 from asking on cross-examination or introducing evidence during his case-in-chief about the victims' prior sexual conduct and, in particular, whether they had engaged in commercial sex acts. We also filed a motion seeking to prevent the defendant from introducing what is called "reverse 404(b)" evidence under the federal rules of evidence that prohibit proving "good character" through specific examples. Based on trial subpoenas issued by the defendant, we had strong reason to believe he intended to call other women who voluntarily prostituted for him to prove that he did not use force, fraud, or coercion to traffic the victims who were planning to testify. I argued both motions. In the end, the district court withheld ruling on the motions until trial and the defendant ultimately pleaded guilty on the last business day before the scheduled trial.

Another example of a difficult oral argument occurred during a contested supervised release hearing when the district court recessed for a short break for the parties to research and return to argue whether the Sixth Amendment right to confrontation applied to scientists who interpreted urine analysis. The issue arose because the proceeding was technically not considered a new criminal prosecution for purposes of the Fifth and Sixth Amendments. At the time, the question was not yet decided by the governing court of appeals and, ultimately, the district court declined to decide the legal question and requested that I call the expert witness to conduct an in-court direct examination, which I did.

- d. What is the most difficult experience you have had writing a brief for a federal district court, and why?

I have drafted numerous criminal motions and pleadings in federal district court, from charging documents such as indictments, criminal complaints, and informations, to motions *in limine*, plea agreements, factual bases, position papers, motions to dismiss indictments, a motion for a bill of particulars, a

motion to suppress evidence, proposed jury instructions, and habeas pleadings. But I think the most difficult ones have always been the sentencing memoranda where I recommended particular sentences be imposed for criminal defendants.

- e. Please describe your most significant experiences litigating before a federal district court.

My Senate Judiciary Questionnaire lists the top ten most significant litigation matters that I have handled, eight of which were litigated in federal district court. Of those, I consider the prosecution of Robert Bonner, Michael Randall, and Stephanie McLaughlin for the largest sex trafficking venture ever uncovered in the Eastern District of Virginia to be the most significant, both in scope as it included over 55 women victims and in seriousness of offense. Bonner and his co-conspirators recruited victims from Internet websites and used victims' substance abuse issues as a means to manipulate them to perform commercial sex acts for his financial gain. In one instance, he caused a fentanyl patch to be provided to a 21-year old victim who overdosed as a result and died in the hotel room from which Bonner was prostituting her. Bonner was indicted for multiple counts of sex trafficking by force, fraud, and coercion and drug distribution with death resulting, which carried a mandatory life sentence if convicted. I conducted at least two dozen witness interviews and, along with my co-counsel, presented the superseding indictment to the grand jury. At trial, I would have conducted the direct examinations of 15 of the 24 witnesses and presented opening statements. On the last business day before trial was to begin in July 2015, Bonner pleaded guilty. Co-conspirator Randall pleaded guilty to sex trafficking of a child and received a 25-year sentence. Co-conspirator McLaughlin pleaded guilty to sex trafficking and received a 24-month sentence. I argued the sentencing hearing for Bonner where I successfully secured the maximum sentence permissible under the terms of the plea agreement (Bonner had entered a plea under Federal Rule of Criminal Procedure (c)(1)(C) that limited the judge's discretion from 20 to 30 years of imprisonment). For my involvement in this case, I was nominated for a United States Department of Justice award.

The defense of two pharmaceutical companies in a \$3 billion healthcare fraud case was also significant. The United States Attorney's Office for the Western District of Virginia and the United States Department of Justice's Consumer Protection Branch brought an indictment against Indivior, Inc., and Indivior PLC for charges of healthcare, wire, and mail fraud. The superseding indictment alleged fraud based on the marketing, sale, promotion, and distribution of the opioid-addiction-treatment drug, Suboxone Film, and sought \$3 billion in forfeiture. Upon joining Jones Day, I have played a significant role in this case. Among other things, I drafted the motion to dismiss the superseding indictment and related responses, a motion to suppress evidence recovered from the search warrant of Indivior's headquarters, multiple motions *in limine* and responses to the government's motions *in limine*, objections to the government's proposed jury instructions, and the defendants' proposed jury instructions and verdict form. The two-month trial was originally scheduled to begin in May 2020, but it was rescheduled in light of COVID and the parties have now entered a global resolution.

Finally, I would highlight three tax prosecutions where I served as lead counsel in the Middle District of North Carolina. In one, the primary defendant, Herbert Martin, owned and operated a tax preparation business in Rockingham, North Carolina, where he prepared and filed thousands of federal income tax returns that fraudulently claimed refunds for clients. In total, he caused more than \$10.6 million in losses to the United States Treasury. I led the multi-year grand jury investigation and prosecution, including interviews of more than 60 witnesses, and successfully secured an 11-year sentence, as well as a \$10.6 million dollar restitution order based on a complicated tax-loss calculation. Jessica Taylor, a co-conspirator, also entered a plea after indictment and was sentenced to 24 months in prison for her role in the scheme. In the second tax prosecution, Kenneth Stainback, the former president of the North Carolina Board of Funeral Service, and Stephen Smith, the president of McClure Funeral Service, conspired to defraud the United States for over a decade by filing false corporate tax returns for McClure through a sophisticated fraud scheme. After a half-day sentencing hearing, I successfully secured a term of imprisonment for both defendants; Stainback was sentenced to 14 months in prison and Smith was sentenced to six months in prison. In the third tax prosecution, Henti Lucian Baird, a former IRS Revenue Officer and owner of HL Baird's Tax Consultants, evaded paying over \$500,000 in taxes through the use of more than ten nominee bank accounts held in his children's names, and thousands of deposits and fraudulent transfers between the accounts. I was the lead prosecutor at all stages of litigation, and I argued the sentencing hearing where the government secured a 43-month sentence.

- f. Please describe your most significant experiences litigating in Florida, or in any other state contained in the 11th Circuit, in state or federal court.

Two of the ten cases listed in response to Question 17 on my Senate Judiciary Questionnaire were litigated in federal district courts in the Eleventh Circuit. The first case was *United States v. Wells* in the Middle District of Alabama. Alana Wells worked at a healthcare company where she had access to patient information protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). She stole the names, dates of birth, and social security numbers of patients and provided that information to co-conspirators who then used it to file fraudulent tax returns seeking refunds from the IRS. I, along with co-counsel, indicted her for one count of a multi-object conspiracy to commit identity theft and wire fraud, two counts of possessing 15 or more unauthorized access devices, two counts of aggravated identity theft, and one count of wrongful disclosure of personally identifiable information in violation of HIPAA. At the time of the indictment, it was the first time the Tax Division had ever charged an individual for a criminal violation of HIPAA. Shortly before trial, Wells pleaded guilty to conspiracy to commit wire fraud and identity theft and aggravated identity theft and she was sentenced to 26 months in prison.

The second case was *United States v. Kalmar* in the Middle District of Florida. Attila Kalmar was charged with mail fraud, money laundering, and corruptly endeavoring to obstruct the IRS through filing fictitious trust income tax returns on behalf of a nominee entity that falsely reported large interest income. I was assigned as lead

counsel to the case immediately before the statute of limitations expired and successfully secured grand jury testimony of key witnesses and a timely indictment. I drafted and filed a brief arguing that Kalmar should be detained due to his flight risk, ultimately securing detention pending trial (a result that is unusual in tax prosecutions). I also secured a restraining order to prevent dissipation of the fraud proceeds. Kalmar later pleaded guilty and was sentenced to 18 months of imprisonment (this occurred after I left the Tax Division).

While at the State Attorney's Office for the Eighth Judicial Circuit in Florida, I prosecuted a defendant for capital sexual battery against a minor. As part of a *Williams* hearing (similar to a Rule 404(b) hearing), I conducted the direct examination of the 12-year old minor victim about the repeated sexual abuse she suffered by the defendant—her grandfather—who sat at the defense counsel's table. After I argued and won the *Williams* hearing, the defendant pleaded guilty.

2. In 2017, you were a John Marshall Fellow at the Claremont Institute. According to multiple news articles, the Claremont Institute has been accused of promoting alt-right thought and associating itself with white nationalists.⁵
 - a. Were you aware that the Claremont Institute was “flirting with alt-right authoritarianism”⁶ before you applied to be a John Marshall Fellow?

The Claremont Institute has a serious reputation as a deeply intellectual think tank that is dedicated to the principles of the American Founding and the legacy of Abraham Lincoln. At the time I applied to be a John Marshall Fellow, I was not familiar with the news articles referenced above and I would not knowingly be part of any organization associated with “alt-right authoritarianism.”

- b. Were you part of a Claremont Institute listserv that was shut down in 2018 after one individual emailed the list: “Heaven forbid that some thinkers – like the American founders who favored our country to be majority white – think that the U.S. of A should stay majority white! Perish the thought. Can't have that.”?

I am not familiar with the email to which you are referring and, to the best of my recollection, was not part of that listserv.

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

In general terms, I agree with the jurisprudential philosophy of originalism that seeks to determine the meaning of the constitutional text as understood at the time it was ratified.

⁵ See Mark Joseph Stern, “*Scholars*” Pushing the Kamala Harris Birther Lie, SLATE (Aug. 14, 2020), <https://slate.com/news-and-politics/2020/08/kamala-harris-birther-birthright-citizenship-claremont.html>; Eliana Johnson, *Trump Speechwriter's ouster sparks racially charged debate*, POLITICO (Aug. 23, 2018), <https://www.politico.com/story/2018/08/23/trump-think-tank-racism-claremont-794070>.

⁶ Conor Friedersdorf, *An Attack on Founding Principles at the Claremont Institute: The Think Tank Is Ostensibly Dedicated to Fusing Conservatism with the Declaration of Independence and the Constitution. Why Is It Flirting with Alt-Right Authoritarianism?*, ATLANTIC (Sept. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/09/an-attack-on-founding-principles-at-the-claremont-institute/499094>.

4. In 2020, at a Federalist Society event, you stated that Justice Clarence Thomas had “courage” because he had “taken the commitment to originalism to new heights.”⁷ You also jokingly said that Justice Antonin Scalia once referred to Justice Thomas as a “bloodthirsty originalist” and said while that may not have been intended as a compliment, you thought it was one.

a. What did you mean when you said Justice Thomas has “taken the commitment to originalism to new heights”?

I meant that Justice Thomas has been willing to follow the law wherever it leads without regard for his personal or political preferences.

i. Why do you believe it is courageous to take originalism to new heights?

In focusing on what the law meant at the time the text of a constitutional provision or statute was ratified or enacted, Justice Thomas has received and continues to receive widespread criticism. Yet, he remains committed to the oath he took as a jurist. In my opinion, that is courageous.

b. Why in your view is it a compliment to be referred to as a “bloodthirsty originalist”?

I understood Justice Scalia’s comment to mean that Justice Thomas is willing to articulate the original meaning of a provision regardless of its popularity.

c. Your remarks at this 2020 Federalist Society event seemed to have praised a commitment to originalism that is beyond the norm. Is that accurate?

I am not sure it is “beyond the norm.” Please see my responses to Questions 4(a), (b), and (c) for what I meant by my comments.

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

In general terms, I agree with the jurisprudential philosophy of textualism that seeks to determine what the meaning of the statutory text as understood at the time it was enacted.

6. 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?

⁷ Banquet and Discussion with Justice Clarence Thomas [2020 Florida Chapters Conference], The Federalist Society (Feb. 12, 2020); <https://www.youtube.com/watch?v=RvmGHEYmXSQ>.

The Supreme Court has held that the text of a statute is the starting place for construing it and that it is appropriate to consider legislative history only when the statutory text is ambiguous. *See, e.g., Milner v. Dep't of Navy*, 562 U.S. 562, 569, 572 (2011). If confirmed, I will follow all Supreme Court and Eleventh Circuit precedent on 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 6(a).

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

I understand judicial restraint to primarily mean that an Article III court decides only the question presented in the case or controversy before it. I think judicial restraint can also be modeled by a jurist in refraining from opining about his or her personal views of a matter, which are not relevant in determining what the law is and could lead the public to believe that the jurist is not impartial.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁸ Was that decision guided by the principle of judicial restraint?

As a nominee to an inferior Article III court, it is generally not appropriate for me to comment on the merits or demerits of any particular Supreme Court opinion. If confirmed, I would faithfully apply all Supreme Court precedent.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁹ Was that decision guided by the principle of judicial restraint?

As a nominee to an inferior Article III court, it is generally not appropriate for me to comment on the merits or demerits of any particular Supreme Court opinion. If confirmed, I would faithfully apply all Supreme Court precedent.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹⁰ Was that decision guided by the principle of judicial restraint?

As a nominee to an inferior Article III court, it is generally not appropriate for me to comment on the merits or demerits of any particular Supreme Court opinion. If confirmed, I would faithfully apply all Supreme Court precedent.

- 8. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have

⁸ 554 U.S. 570 (2008).

⁹ 558 U.S. 310 (2010).

¹⁰ 570 U.S. 529 (2013).

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?

I have not studied in depth the literature or statistics that you reference concerning voter fraud and, because it is both a political question that is hotly debated and a question that could come before me as a judge, it would not be appropriate for me to comment on that broad question. See Canon 3(6)(A) & Canon 5.

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

Please see my response to Question 8(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 8(a).

9. 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 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?

This broad question is subject to vigorous debate by academics, politicians, and the American people. I understand that there is a significant amount of academic literature on this question, though I have not extensively studied that literature. To avoid

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.*

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.*

weighing in on the political debate generally and running afoul of Canon 5, and to avoid any appearance of bias in particular cases, *see* Canon 3(A)(6), I can only answer this question based on my experience as a former federal prosecutor. In that capacity, I took implicit bias training and endeavored never to make charging decisions, to engage in plea negotiations, or to recommend sentences to federal district courts based on racial considerations, explicit or implicit. Based on my observations, I likewise never witnessed that conduct by my colleagues at the Department of Justice.

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

I am aware that there are statistics showing that racial minorities constitute a larger percentage of individuals incarcerated when compared to their representation in the population at large.

- 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 took implicit bias training while serving at the Department of Justice.

- 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?

I believe disparities in sentencing for similarly situated defendants who commit the same crimes is a great injustice. It would not be appropriate for me to speculate as to possible causes for the statistics that you reference, but I can commit that, if confirmed as a federal district court judge, I will endeavor to ensure that similarly situated defendants who commit the same crimes receive proportional sentences irrespective of their race.

- 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 9(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 court judges should take seriously their task of calculating the Sentencing Guidelines and carefully evaluate their reasons for granting downward departures or variances. I think being even-handed and conscientious about the

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 Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

reasons for those departures and variances is one measure that federal judges could take to ensure that impermissible considerations are not used to impose differing sentences on similarly situated defendants.

10. 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 that question or reviewed the studies to which you are referring, so I am not in a position to provide an informed answer.

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.

I have not studied that question or reviewed the studies to which you are referring, so I am not in a position to provide an informed answer.

11. 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, I believe diversity is important in the judicial branch.

12. 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.

13. 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.

Yes.

14. 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.

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.*

²¹ 347 U.S. 483 (1954).

²² 163 U.S. 537 (1896).

15. 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, not that I recollect.

16. 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?

Under 28 U.S.C. § 455, a judge’s race or ethnicity alone is not a basis for recusal. If the question asks me to agree with particular comments by the President, it would be improper for me to comment on the political statements of an elected official. *See* Canon 5(C).

17. 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 stated that due process protections attach to all “persons” in the United States. *Zadvydas v. Davis*, 633 U.S. 678, 693 (2001). I would faithfully apply all Supreme Court and Eleventh Circuit precedent about due process protections for individuals.

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 September 16, 2020
For the Nomination of:**

Kathryn Kimball Mizelle, to be United States District Judge for the Middle District of Florida

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

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

If I am fortunate enough to be confirmed, I would follow all Eleventh Circuit and Supreme Court precedent about sentencing. In general terms, I would first properly calculate the Sentencing Guidelines range, taking into account the pre-sentence investigation report prepared by the Probation Office, the sentencing memorandum filed by counsel, and my own independent calculation of the Guidelines. I would then apply the factors listed in 18 U.S.C. § 3553(a), and seek to impose a sentence that is sufficient but not greater than necessary to achieve the purposes of punishment, taking into account any arguments by counsel and victim statements.

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

I would begin by looking to the Sentencing Guidelines to determine the properly calculated Guidelines range, as required by law. I would then consider whether there are any factors that warrant a departure or variance from the Guidelines. Finally, I would consider the pre-sentence investigation report and the arguments of counsel as to what would constitute a fair and proportional sentence.

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

There are instances when departures from the Sentencing Guidelines are appropriate, such as when the Government files a motion for a downward departure based on substantial assistance.

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

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

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

I have not had occasion to study the data surrounding whether mandatory minimum sentences are more likely to deter certain types of crime compared to discretionary or indeterminate sentencing.

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

I believe that consistency in sentencing and lack of disparity between similarly situated defendants are key factors in creating an equitable criminal justice system. At the same time, the sentence must be proportional to the crime committed and no greater than necessary to serve the purposes of punishment.

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

As a former federal prosecutor, I have encountered instances where I believed that charging a particular defendant with a crime that carried a mandatory minimum sentence could have resulted in an injustice if that defendant was convicted. In those circumstances, I recommended to my supervisors charging the individual with an appropriate offense to match the seriousness of the conduct.

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

1. **Describing the injustice in your opinions?**
2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**
3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

As a judicial nominee, I cannot commit to taking any specific course of action in rendering a decision or imposing a sentence. However, I can commit that I will take all appropriate actions to apply the law faithfully

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

and impartially to all.

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

If I am fortunate enough to be confirmed, I will take into account all options related to sentencing, including alternatives to incarceration.

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, a judge plays an important role in ensuring that the justice system is fair and equitable. One of the important ways a judge can do this is by ensuring that all litigants appearing before the court are treated fairly and with respect and that the law is applied impartially.

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

I am aware that there are statistics showing that racial minorities constitute a larger percentage of individuals incarcerated when compared to their representation in the population at large.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.
 - a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

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

Speaking from personal experience, the opportunity to clerk for a federal judge is an informative experience that opens the door to other jobs and opportunities. As such, I would consider applicants that come from a variety of backgrounds and have diverse experiences, including minorities and women.

Senator Josh Hawley
Questions for the Record

Kathryn Kimball Mizelle
Nominee, U.S. District Court for the Middle District of Florida

- 1. Under Supreme Court and U.S. Court of Appeals for the Eleventh Circuit precedent, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment’s prohibition on cruel and unusual punishment?**

Under Supreme Court and Eleventh Circuit precedent, a prisoner must establish two elements to succeed on a method-of-execution challenge under the Eighth Amendment: (1) that the government’s method of execution creates a risk of severe and imminent pain and (2) that an available alternative method of execution would entail a significantly less severe risk. *See Glossip v. Gross*, 576 U.S. 863, 877-78 (2015) (summarizing the standard articulated by the controlling opinion in *Baze v. Rees*, 553 U.S. 35 (2008)); *accord Brooks v. Warden*, 810 F.3d 812, 818-19 (11th Cir. 2016) (applying the *Baze-Glossip* standard).

- 2. Under the Supreme Court’s holding in *Glossip v. Gross*, is a petitioner required to establish the availability of a “known and available alternative method” that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

Yes, a prisoner must establish an available alternative method of execution for both facial and as-applied method-of-execution challenges under the Eighth Amendment. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1126-29 (2019) (holding that the *Baze-Glossip* requirement of an identifying an available alternative applies to both kinds of challenges).

- 3. Have the Supreme Court or the U.S. Court of Appeals for the Eleventh Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

No, not that I am aware.

- 4. Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

No.

5.

- a. **Under Supreme Court and U.S. Court of Appeals for the Eleventh Circuit precedent, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

The Supreme Court's decisions in two cases primarily govern this question for purposes of the Free Exercise Clause. First, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that a neutral law of general applicability does not need to be justified by a compelling government interest, regardless of whether the law burdens a particular religious practice. Whether *Smith* was correctly decided is a question before the Supreme Court this upcoming term. See *Fulton v. City of Philadelphia*, No. 19-123. Second, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that courts should carefully evaluate the record to determine whether the governmental action is in fact neutral and generally applicable and does not target or burden a particular practice because of its religious motivation. As the Court instructed, “[f]acial neutrality is not determinative.” *Id.* at 544.

In the Eleventh Circuit, “[i]f a law is one that is neutral and generally applicable, then rational basis scrutiny should be applied, requiring that the plaintiff show that there is not a legitimate government interest or that the law is not rationally related to protect that interest.” See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1255 n.21 (11th Cir. 2012). But, if “a law is not neutral or generally applicable, either because the law is facially discriminatory or, alternatively, because the object of the law is to infringe upon or restrict practices because of their religious motivation, then strict scrutiny is the proper framework.” *Id.*

- b. **Under Supreme Court and U.S. Court of Appeals for the Eleventh Circuit precedent, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.**

The Supreme Court has articulated the governing rule under the First Amendment in several cases, most recently this past term in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2255 (2020), where it

reiterated that the “strictest scrutiny” or the “most exacting scrutiny” applies when governmental action discriminates against individuals and entities based solely on “their religious character,” *id.* To satisfy this “stringent standard,” the “government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Id.* at 2260 (internal quotation marks omitted). Stated otherwise, the Free Exercise Clause “protects religious observers against unequal treatment” and against “laws that impose special disabilities on the basis of religious status.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017).

c. What is the standard in the U.S. Court of Appeals for the Eleventh Circuit for evaluating whether a person’s religious belief is held sincerely?

The Eleventh Circuit applies the Supreme Court’s precedent in determining whether a religious belief is sincerely held for purposes of the Religious Freedom Restoration Act: “our narrow function in this context is to determine whether the line drawn between conduct that is and is not permitted under one’s religion reflects an *honest conviction*.” *Davila v. Gladden*, 777 F.3d 1198, 1204 (quoting *Burwell v. Hobby Lobby*, 573 U.S. 683, 725 (2014)). In other words, the Eleventh Circuit does not inquire into the “the place of a particular belief in a religion or the plausibility of a religious claim.” *Id.* (internal quotation marks omitted). Rather, it focuses only upon whether a plaintiff “actually holds the beliefs he claims to hold.” *Id.* (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014)).

6. What is your understanding of the Supreme Court’s holding in *District of Columbia v. Heller*?

The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects the individual “right to keep and bear arms for the purpose of self-defense,” *McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010).

7. Please state whether you agree or disagree with the following statement and explain why: “Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted.”

Yes, I agree with that approach to statutory interpretation.

8.

a. Do you believe the U.S. criminal justice system is systemically racist? Why or why not?

This broad question is subject to vigorous debate by academics, politicians, and the American people. I understand that there is a significant amount of academic literature on this question, though I have not extensively studied that literature. To avoid weighing in on the political debate generally and running afoul of Canon 5, and to avoid any appearance of bias in particular cases, *see* Canon 3(A)(6), I can only answer this question based on my experience as a former federal prosecutor. In that capacity, the statutes that I was charged with enforcing did not facially discriminate based on race. Nor did I make charging decisions, engage in plea negotiations, or recommend sentences to federal district courts in a manner that systemically discriminated based on race. I likewise never witnessed that conduct by my colleagues at the Department of Justice.

b. Do you believe that policing in the United States is systemically racist? Why or why not?

As a law clerk at the U.S. District Court for the Middle District of Florida and at the Eleventh Circuit, I worked on pattern-and-practice lawsuits brought against police departments under 42 U.S.C. § 1983. Because those kinds of lawsuits are routinely litigated in the federal district court to which I have been nominated, I cannot comment in a way that could give the impression that I have a bias in favor or against a particular litigant. *See* Canon 3(A)(6). However, I can speak to my own personal experience with individual law enforcement officers, having worked with local law enforcement in Bradford County, Florida, as well as federal agents from IRS, HSI, USPS, and FBI. The officers with whom I prosecuted cases were men and women of integrity, deeply committed to the rule of law, and impartial towards all. I never witnessed racism by them of any sort.

c. Do you believe that the U.S. Constitution is systemically racist? Why or why not?

No. The Constitution and the Declaration of Independence are—and remain when evaluated alongside other constitutions and founding charters—remarkable. Our country’s government is premised on sovereignty residing in the People. And the Declaration of Independence explicitly recognizes that those People “are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The Constitution was designed to protect these rights, primarily through the separation of powers and federalism.

Of course, there have been shameful and abhorrent incidents in our country's history when these ideals were ignored or blatantly rejected. *See, e.g., Dred Scott v. Sandford*, 60 U.S. 393 (1857). And there have been constitutional amendments to ensure that those abuses are not repeated, *see* Const. amends. XIII, XIV, XV, and to correct where the Constitution did not live up to the principles upon which it was created, *see* Art. I, § 2. But the failings of individual jurists, politicians, and even entire States of the Union do not fundamentally change the *principles* upon which our Constitution rests.

d. Describe the level of confidence you have in the American justice system.

Based on my personal experience as a former federal prosecutor, I am confident that the American justice system provides—on the whole—just outcomes. Like any human institution, it is not perfect. But our Republic and the constitutional safeguards guaranteed to criminal defendants are remarkable in both ideals and practice when compared to any other country, now and as a historical matter.