

**Nomination of Lee Philip Rudofsky to the United States District Court for the
Eastern District of Arkansas
Questions for the Record
Submitted August 7, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.
- a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

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?**

A district court is bound to follow Supreme Court precedent and ordinarily should not question that precedent. But there may be some extraordinary and unusual circumstances that justify a district court judge's voicing disagreement with Supreme Court precedent, so long as that judge still follows binding precedent.

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

District court decisions ordinarily are not binding on that court in later cases, with limited exceptions. If confirmed as a district judge, I would follow the Supreme Court and Eighth Circuit precedents on that issue.

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

The Supreme Court has identified a number of factors that it will consider when analyzing whether to overturn its own precedent. *See, e.g., South Dakota v. Wayfair*, 585 U.S. ___ at * 17-22(2018); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-69 (1992). The Court has been clear that it must exercise the utmost caution before overturning precedent. As a nominee to the district court, I am not going to grade or give a thumbs up or thumbs down to the Court's decisions in this area.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so

effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

Roe v. Wade is settled law and, if confirmed, I will fully and faithfully follow and apply it.

- b. Is *Roe v. Wade* settled law?**

Yes.

- c. If confirmed, will you commit to upholding *Roe* and *Casey*?**

If confirmed, I will apply *Roe*, *Casey*, and all other binding Supreme Court decisions.

3. From 2015 to 2018, you served as the Arkansas Solicitor General.

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

My ethical duties to my former clients, including my duty of confidentiality, prevent me from disclosing the legal advice that I gave to clients in my role as an attorney.

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

My ethical duties to my former clients, including my duty of confidentiality, prevent me from disclosing the legal advice that I gave to clients in my role as an attorney.

4. In 2016, you defended an Arkansas law that sought to ban abortions at twelve weeks, in violation of the Supreme Court’s holding in *Roe v. Wade*. In a brief filed in the Supreme Court, you argued that the case would be an “ideal vehicle” for the Court to “reevaluate” and “overturn” the viability rule established in *Roe* and affirmed in *Planned Parenthood v. Casey*. You also argued that *Roe* is “unsupported by law or logic and is untenable.” (Petition for Writ of Certiorari, *Beck v. Edwards*, 136 S. Ct. 895 (2016))

- a. Does the doctrine of *stare decisis* apply to the viability rule established in *Roe*?**

Yes.

b. Please explain the basis for your argument that the Arkansas 12-week abortion ban was an “ideal vehicle” for the Court to “reevaluate” *Roe*.

Your question is about the certiorari petition and reply brief in support of that petition in *Beck v. Edwards*. The case was litigated in the federal district court and in the Eighth Circuit before I entered state government; I was then involved in editing the petition for certiorari and the reply brief in support of certiorari before the Supreme Court. The petition and reply provide the legal arguments made and authorities cited in furtherance of our client’s position. The arguments reflect zealous advocacy of a client’s position.

c. Please explain the basis for your argument that the Supreme Court should overturn 40-year-old precedent.

Please see my answer to Question 4(b).

d. Please explain what you meant when you wrote that *Roe* is “unsupported by law or logic and is untenable.”

Please see my answer to Question 4(b).

In that same brief, you argued that *Roe* and *Casey* established rules that are “far beyond what is necessary to ensure that a woman has a reasonable amount of time to terminate her pregnancy, and...thereby improperly limit[] the prerogative of the states to advance what the Court recognizes are profoundly important interests.” (Petition for Writ of Certiorari, *Beck v. Edwards*, 136 S. Ct. 895 (2016))

e. Please identify all legal authority supporting your assertion that *Roe* and *Casey* “improperly limit[] the prerogative of the states.”

Please see my answer to Question 4(b).

Your brief also stated that the state’s twelve-week abortion ban “provides a reasonable amount of time for a woman to terminate her pregnancy.” (Petition for Writ of Certiorari, *Beck v. Edwards*, 136 S. Ct. 895 (2016))

f. What was your basis for concluding that twelve weeks is a “reasonable amount of time” for a woman to terminate her pregnancy?

Please see my answer to Question 4(b).

5. In response to a question from Senator Hirono about arguments that you advanced in *Beck v. Edwards*, you stated that you were “directed by [your] boss, the Attorney General, to file

the reply and the cert petition” in that case and that the arguments made in those briefs were “[your] client’s positions.”

However, in your Senate Judiciary Questionnaire, you wrote that as Arkansas Solicitor General you “reviewed and revised nearly all briefs from [the] civil and criminal departments” before they were filed; you “helped those departments plan and supervise legal strategy for trial litigation in both the state and federal courts” for cases involving novel or sensitive legal matters; and you “complete[d] a deep dive into the briefs and trial record of almost every case argued by the Office.”

a. Did you review and revise the briefs filed in the Supreme Court by the State of Arkansas in *Beck v. Edwards*?

Please see my answer to Question 4(b).

b. Did you help plan and supervise Arkansas’ legal strategy during any stage of litigation in *Beck v. Edwards*?

Please see my answer to Question 4(b).

6. In your personal capacity, you joined amicus briefs filed in *Hollingsworth v. Perry* and in *Obergefell v. Hodges* that argued in favor of same-sex marriage. Specifically, your brief in *Obergefell* argued that “[t]he Fourteenth Amendment requires equal access to civil marriage because there is no legitimate, fact-based justification for government to exclude same-sex couples in committed relationships.” (Brief of Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)) The Supreme Court then held in *Obergefell* that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee same-sex couples the right to marry.

At your hearing, you stated you were “not an expert in Fourteenth Amendment jurisprudence,” when you signed the briefs, that you have become “much more familiar with this area of law” since you signed the briefs, and that, as a “legal matter,” you “wouldn’t join the arguments in those briefs” today.

a. Please explain in detail what you now find deficient in the legal reasoning of these briefs.

When I joined these amicus briefs, I was not an expert in Fourteenth Amendment jurisprudence. My litigation practice up to that time had not involved substantive due process or equal protection cases, and I had not studied the doctrines since law school. I joined the amicus briefs because, at the time, the arguments in the briefs seemed—on the whole—persuasive to me. I did not write, edit, or have any opportunity to suggest or alter the content of the amicus briefs. My involvement was limited to a binary decision to join or not join after Mr. Mehlman and his counsel finalized the amicus briefs.

Since the time I joined the amicus briefs, I have personally litigated numerous equal protection and substantive due process cases, and I have reviewed and substantively edited the work of other attorneys in even more of these cases. This has required me to—in a serious and systematic way—analyze and grapple with the vast caselaw that forms the nuanced doctrine on the clauses. It has also caused me to study the various academic theories on the original public meaning of the Fourteenth Amendment. Based on this learning, if I could go back in time and do it over again, I would not have joined the amicus briefs. The briefs do not include any analysis of the original public meaning of the Fourteenth Amendment or any analysis of *Washington v. Glucksberg*, 521 U.S. 702 (1997).

I have not said whether I agree or disagree with the Supreme Court’s decisions in *Hollingsworth* or *Obergefell*. As a judicial nominee, it would be inappropriate for me to grade or give a thumbs up or thumbs down to any particular decision of the Supreme Court. If I am confirmed as a district judge, I will fully and faithfully follow and apply both *Hollingsworth* and *Obergefell*, just like any other controlling precedent of the Supreme Court.

b. Please cite to specific arguments, passages, or quotations in these briefs that would cause you not to join them today.

Please see my answer to Question 6(a).

c. Do you now disagree with your brief’s argument that the Fourteenth Amendment “requires equal access to civil marriage?”

Please see my answer to Question 6(a).

d. Please explain how the legal reasoning advanced in your *Obergefell* brief – that the Fourteenth Amendment requires equal access to civil marriage – differs from the ultimate holding in the Supreme Court’s *Obergefell* decision.

Please see my answer to Question 6(a).

In your Senate Judiciary Questionnaire, you noted that you discussed your potential nomination with Senator Boozman, Senator Cotton, the White House Counsel’s Office, and the Department of Justice’s Office of Legal Policy. You also interviewed with a committee formed by Senators Boozman and Cotton.

e. Did you ever discuss the amicus briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges* with Senator Boozman or a member of his staff? If yes, please explain in detail the nature of this discussion.

No.

- f. Did you ever discuss the amicus briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges* with Senator Cotton or a member of his staff? If yes, please explain in detail the nature of this discussion.**

I did not ever discuss the briefs with Senator Cotton. I did discuss the briefs with a staffer in Senator Cotton's office. It was a very short part of a broader discussion on my past experiences and background. I told the staffer essentially the same thing I told the Senate Judiciary Committee at my hearing.

- g. Did you ever discuss the amicus briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges* with anyone from the White House Counsel's Office? If yes, please explain in detail the nature of this discussion.**

During my initial interview with lawyers from the White House Counsel's office and the Office of Legal Policy in the Department of Justice, I was asked whether I thought the briefs were a good example of originalism. I said no and then, without further prompting, told my interviewers essentially the same thing I told the Senate Judiciary Committee at my hearing.

- h. Did you ever discuss the amicus briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges* with anyone from the Department of Justice's Office of Legal Policy? If yes, please explain in detail the nature of this discussion.**

Please see my answer to Question 6(g). Additionally, during preparation sessions in anticipation of the Senate Judiciary Committee hearing, I told lawyers in the Department of Justice's Office of Legal Policy how I planned to discuss the amicus briefs.

- i. Did you ever discuss the amicus briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges* with a member of the committee formed by Senators Boozman and Cotton to interview judicial candidates? If yes, please explain in detail the nature of this discussion.**

During my interview, the amicus briefs were a very quick topic of discussion. I do not recall how they came up. I told that committee essentially the same thing I told the Senate Judiciary Committee at the hearing.

- j. In the course of these discussions regarding your nomination, did any individual ask you to disavow or suggest to you that you should disavow the amicus briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges*? If yes, please explain in detail the nature of this discussion.**

No.

- k. In the course of these discussions regarding your nomination, did any individual suggest or convey to you that support for your nomination would be dependent on your disavowing the briefs you joined in *Hollingsworth v. Perry* and/or *Obergefell v. Hodges*? If yes, please explain in detail the nature of this discussion.**

No.

7. In a 2000 letter to the editor, you argued that affirmative action “perpetuates and maintains a system of racial stereotyping” that “serves to undermine the fight against racism which supporters of affirmative action allege to so vehemently oppose.” (*S.A. Member’s Remarks both ‘Reactionary’ and ‘Absurd,’* CORNELL DAILY SUN (Apr. 13, 2000))

- a. On what basis did you conclude that affirmative action “maintains a system of racial stereotyping?”**

This statement is from an opinion letter I wrote to my school newspaper when I was in college. It was nearly twenty years ago. I do not recall the basis for my opinion.

- b. What did you mean when you wrote that supporters of affirmative action “allege” to oppose racism?**

This statement is from a letter I wrote to my school newspaper when I was a junior in college. It was nearly twenty years ago. I do not recall what I meant at the time.

- c. Do you oppose the use of race as one of several criteria to be considered in higher education admissions?**

If confirmed as a district judge, I would fully and faithfully follow and apply the controlling precedents of the United States Supreme Court and the Eighth Circuit on questions of using race as one of several criteria in higher education admissions. *See, e.g., Fisher v. University of Texas*, 579 U.S. ___, 136 S. Ct. 2198 (2016); *Fisher v. University of Texas*, 570 U.S. 297 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

- d. Do you oppose the use of race as one of several criteria to be considered in hiring decisions?**

If confirmed as a district judge, I would fully and faithfully follow and apply the controlling precedents of the United States Supreme Court and the Eighth Circuit on questions of using race as one of several criteria in hiring decisions. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

8. While Solicitor General of Arkansas, you argued in support of the state’s voter identification law. Your brief argued that the level of impairment posed by the law on the right to vote was “at best *de minimis* and easily justified by the State’s concerns with preventing voter fraud.” (Commissioners’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, *Haas v. Martin* (Ark. Cir. 2018))

a. What evidence did you rely on in determining that voter fraud is a widespread problem that justifies impairing the right to vote?

The brief you cite did not use the phrase “widespread problem.” Our client did, nonetheless, provide the trial court a third-party report compiling circumstances of voter fraud and electoral fraud across the country. Moreover, to the best of my recollection, our client’s position was that a state has a legitimate interest in prophylactically addressing concerns of potential voter fraud. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 191-97 (2008). The record in the *Haas* case describes the evidence and authorities cited in furtherance of our client’s position. The brief reflects zealous advocacy of a client’s position.

b. What evidence did you rely on in determining that voter ID requirements are effective in preventing voter fraud?

Please see my answer to Question 8(a).

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

Yes.

10. 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 to an inferior court, it would be inappropriate for me to grade or give a thumbs up or thumbs down to the Court’s opinion in *Heller*. If confirmed as a district judge, I will fully and faithfully follow and apply *Heller*, as I would any other precedent of the Supreme Court.

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

The Court made clear that some regulations related to firearms do not violate the Second Amendment. *See 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?

In *Heller*, the Court said that nothing in its precedents foreclosed adoption of the original understanding of the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). Given *Heller*'s statement, as a judicial nominee to an inferior court, it would be inappropriate for me to grade or give a thumbs up or thumbs down to this statement in *Heller*. If confirmed as a district judge, I will fully and faithfully follow and apply *Heller*, as I would any other precedent of the Supreme Court.

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

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

In terms of what First Amendment rights apply to what types of corporations and how they apply, I will fully and faithfully follow and apply controlling precedent from the Supreme Court and the Eighth Circuit.

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

I would, if confirmed as a district judge, faithfully and fully follow the controlling precedent of the Supreme Court and the Eighth Circuit in this (and every other) area.

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

The existence and extent of religious freedom for corporations is a subject of ongoing litigation, and it would be inappropriate for me to offer an opinion. I would fully and faithfully apply controlling precedents from the United States Supreme Court and the Eighth Circuit.

12. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2002. Additionally, you indicated that you have served as the Vice-President of the Northwest Arkansas Lawyers' Chapter since 2014; as Colloquia Chair of Harvard Law Chapter from 2004 to 2005; and on the International Law and

National Security Practice Group Executive Committee from 2004 to 2006. 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 had no involvement with writing any portion of the "About Us" webpage. I cannot comment on what the Federalist Society means by that language.

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

Please see my answer to Question 12(a).

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

Please see my answer to Question 12(a).

- d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?**

Yes. I have a long-time personal friend who happens to work at the Federalist Society. I understand that in his personal capacity he said nice things about my legal abilities to at least one staff member in a Senator's office and one staff member in the White House.

- e. What does your role as Vice-President of the Northwest Arkansas Lawyers' Chapter entail?**

I assist the President of the chapter with coordinating and hosting one to two legal events a year—a debate between lawyers and/or professors of differing legal views; a panel of lawyers and/or professors discussing recent Supreme Court cases; or a lawyer, professor, or judge speaking on a topic of interest to our chapter members. Once a year, if possible, I attend a regional meeting of chapter leaders.

f. What did your role as Colloquia Chair of the Harvard Law Chapter entail?

I hosted a “book club” once a month or once every two months for our members and anyone else who wanted to attend. At the end of the previous month, the attendees would by consensus select a book, law review article, or Supreme Court case to discuss at the next meeting. The discussion was free-flowing, without leadership or moderation. I simply secured the location and food for the event.

g. What did your role on the International Law and National Security Practice Group Executive Committee entail?

To the best of my recollection, I simply listened to the routine meetings of the Practice Group Executive Committee. This was a “student liaison” role, which allowed me to learn about the practice group and what it covered.

13. On your Senate Questionnaire, you indicated that you have been a member of the Republican National Lawyers Association (“RNLA”) intermittently since 2004. The RNLA’s “About Us” webpage states that “[e]ach member . . . must ascribe to the accomplishment” of the organizations missions, which include: “Advancing Republican Ideals. The RNLA further builds the Republican Party goals and ideals through a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates.”

a. Please detail the activities that your membership in this organization has entailed.

To the best of my recollection, I have attended approximately five policy conferences of the group since 2004. I have presented as a guest speaker. When I was Deputy General Counsel of Mitt Romney’s 2012 presidential campaign, I attended chapter meetings across the country.

b. In what ways do you believe that you have “directly support[ed] Republican policy, agendas and candidates”?

I have worked as a lawyer on several political campaigns.

14. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA), but you wrote “dates unknown.”

a. Are you currently a member of the NRA?

No.

- b. If confirmed to the District Court, will you remain a member or renew your membership with the NRA?**

No.

- c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?**

If confirmed as a district judge, I will recuse myself whenever the statutes and canons governing recusal require it.

- d. Can you cite any issue areas where you disagree with the NRA's publicly stated positions?**

As a district judge, my policy preferences must be and will be irrelevant to my judicial analysis in all cases. I will fairly and impartially decide cases based on controlling precedent, the Constitution, and the laws written by Congress. As a judicial nominee, it would be inappropriate for me to offer an opinion on matters of political debate.

- e. Why did you join the National Rifle Association?**

I cannot recall what motivated me to join.

15. 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?**

To the best of my recollection, no.

- 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?**

To the best of my recollection, no.

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

If confirmed as a district judge, I will fully and faithfully follow and apply the controlling precedents of the Supreme Court and the Eighth Circuit in the area of administrative law, just like I will in all areas of law.

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

Yes, based on my current knowledge.

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

For a district judge in the Eastern District of Arkansas, it is appropriate to do so whenever the controlling precedents of the Supreme Court and the Eighth Circuit say to do so. As a general matter, the Supreme Court often considers a statute’s legislative history when a statute’s text is ambiguous. The Court also has used legislative history in a confirmatory manner when the statute’s language is not ambiguous.

If a litigant provides legislative history as part of his argument regarding the meaning of a statute, I will certainly review the legislative history as part of my preparation to resolve the case.

18. 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.

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

I sat down at a computer and wrote out the answers. A few times, I called colleagues with whom I worked to ensure the accuracy of an answer. If necessary, I looked up cases and pleadings. When I completed the draft, I set it aside for a few days and then reviewed and edited it. I submitted draft answers to the Office of Legal Policy for their feedback. I then independently evaluated my answers and finalized them for submission.

Written Questions for Lee Phillips Rudofsky
Submitted by Senator Patrick Leahy
August 6, 2019

1. You have a history of defending anti-choice laws in Arkansas, going so far as to lobby the Supreme Court to take up one case as an “ideal vehicle” for reconsidering its abortion jurisprudence.

- (a) **Changing the abortion jurisprudence—limiting reproductive rights—is clearly something you’ve worked toward. Do you intend to take this view to the bench, strategizing to find ideal cases to restrict abortion access?**

As Solicitor General of Arkansas, I was directed by my boss the Attorney General to defend or supervise the defense of several laws related to abortion that were passed by the Arkansas legislature and signed by the Governor. Our office had a duty to zealously advocate for our clients, which we did to the best of our abilities.

If confirmed as a district judge, my duty would be entirely different. My duty would be to dispassionately, impartially, and fairly decide cases based on controlling precedents of the United States Supreme Court and the Eighth Circuit. A judge’s commitment to fully and faithfully follow controlling precedent is one of the most important things he or she can do to maintain, protect, and uphold the rule of law. It is a basic component of our legal system that must be scrupulously observed.

2. Changing the abortion jurisprudence—limiting reproductive rights—is clearly something you’ve worked toward. Do you intend to take this view to the bench, strategizing to find ideal cases to restrict abortion access?

Please see my answer to Question 1(a).

- (a) **How is an LGBT person, appearing before you, ever going to believe they will receive a fair day in court?**

If confirmed as a district judge, every single person, regardless of race, creed, religion, sex, disability, gender identity, sexual orientation, or any other personal characteristic, will be treated fairly in my courtroom. Their legal arguments will be fairly and impartially resolved according to statutory law, the Constitution, and controlling precedents of the Supreme Court and Eighth Circuit.

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

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

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

As a general matter, if confirmed as a district judge, my first resort to interpret a statute would be the controlling precedents of the Supreme Court and the Eighth Circuit. If the Supreme Court or the Eighth Circuit has interpreted the provision, I would adopt that interpretation. In a case of first impression, in interpreting a particular statutory provision, my understanding of the rules of interpretation from controlling precedent is to look at the words of the statutory provision in the specific context and structure of the remainder of the statute. A dictionary may well be useful to understand specific words in the statutory provision, but the ultimate determination of the provision’s meaning must consider the provision’s place in and relationship to the rest of the statutory language. Statutes must be interpreted as a coherent whole, and this precludes isolating particular provisions and reading them out of context.

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

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

Maintaining respect for the rule of law is important. As a judicial nominee, I do not believe it would be appropriate for me to comment on a political back-and-forth.

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

Please see my answer to Question 4(a).

5. 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?

To the best of my current understanding, no. If I am confirmed and a case involving national security law or war powers were to come before me, I would review closely and fully and faithfully follow the controlling precedents of the Supreme Court and the Eighth Circuit.

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

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

When litigants fail to comply with court orders, courts have a number of different ways to encourage compliance and ultimately punish non-compliance. The particular method or methods a court will select depend on a number of factors, including but not limited to the type of order at issue, the nature of the case, and the reasons for non-compliance.

7. 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?

The Constitution provides Congress with its own war powers and, as a general matter, Congress can exercise those powers in a time of war. If I am confirmed and a case involving national security law or war powers were to come before me, I would review closely and fully and faithfully follow the controlling precedents of the Supreme Court and the Eighth Circuit.

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

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

I think the abstract question you ask is an incredibly important one, but I could see specific instances of and variations on this question coming before the courts. If I were confirmed and such a case were to come before me, I would review closely and fully and faithfully follow the controlling precedents of the Supreme Court and the Eighth Circuit.

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

If I am confirmed as a district judge and a case involving national security law or war powers were to come before me, I would review closely and fully and faithfully follow the controlling precedents of the Supreme Court and the Eighth Circuit.

9. 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 made clear that the equal protection clause applies to women.

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

As a general matter, I believe the Voting Rights Act is an important piece of legislation. As a district court judge, I would apply the Voting Rights Act faithfully, consistent with the binding precedent of the Supreme Court and the Eighth Circuit.

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

The Constitution says that "[n]o Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, 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." U.S. Const., art. I, § 9, cl. 8.

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

the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

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

As a judicial nominee, it would be inappropriate for me to grade or give a thumbs up or thumbs down to a particular Supreme Court case. Accordingly, my answer to this question is not about *Shelby County*.

Findings of fact made by district courts are upheld by appellate courts unless they are clearly erroneous. With respect to Congress, the Supreme Court has afforded varying levels of deference to congressional fact-finding based on the nature of the case. If confirmed as a district judge, I would look to and apply precedents of the Supreme Court and the Eighth Circuit that are analogous to the particular case before me.

13. 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”?

In each of the three Amendments you specify, the text includes a section that gives Congress the “power to enforce” the Amendment “by appropriate legislation.” The Supreme Court has described Congress’s authority as broad, but not unlimited.

14. 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?

Yes, the Supreme Court has made that clear.

15. 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?

Stare decisis is an important feature of our judicial system and helps maintain the rule of law as well as respect for the rule of law. Judges should use the utmost caution before concluding that a past precedent of their court should be overturned. This utmost caution applies whether the issue concerns the Constitution or a statute, although the Supreme Court appears more willing to revisit constitutional rulings than rulings of statutory interpretation.

The Supreme Court has identified a number of factors that judges should consider when analyzing whether to overturn prior caselaw of their court. See, e.g., *South Dakota v. Wayfair*, 585 U.S. ___, 138 S. Ct. 2080, 2096-99 (2018); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-69 (1992). Those factors should be evaluated before a judge at any level of the judiciary decides to overturn prior caselaw from his or her court.

16. 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.

If confirmed as a district judge, I will recuse on all cases that I worked on as Solicitor General of Arkansas. I expect that, initially, there will be a fair number of these. I will recuse on all cases I worked on during my other legal jobs, but I don't expect there to be many such cases. I will recuse on all cases involving Walmart for a reasonable period after my resignation or my wife's resignation, whichever comes later. I will determine what a reasonable period is after input from the Chief Judge of the Eastern District of Arkansas. I will recuse from all cases in which I own stock in a party or real party in interest. Beyond that, I will recuse myself when it is called for under applicable law and the canons of judicial conduct. I will make this evaluation on a case-by-case basis.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that

“legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

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

The underlying supposition of our democratic republic is that people, individually and collectively as a polity, can and should govern themselves. The people are, in general, the best protectors of their own rights and interests. That is one primary reason why law-making authority is given exclusively to the democratic branches of government. Laws that obstruct the normal functioning of the democratic process imperil the ability of the representative branches of government to fairly govern and protect the rights and interests of all our citizens.

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

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

Yes.

19. **Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

While my legal practice has been extremely varied over the years, I have not been involved with or studied questions about the pardon power of the President. If I am confirmed, and if a case were to come before me regarding the scope and extent of the President’s pardon power, I would determine if there is controlling precedent on the issue. If there were, I would follow it. If not, I would look to persuasive authority on the issue, and I would perform an inquiry into the original public meaning of the constitutional provision providing the President with the pardon power.

20. 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?

Regarding section 5 of the Fourteenth Amendment, the text gives Congress the “power to enforce” the Amendment “by appropriate legislation.” The Supreme Court has described Congress’s power as broad, but not unlimited.

Regarding the Commerce Clause, the Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const., art. I, § 8, cl. 3. Additionally, the Constitution provides Congress with the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.” U.S. Const., art. I, § 8, cl. 18. The Supreme Court has explained that Commerce Clause gives Congress the power to regulate the channels of interstate commerce, persons or things in interstate commerce, and those activities that affect interstate commerce. The Court has also explained that the Necessary and Proper Clause affords Congress great latitude in exercising its Commerce Clause powers. Of course, Congress’s power is not unlimited.

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

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

As a judicial nominee to a district court, it is not appropriate for me to grade or give a thumbs up or a thumbs down to a particular decision of the Supreme Court. If confirmed, I will fully and faithfully follow all Supreme Court and Eighth Circuit precedent. I would determine the “appropriate weight” by determining what weight controlling precedents of the Supreme Court and the Eighth Circuit afforded to executive factual findings in circumstances analogous to whatever case was in my courtroom. In determining whether there is a point at which evidence of unlawful pretext overrides a facially neutral justification of immigration

policy, I would follow and apply controlling precedent of the Supreme Court and the Eighth Circuit.

22. **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.**

If confirmed as a district court judge, I would fully and faithfully follow and apply the controlling precedents of the United States Supreme Court and the Eighth Circuit in determining whether a particular restriction on abortion constituted an undue burden.

In 2017, the Eighth Circuit, interpreting *Whole Women’s Health v. Hellerstadt*, 579 U.S. ___, 136 S. Ct. 2292 (2016), held that a law creates an undue burden if its “benefits are substantially outweighed by the burdens it imposes.” *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). The Supreme Court denied a petition for a writ of certiorari in that case. As a district judge, I would be bound to adopt the Eighth Circuit’s definition of the undue burden standard unless and until it is altered by the Supreme Court. Other circuits have defined the undue burden standard differently.

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

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

I do not believe it is appropriate for a judicial nominee to give a grade or thumbs up or thumbs down to Supreme Court decisions, including its qualified immunity decisions. If I am confirmed as a district judge, I will fully and faithfully follow the controlling qualified immunity precedents of the Supreme Court and the Eighth Circuit.

24. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts,

held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

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

Were I presented with such an argument in court at some point in the future, I would listen to all of the parties’ legal arguments and analyses of relevant precedents. I would determine whether controlling precedents from the Supreme Court or the Eighth Circuit have answered the question one way or other. If not, I would use the logic and analytical frameworks of controlling precedents from the Supreme Court and the Eighth Circuit to determine what the Fourth Amendment requires under the facts of the particular case presented.

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

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

Although my litigation career has been extremely varied, I have not had a case touching on this question and have not studied it academically. If I am confirmed as a district judge and a case presenting this question were to come before me, I would faithfully and fully follow and apply controlling precedents of the Supreme Court and the Eighth Circuit.

26. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

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

I do not believe it is appropriate for me to comment on Justice Kavanaugh's confirmation hearing. I answer your question as a general matter and not in relation to a specific event.

Yes. A judge must be able to decide cases fairly, impartially, and dispassionately based solely on the law. That is one reason the Constitution provided for judges that do not stand for election and are appointed for life—so judges do not need to worry about whether their opinion is liked or disliked by the populace or by politicians. The rule of law requires that judges not base their decisions on desired political or policy outcomes.

Senator Dick Durbin
Written Questions for Rudofsky
August 7, 2019

For questions with subparts, please answer each subpart separately.

Questions for Mr. Rudofsky

1. During your hearing you said that, if you had to do it over again, you would not have signed amicus briefs that you joined in submitting for the *Obergefell* and *Hollingsworth* cases.

a. Please explain why you no longer stand behind the arguments you presented in these briefs.

When I joined these amicus briefs, I was not an expert in Fourteenth Amendment jurisprudence. My litigation practice up to that time had not involved substantive due process or equal protection cases, and I had not studied the doctrines since law school. I joined the amicus briefs because, at the time, the arguments in the briefs seemed—on the whole—persuasive to me. I did not write, edit, or have any opportunity to suggest or alter the content of the amicus briefs. My involvement was limited to a binary decision to join or not join after Mr. Mehlman and his counsel finalized the amicus briefs.

Since the time I joined the amicus briefs, I have personally litigated numerous equal protection and substantive due process cases, and I have reviewed and substantively edited the work of other attorneys in even more of these cases. This has required me to—in a serious and systematic way—analyze and grapple with the vast caselaw that forms the nuanced doctrine on the clauses. It has also caused me to study the various academic theories on the original public meaning of the Fourteenth Amendment. Based on this learning, if I could go back in time and do it over again, I would not have joined the amicus briefs. The briefs do not include any analysis of the original public meaning of the Fourteenth Amendment or any analysis of *Washington v. Glucksberg*, 521 U.S. 702 (1997).

I have not said whether I agree or disagree with the Supreme Court's decisions in *Hollingsworth* or *Obergefell*. As a judicial nominee, it would be inappropriate for me to grade or give a thumbs up or thumbs down to any particular decision of the Supreme Court. If I am confirmed as a district judge, I will fully and faithfully follow and apply both *Hollingsworth* and *Obergefell*, just like any other controlling precedent of the Supreme Court.

b. Please identify any other briefs which, if you had to do it over again, you would not sign, and please explain your reasons why.

The two amicus briefs discussed above were the only briefs I have ever joined in my personal capacity. All other briefs with which I have been associated were submitted to

courts in my capacity as a lawyer for a client. In this capacity, I zealously advocated my clients' positions, consistent with my ethical duties.

**Nomination of Lee Phillip Rudofsky
to the United States District Court for the Eastern District of Arkansas
Questions for the Record
Submitted August 7, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you have been a member of the Federalist Society for Law and Public Policy Studies since 2002.

- a. What has your level of involvement with the Federalist Society been over the past seventeen years?

It has varied. My Senate Questionnaire lists the roles I have held and the times I have spoken at Federalist Society events.

- b. If confirmed, do you plan to remain an active participant in the Federalist Society?

I intend to remain a member of the Federalist Society, but I will step down as Vice President of the Northwest Arkansas Lawyers Chapter.

- c. If confirmed, do you plan to donate money to the Federalist Society?

There is a membership fee, and so if that is considered a donation then the answer would be yes.

- d. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

No.

2. 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 read the story and had not listened to the associated recording until you requested I do so. I have now done so.

- 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.

I have not studied the issue enough to respond.

- 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?

In my personal experience, my judicial confirmation process has not been like a political campaign. Your question as to spending disclosures strikes me as a policy question, on which the appropriate course for a judicial nominee is to defer to the political branches of government. If I am so lucky to be confirmed as a district judge, whatever statutes Congress passes, I will fully and faithfully apply unless they are unconstitutional under controlling precedents of the United States Supreme Court or the Eighth Circuit.

- 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.

To the best of my knowledge, neither the Federalist Society nor any of the other organizations identified in the story took a position on my nomination or advocated for or against my nomination.

I have heard second- and third-hand that Mr. Leo is generally supportive of my nomination. But I do not know if he took an active position on my nomination or otherwise engaged in any active advocacy for it.

I have a long-time personal friend who happens to work at the Federalist Society. I understand that in his personal capacity he said nice things about my legal abilities to at least one staff member in a Senator’s office and one staff member in the White House.

- 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?

Mr. Leo’s remarks were more extensive than the quotations provided above. In context, there is significant room for interpretation of his remarks. Because I am not confident in precisely what Mr. Leo meant, I cannot comment on whether or not I agree with him.

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

Yes. In our democratic republic, an unelected judge’s role is to impartially, dispassionately, and fairly interpret the law and apply it to a given factual circumstance. The role is not to make, alter, or bend the law or facts depending on the outcome the judge would like. This is a vital component of the rule of law.

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

There are a host of situations in which the practical consequences of a particular ruling need to be considered. For example, at the preliminary injunction stage, judges must look at the risk of irreparable harm, the balance of harms, and the public interest as part of the judicial analysis. For another example, some evidentiary decisions require a judge to consider the amount of prejudice that would result from a jury hearing the evidence. If I am confirmed as a district judge, I would fully and faithfully follow the precedents of the United States Supreme Court and the Eighth Circuit as to when it is appropriate and necessary to consider the practical consequences of a particular ruling.

4. 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?

Determinations of this nature are significantly cabined by controlling precedent of the United States Supreme Court and the Eighth Circuit. There is clear precedent setting forth how to determine whether a fact is genuinely in dispute and whether any such genuinely disputed facts are material to the legal issues in the case. Those precedents provide enough clarity that, in most situations, I believe all judges would reach the same conclusion. Of course, there will be hard cases on the margins where judges might reach disparate conclusions.

5. 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?

While a judge should dispassionately, impartially, and fairly apply the law regardless of whether he or she likes the outcome, empathy is very important to the judicial role in a number of ways. Good judges work hard to understand the position and motivation of people in the judicial process. This helps in assessing credibility of witnesses, understanding specific testimony, determining fair sentences for convicted defendants, dealing with counsel, and making everyone feel respected and listened to in court.

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

A judge must set aside his or her personal life experiences and dispassionately, impartially, and fairly interpret and apply the law. In terms of life experience helping a person gain empathy, please see my answer to Question 5(a).

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

No.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

A district judge is bound to follow binding precedent and ordinarily should not question that precedent. But there may be some extraordinary and unusual circumstances that justify a district judge's voicing disagreement with binding precedent, so long as that judge still follows binding precedent.

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

I cannot think of any circumstance in which that would be an appropriate thing for a sitting judge to do.

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?

Our founders believed the Seventh Amendment right to have one's case judged by a jury of one's peers was a vital part of our liberty. A jury is the popular element of the judicial branch of government.

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

If confirmed as a district judge, I will fully and faithfully follow all controlling precedents of the United States Supreme Court and the Eighth Circuit when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses. To the extent those controlling cases include the consideration of the Seventh Amendment as an appropriate factor in the adjudication, I will too.

- 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?

If confirmed as a district judge, I will fully and faithfully follow all controlling precedents of the United States Supreme Court and the Eighth Circuit when adjudicating issues surrounding the scope and application of the Federal Arbitration Act. To the extent those controlling cases include the consideration of the Seventh Amendment as an appropriate factor in the adjudication, I will too.

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

The Supreme Court has afforded varying levels of deference to congressional fact-finding depending on the nature of the case. If confirmed as a district judge, I would look to precedents of the United States Supreme Court and the Eighth Circuit that are analogous to the particular case before me. I would use the level of deference used in controlling precedents in similar circumstances.

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. I had not read it until you asked me to do so.

- 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.

Before attending any event, I will ensure that my attendance comports with all ethical requirements.

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

**Nomination of Lee Philip Rudofsky, to be United States District Court Judge
for the Eastern District of Arkansas
Questions for the Record
Submitted August 7, 2019**

QUESTIONS FROM SENATOR COONS

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

As a district judge, I would first determine whether a superior court has decided whether a particular right is or is not fundamental. If so, I would fully and faithfully follow that ruling.

In a case of first impression, I would apply the legal tests and analytical frameworks set out in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and other controlling precedents. As a general matter, a judge determines whether a right is fundamental by considering whether the right is 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 it were sacrificed.

- 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. I would follow the example set by the United States Supreme Court in its substantive due process cases. The Court has relied on, *inter alia*, treatises, books, articles, common law sources, state constitutions, practice in the American colonies, early state statutes and judicial decisions, and long-established traditions. I would also examine all sources and arguments provided by the parties to the case.

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

If the right has been recognized (or rejected) as a fundamental right by the United States Supreme Court or the Eighth Circuit, then I would fully and faithfully follow that controlling precedent. In the absence of controlling precedent, I would consider all out-of-circuit precedent.

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

Yes.

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

Yes, I would follow all Supreme Court (and Eighth Circuit) precedent on this question.

- f. What other factors would you consider?

In addition to *Obergefell* and *Glucksberg*, the Supreme Court has provided significant guidance on other factors that should be considered in cases including, but not limited to, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), *Loving v. Virginia*, 388 U.S. 1 (1967), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). I would look to these and other Supreme Court and Eighth Circuit cases for guidance on what factors to consider.

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

The Supreme Court has made clear that the Fourteenth Amendment’s equal protection clause applies beyond race, including to gender.

- 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 answer to Question 2. If confirmed, I will follow all Supreme Court and Eighth Circuit precedent.

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

I do not know why this specific issue was not addressed and resolved earlier than 1996. Prior to 1996, the Supreme Court had already recognized that the equal protection clause applied to gender. See *United States v. Virginia*, 518 U.S. 515, 531-34 (1996) (collecting cases).

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

The Supreme Court has made clear that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry on the same terms as opposite sex couples.

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

This question is the subject of ongoing litigation, and therefore the canons of judicial conduct prevent me from opining on this topic.

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

The Supreme Court has held that there is such a right.

- 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 there is such a right.

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

The Supreme Court has held that there is such a right.

- 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 answers to Questions 3, 3(a), and 3(b).

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?

As a district judge, it would be appropriate for me to consider such evidence when controlling precedent from the United States Supreme Court or the Eighth Circuit states that it is appropriate to do so.

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

It depends on the legal issues involved in the case and the nature of the evidence proffered. In most cases, factual data is an extraordinarily important part of judicial analysis and helps determine whether relevant legal tests are met. Scientific evidence and sociological evidence—usually presented by way of expert opinions—can also be critically important to a judge’s determination of relevant facts and whether relevant legal tests are met. As a district judge, I would fully and faithfully follow Supreme Court and Eighth Circuit precedent to evaluate the relevance and import of all evidence.

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?

Obergefell made clear that the right to marry is fundamental, and same-sex couples cannot be excluded from that fundamental right simply because they were excluded from it in the past. If confirmed as a district judge, I would fully and faithfully follow and apply *Obergefell*.

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

Obergefell is binding precedent. If confirmed as a district judge, I will fully and faithfully follow and apply it and all other controlling precedents.

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?

As a district judge, the debate over whether *Brown*'s holding is consistent or inconsistent with an original understanding of the Fourteenth Amendment is entirely academic. I will fully and faithfully follow and apply *Brown*. As an academic matter, there are several scholarly articles discussing why *Brown*'s core holding is consistent with the original public meaning of the Fourteenth Amendment.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”?
- Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Aug. 7, 2019).

As a district judge, this debate would be academic. I would rely on controlling precedent from the Supreme Court and the Eighth Circuit for the meaning of the terms you specify.

- 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?

If confirmed as a district judge, I would fully and faithfully follow the controlling precedents of the Supreme Court and the Eighth Circuit with respect to the meaning and interpretation of a particular constitutional provision, whether or not those precedents are based on the provision's original public meaning.

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

If confirmed as a district judge, I would fully and faithfully follow the controlling precedents of the Supreme Court and Eighth Circuit with respect to the application of a particular constitutional provision, whether or not those precedents were based on the public's understanding of the provision's scope at the time of adoption.

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

If confirmed as a district judge, I would fully and faithfully follow the controlling precedents of the Supreme Court and the Eighth Circuit. In cases of first impressions, I would use the interpretative framework and sources identified in the Supreme Court and Eighth Circuit precedents relevant to the constitutional provision I was analyzing.

7. While serving as Solicitor General of Arkansas, you argued that *Roe v. Wade* makes clear that a primary source of a woman's right to an abortion is her right to avoid unwanted parenthood, not unwanted pregnancy. At the hearing on your nomination, you testified that you would have to refer to the brief that you filed in which you made this argument in order

to identify legal precedent that supports the argument. Please review this brief and identify the precedent on which you relied for the assertion that a woman's right to an abortion is primarily based on the right to avoid unwanted parenthood, rather than unwanted pregnancy.

Your question is about the certiorari petition and reply brief in support of that petition in *Beck v. Edwards*. The case was litigated in the federal district court and in the Eighth Circuit before I entered state government; I was then involved in editing the petition for certiorari and the reply brief in support of certiorari before the Supreme Court. The petition and reply identify the precedents on which our client's position relied. The arguments in the petition and reply reflect zealous advocacy for a client's position.

8. In 2013 and 2015, you signed Supreme Court amici briefs in support of recognizing a constitutional right to same-sex marriage. At the hearing on your nomination, you testified that you would not sign those briefs today, and you explained that you did so previously because at the time you were not an expert in Fourteenth Amendment jurisprudence. Please explain how your understanding of the Fourteenth Amendment has changed in the last four years.

When I joined these amicus briefs, I was not an expert in Fourteenth Amendment jurisprudence. My litigation practice up to that time had not involved substantive due process or equal protection cases, and I had not studied the doctrines since law school. I joined the amicus briefs because, at the time, the arguments in the briefs seemed—on the whole—persuasive to me. I did not write, edit, or have any opportunity to suggest or alter the content of the amicus briefs. My involvement was limited to a binary decision to join or not join after Mr. Mehlman and his counsel finalized the amicus briefs.

Since the time I joined the amicus briefs, I have personally litigated numerous equal protection and substantive due process cases, and I have reviewed and substantively edited the work of other attorneys in even more of these cases. This has required me to—in a serious and systematic way—analyze and grapple with the vast caselaw that forms the nuanced doctrine on the clauses. It has also caused me to study the various academic theories on the original public meaning of the Fourteenth Amendment. Based on this learning, if I could go back in time and do it over again, I would not have joined the amicus briefs. The briefs do not include any analysis of the original public meaning of the Fourteenth Amendment or any analysis of *Washington v. Glucksberg*, 521 U.S. 702 (1997).

I have not said whether I agree or disagree with the Supreme Court's decisions in *Hollingsworth* or *Obergefell*. As a judicial nominee, it would be inappropriate for me to grade or give a thumbs up or thumbs down to any particular decision of the Supreme Court. If I am confirmed as a district judge, I will fully and faithfully follow and apply both *Hollingsworth* and *Obergefell*, just like any other controlling precedent of the Supreme Court.

**Questions for the Record for Lee Rudofsky
From Senator Mazie K. Hirono**

1. In your brief opposing certiorari in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegly*, you argued that a law requiring medication abortion providers to have a contractual relationship with a physician with hospital admitting privileges was consistent with the Supreme Court's decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, because "there is no right to choose medication abortion."

In your view, do *Roe* and *Casey* permit a state to ban medication abortion—a procedure that involves taking a combination of two pills—and leave surgery as the only form of abortion available to a woman?

The brief opposing certiorari was drafted by my Deputy. The arguments in the brief reflect zealous advocacy for our client. The specific question you pose is one that might come before me if I am confirmed, and so it is inappropriate for me to comment aside from saying that I would fully and faithfully follow and apply *Roe*, *Casey*, and their progeny.

2. In September 2015, *Arkansas Times* published an article titled "Solicitor general bases attack on Planned Parenthood on debunked hearsay."

The article related to an argument you made in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Selig*, a case involving Arkansas's attempt to defund Planned Parenthood. You defended the state's efforts by pointing to highly-edited videos that falsely suggested that Planned Parenthood intended to profit from the sale of fetal tissue. You allegedly claimed that "[o]ne video suggests that tissue was taken from an aborted fetus while its heart was still beating."

Your claim about what the video showed was similar to a statement Carly Fiorina made during a Republican presidential debate the night before. By the next morning, that statement had been debunked.

Do you stand by your statement that "[o]ne video suggests that tissue was taken from an aborted fetus while its heart was still beating"? If so, what portion of the video supports this statement?

This case is still in litigation in federal district court in the Eastern District of Arkansas, and a case concerning the same issues and mostly the same parties is being litigated in the Arkansas state court system. Accordingly, my ethical duties to former clients preclude me from commenting on the factual issues in this case.

Consistent with my duties as a lawyer, I informed the Court of my client's justifications for its termination decision, including my client's position on what the videos showed or suggested. Simultaneously, I informed the Court that Planned Parenthood disputed the factual accuracy of the videos. See Defendant's Response to Plaintiff's Motion for

Preliminary Injunction, *Planned Parenthood of Arkansas & Eastern Oklahoma, et. al. v. Selig*, Case No. 4:15-cv-00566-KGB, Doc. 16 (Sept. 16, 2015).

3. You joined amicus briefs supporting the right to same-sex marriage in the cases *Hollingsworth v. Perry* (2013) and *Obergefell v. Hodges* (2015). During your confirmation hearing, you disavowed your support for those briefs. You testified as follows:

“When I joined these amicus briefs, I was not an expert in Fourteenth Amendment jurisprudence. Since that time, I’ve become much more familiar with this area of law as Solicitor General. And, if I had it to do over again, as a legal matter, I wouldn’t join the legal arguments in those briefs.”

a. Why did you join the amicus briefs in *Hollingsworth* and *Obergefell* in 2013 and 2015, respectively?

When I joined these amicus briefs, I was not an expert in Fourteenth Amendment jurisprudence. My litigation practice up to that time had not involved substantive due process or equal protection cases, and I had not studied the doctrines since law school. I joined the amicus briefs because, at the time, the arguments in the briefs seemed—on the whole—persuasive to me.

I did not write, edit, or have any opportunity to suggest or alter the content of the amicus briefs. My involvement was limited to a binary decision to join or not join after Mr. Mehlman and his counsel finalized the amicus briefs.

b. What did you learn about Fourteenth Amendment jurisprudence between March 5, 2015—the date of the amicus brief in *Obergefell*—and July 31, 2019—the date of your confirmation hearing—that led you to believe the arguments you supported in the *Hollingsworth* and *Obergefell* briefs were incorrect as a matter of law?

Since the time I joined the amicus briefs, I have personally litigated numerous equal protection and substantive due process cases, and I have reviewed and substantively edited the work of other attorneys in even more of these cases. This has required me to—in a serious and systematic way—analyze and grapple with the vast caselaw that forms the nuanced doctrine on the clauses. It has also caused me to study the various academic theories on the original public meaning of the Fourteenth Amendment.

Based on this learning, if I could go back in time and do it over again, I would not have joined the amicus briefs. The briefs do not include any analysis of the original public meaning of the Fourteenth Amendment or any analysis of *Washington v. Glucksberg*, 521 U.S. 702 (1997).

I have not said whether I agree or disagree with the Supreme Court’s decisions in *Hollingsworth* or *Obergefell*. As a judicial nominee, it would be inappropriate for me to grade or give a thumbs up or thumbs down to any particular decision of the

Supreme Court. If I am confirmed as a district judge, I will fully and faithfully follow and apply both *Hollingsworth* and *Obergefell*, just like any other controlling precedent of the Supreme Court.

- c. **What arguments advanced in the amicus briefs you joined in *Hollingsworth* and *Obergefell* are incorrect as a matter of law or otherwise inconsistent with your view of the Fourteenth Amendment?**

Please see my answer to Question 3(b).

- d. **For each of the following statements found in the *Hollingsworth* brief and/or the *Obergefell* brief, please state whether you still agree with the statement. If you do not agree with the statement, please identify what part of the statement you no longer agree with, when your position changed, and what caused it to change.**

- i. “[T]raditional conservative values, including the commitment to limited government, the protection of individual freedom, and the belief in the importance of stable families . . . are consistent with . . . providing civil marriage rights to same-sex couples.” *See* Brief of Amici Curiae Kenneth B. Mehlman et al. Supporting Respondents, 2013 WL 769312, at *2, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) [hereinafter *Hollingsworth Br.*]; *see* Brief of Amici Curiae Kenneth B. Mehlman et al. Supporting Petitioners, 2015 WL 981540, at *1, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) [hereinafter *Obergefell Br.*].

Please see my answers to Questions 3(a) and 3(b).

- ii. “[T]here is no legitimate, fact-based reason for denying same-sex couples the same recognition in law that is available to opposite-sex couples.” *Hollingsworth Br.* at *2; *Obergefell Br.* at *4.

Please see my answers to Questions 3(a) and 3(b).

- iii. “[M]arriage is strengthened, not undermined, and its benefits and importance to society as well as the support and stability it gives to children and families promoted, not undercut, by providing access to civil marriage for same-sex couples.” *Hollingsworth Br.* at *3; *see Obergefell Br.* at *4.

Please see my answers to Questions 3(a) and 3(b).

- iv. “[P]roviding access to *civil* marriage for same-sex couples . . . poses no credible threat to religious freedom or to the institution of religious marriage.” *Hollingsworth Br.* at *3; *see Obergefell Br.* at *4.

Please see my answers to Questions 3(a) and 3(b).

- v. “[P]ermitting civil marriage for same-sex couples will enhance the institution, protect children, and benefit society generally.” *Hollingsworth Br.* at *5; *Obergefell Br.* at *16.

Please see my answers to Questions 3(a) and 3(b).

- vi. “There is no reason to believe that the salutary effects of civil marriage arise to any lesser degree when two women or two men lawfully marry each other than when a man and a woman marry.” *Hollingsworth Br.* at *8; *see Obergefell Br.* at *11.

Please see my answers to Questions 3(a) and 3(b).

- vii. “[T]he government can[not] rationally promote the goal of strengthening families by *denying* civil marriage to same-sex couples.” *Hollingsworth Br.* at *10.

Please see my answers to Questions 3(a) and 3(b).

- viii. “No credible evidence supports the deinstitutionalization theory”—i.e., “that allowing same-sex couples to marry will harm the institution of marriage by severing it from child-rearing.” *Hollingsworth Br.* at *10-11; *see Obergefell Br.* at *17.

Please see my answers to Questions 3(a) and 3(b).

- ix. “Allowing same-sex couples to marry in no way undermines the importance of marriage for opposite-sex couples who enter into marriage to provide a stable family structure for their children. *Hollingsworth Br.* at *12-13; *Obergefell Br.* at *22.

Please see my answers to Questions 3(a) and 3(b).

- x. There is no evidence “that same-sex marriage [is] detrimental to children.” *Hollingsworth Br.* at *14; *see Obergefell Br.* at *19.

Please see my answers to Questions 3(a) and 3(b).

- xi. “[L]aws that bar same-sex couples from the institution of civil marriage . . . are inconsistent with the United States Constitution’s dual promises of equal protection and due process.” *Obergefell Br.* at *2.

Please see my answers to Questions 3(a) and 3(b).

- xii. Laws that bar same sex couples from the institution of civil marriage “harm children.” *Obergefell Br.* at *3.

Please see my answers to Questions 3(a) and 3(b).

- xiii. Bans against same-sex marriage “impede family formation, harm children, and discourage fidelity, responsibility, and stability.” *Obergefell Br.* at *16.**

Please see my answers to Questions 3(a) and 3(b).

Nomination of Lee Phillip Rudofsky
United States District Court for the Eastern District of Arkansas
Questions for the Record
Submitted August 7, 2019

QUESTIONS FROM SENATOR BOOKER

1. While serving as Arkansas State Solicitor General, you assisted in Arkansas’s brief requesting cert before the Supreme Court in the case *Beck v. Edwards*. In that case, the Center for Reproductive Rights and the American Civil Liberties Union challenged as unconstitutional an Arkansas law attempting to ban abortions beginning at twelve weeks of pregnancy if a fetal heartbeat could be detected.¹ In requesting cert, you argued that the Court should grant cert because that case would be an “ideal vehicle” for the Court to “reevaluate the viability rule imposed in *Roe* and *Casey*” and “overturn [the] unnecessary and constitutionally infirm” rule.² You stated that this rule is “free from any serious constitutional mooring”³ and that “[s]o long as . . . a state provides some opportunity for a woman to terminate her pregnancy, the actual constitutional right announced in *Roe* is preserved.”⁴

- a. Do these statements accurately reflect your opinion of *Roe v. Wade*, *Planned Parenthood v. Casey*, and a woman’s constitutional right to abortion?

Your question is about the certiorari petition and reply brief in support of that petition in *Beck v. Edwards*. The case was litigated in the federal district court and in the Eighth Circuit before I entered state government; I was then involved in editing the petition for certiorari and the reply brief in support of certiorari before the Supreme Court. The arguments in the petition and reply reflect zealous advocacy for our client’s position. If confirmed as a district judge, I would fully and faithfully follow and apply *Roe*, *Casey*, and all other controlling precedents in this area and every other area of law.

- b. Do you believe that *Roe v. Wade* is settled law?

Yes.

- c. Do you believe that *Planned Parenthood v. Casey* is settled law?

Yes.

- d. If confirmed, would you adhere fully to the letter and spirit of all Supreme Court decisions, including *Roe v. Wade* and *Planned Parenthood v. Casey*?

Yes.

2. In 2013 and 2015, you joined two amicus briefs for the Supreme Court cases *Hollingsworth v. Perry* and *Obergefell v. Hodges*. In both briefs, you supported the position that “traditional and conservative values” are “consistent with—indeed, are

advanced by—providing civil marriage rights to same-sex couples.” The *Obergefell* brief argued that the Fourteenth Amendment “requires equal access to civil marriage because there is no legitimate, fact-based justification for government to exclude same-sex couples in committed relationships.”

At your hearing, however, you stated that “if [you] had it to do over again, as a legal matter, [you] would not have signed those briefs.” In explaining why you now believe

¹ See, e.g., Press release, *Edwards v. Beck*, Center for Reproductive Rights (June 2, 2016), <https://reproductiverights.org/case/edwards-v-beck>.

² Petition for Writ of Certiorari, *Beck v. Edwards*, 136 S.Ct. 895 (2016) (cert. denied), 2015 WL 5895922 at *6 (SJQ Attachment 16(e) at p. 2834).

³ Petition for Writ of Certiorari, *Beck v. Edwards*, 136 S.Ct. 895 (2016) (cert. denied), 2015 WL 5895922 at *1 (SJQ Attachment 16(e) at p. 2843).

⁴ Reply to Brief in Opposition, *Beck v. Edwards*, 136 S.Ct. 895 (2016) (cert. denied), 2015 WL 9302644 at *7.

your prior position to be incorrect, you stated that as Arkansas Solicitor General you “have become much more familiar [in Fourteenth Amendment jurisprudence].”

- a. Do you believe that *Obergefell v. Hodges* is settled law?

Yes.

- b. Do you believe that *Hollingsworth v. Perry* is settled law?

Yes.

- c. Please point to the Fourteenth Amendment jurisprudence that has led you to change your position on this issue and explain why that jurisprudence leads you to *disagree* with the idea that the Fourteenth Amendment “requires equal access to civil marriage because there is no legitimate, fact-based justification for government to exclude same-sex couples in committed relationships.” In answering this question, please note that we are only asking you to elaborate on a position that you have already offered as a judicial nominee.

When I joined these amicus briefs, I was not an expert in Fourteenth Amendment jurisprudence. My litigation practice up to that time had not involved substantive due process or equal protection cases, and I had not studied the doctrines since law school. I joined the amicus briefs because, at the time, the arguments in the briefs seemed—on the whole—persuasive to me. I did not write, edit, or have any opportunity to suggest or alter the content of the amicus briefs. My involvement was limited to a binary decision to join or not join after Mr. Mehlman and his counsel finalized the amicus briefs.

Since the time I joined the amicus briefs, I have personally litigated numerous equal protection and substantive due process cases, and I have reviewed and substantively edited the work of other attorneys in even more of these cases. This has required me to—in a serious and systematic way—analyze and grapple with the vast caselaw that forms the nuanced doctrine on the clauses. It has also caused me to study the various academic theories on the original public meaning of the Fourteenth Amendment. Based on this learning, if I could go back in time and do it over again, I would not have joined the amicus briefs. The briefs do not include any analysis of the original public meaning of the Fourteenth Amendment or any analysis of *Washington v. Glucksberg*, 521 U.S. 702 (1997).

I have not said whether I agree or disagree with the Supreme Court’s decisions in *Hollingsworth* or *Obergefell*. As a judicial nominee, it would be inappropriate for me to grade or give a thumbs up or thumbs down to any particular decision of the Supreme Court. If I am confirmed as a district judge, I will fully and faithfully follow and apply both *Hollingsworth* and *Obergefell*, just like any other controlling precedent of the Supreme Court.

- d. If you regret your position supporting equal protection and access for same-sex couples based on Fourteenth Amendment protections, does that mean you now disagree with the Supreme Court’s decisions in *Obergefell v. Hodges* and *Hollingsworth v. Perry*? In answering this question, please not that we are only asking you to elaborate on a position on Fourteenth Amendment jurisprudence that you have already offered as a judicial nominee.

Please see my answer to Question 2(c).

3. In 2016 and 2017, while serving as Arkansas State Solicitor General, you defended an Arkansas statute requiring a heterosexual, non-biological husband to be listed on the birth certificate of their child but denying this right to homosexual couples. In a brief to the Arkansas State Supreme Court, you argued that “[a]n adult who is not biologically related to a child has no categorical due-process right to direct and govern the care, custody, and control of the child.”⁵ You also argued that “the] right to civil marriage does not equate to categorical parental relationships” to same-sex spouses’ biological children, born to them while married.⁶ Additionally, in requesting that the Supreme Court deny cert to hear the case, you argued in a brief that marriage to a child’s biological parent “does not automatically confer a protected liberty interest in a parental relationship on the biological parent’s same- or opposite sex spouse.”⁷ Ultimately, the Court ruled the law unconstitutional, ruling that the statute denied married same-sex couples access to the ‘constellation of benefits that the Stat[e] ha[s] linked to marriage.’⁸

- a. Do these statements accurately reflect your views on the rights of same-sex married couples?

Your question asks about *Pavan v. Smith*. At the direction of my boss, the Attorney General of Arkansas, I represented Mr. Smith, the Director of the Arkansas Department of Health. As required by the duty of zealous advocacy, I presented the Department’s position to the best of my abilities. As is true in any and all cases where I have acted as counsel, the arguments made in briefs and other court submissions are reflective of my client’s positions as opposed to my own.

- b. If confirmed, would you adhere fully to the letter and spirit of all Supreme Court decisions, including *Obergefell v. Hodges*?

Yes.

⁵ Appellant’s Reply, 2016 WL 7987959 at 8, *Smith v. Pavan et al.*, No. CV-15-988 (Ark. April 15, 2016).

⁶ *Id.*

⁷ Brief for the Respondent in Opposition, 2017 WL 1397395, at 15, *Pavan et al. v Smith*, 137 S.Ct. 2075 (2017).

⁸ *Pavan et al. v Smith*, 137 S.Ct. 2078 (2017).

4. In 2018, you represented Arkansas in a challenge to a statute requiring voters to show photo identification before casting a ballot. In that case, you argued that any burden to voters imposed by the law was “at best *de minimis* and easily justified by the State’s concerns with preventing voter fraud.”⁹

Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws—like the one you defended—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.¹⁰ 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.¹¹

- a. Do you believe—as you argued as Arkansas Solicitor General—that in-person voter fraud is a widespread problem in American elections?

I do not believe I used the phrase “widespread problem.” Our client did, nonetheless, provide the trial court a third-party report compiling circumstances of voter fraud and electoral fraud across the country. Moreover, to the best of my recollection, our client’s position was that a state has a legitimate interest in prophylactically addressing concerns of potential voter fraud. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 191-97 (2008).

Beyond that, the extent of voter fraud is the subject of substantial litigation and political debate, and it would be inappropriate for me as a judicial nominee to offer an opinion.

- b. In arguing on behalf of Arkansas’s voter ID law, how many cases of in-person voter fraud did you find in the state to support the need for the law?

Please see my answer to 4(a).

- c. In your assessment as Arkansas Solicitor General, do restrictive voter ID laws suppress the vote in poor and minority communities?

I am no longer the Arkansas Solicitor General, so I cannot speak in this role.

- d. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Voter ID laws are the subject of substantial litigation and political debate, and it would be inappropriate for me as a judicial nominee to offer an opinion.

5. In an April 2000 letter to the editor, you claimed that “affirmative action perpetuates and maintains a system of racial stereotyping: individuals are lumped into categories

arbitrarily based upon nothing but their race.”¹²

- a. Please explain what you meant by these comments.

This statement is from a letter I wrote to my school newspaper when I was in college. It was nearly twenty years ago. I do not recall what I meant. As a general matter, I recall that, when I was in college, I thought affirmative action hurt more than it helped the ultimate goal of a society where no one is ever treated differently because of the color of his or her skin.

- b. Do you stand by these comments?

I understand the important role diversity plays in education and the workplace, and that such diversity is critical if we are to ever reach the ultimate goal of a society where no one is ever treated differently because of the color of his or her skin.

6. In a 1998 letter to the editor, you addressed an earlier *Cornell Review* article detailing allegations of misconduct by you. In your letter, you admitted to “secretly tap[ing] a conversation with a colleague” and “falsely alleg[ing]” to another colleague that you had

⁹ Defendant Commissioners’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, *Haas v. Martin*, No. CV2018000752, 2018 WL 6320426 (Ark. Cir. 2018).

¹⁰ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹¹ *Id.*

¹² Lee Rudofsky, Letter to the Editor, *S.A. Member’s Remarks both ‘Reactionary’ and ‘Absurd,’* CORNELL DAILY SUN, April 13, 2000; SJQ Attachment 12(a) at p. 145.

reported a threatening email to the campus police.¹³ You apologized for these actions, stating that you “learn[ed] from your mistakes.”¹⁴

- a. Please elaborate on why you thought it appropriate at the time to secretly tape a conversation with another person.

It was not appropriate. This occurred during my freshman year in college, over 20 years ago. While not illegal (New York is a one-party consent state), it was stupid, immature, and wrong.

- b. Please elaborate on why you thought it appropriate at the time to mislead others into believing you had been threatened sufficiently to report it those threats to the police.

It was not appropriate. This occurred during my freshman year in college, over 20 years ago, in one brief, private conversation with another student government representative. We were discussing a threatening email I had received about my role in a controversial campus debate. There is no question it was wrong to say I had gone to the campus police when I had not.

- c. Please elaborate on how you learned from these mistakes.

I learned that no matter how important something might seem at the moment, it is never worth compromising one’s integrity. I also learned the importance of second chances and that good people can make mistakes. I am grateful for having learned these lessons at a young and formative age, as they have been defining principles in my career and my life. I am proud of that, and equally proud of the letters written to this Committee from friends and colleagues from all walks of my life between college and my current job at Walmart. Those letters—signed by people from a wide range of political views, legal philosophies, demographic backgrounds, and economic backgrounds—attest to my integrity and the ethical, compassionate, and responsible way I have lived my life and pursued my career over the last 20 years.

- d. Do you think the behavior described above is conduct acceptable of a United States district court judge?

Please see my answers to Question 6a, 6b, and 6c.

7. Combatting climate change is an issue of great importance to me and of critical importance to our nation. Minority and low-income communities are especially vulnerable to environmental abuse, destruction, and degradation. As Solicitor General of Arkansas, you have repeatedly filed or joined suits challenging environmental protection rules and statutes designed to protect communities from disastrous chemical accidents, prevent premature deaths and unnecessary asthma diagnoses due to polluted air, and ensure our waterways and wildlife in those waterways are free from pollution and contamination.¹⁵

Additionally, while working as an associate at Kirkland & Ellis, you “significantly participated” in the representation of British Petroleum (BP) in the *Deepwater Horizon* litigation.¹⁶ You also represented the Alliance of Automobile Manufacturers, the National Automobile Dealers Association, and individual dealerships who were “challenging certain states’ motor vehicle greenhouse gas standards as preempted by the Clean Air Act and the Energy Policy Conservation Act.”¹⁷

Based on this record, you are someone with extensive experience in preparing for and arguing in litigation involving a variety of complex environmental issues.

a. In your assessment, is climate change real?

Although I have not personally studied the issue, I have no reason to doubt the voices in the scientific community who state that climate change is real and affected to some degree by human activity.

¹³ Lee Rudofsky, Letter to the Editor, *Student Assembly Rep. Apologizes for His Behavior*, CORNELL DAILY SUN; SJQ Attachment 12(a) at p. 149.

¹⁴ *Id.*

¹⁵ *See, e.g.*, Final Brief of Respondent-Intervenors States of Louisiana, Arizona, Arkansas, Florida, Kansas, the Commonwealth of Kentucky by and through Governor Bevin, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin, 2018 WL 655735, *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018); Application for Immediate Stay on Final Agency Action, *West Virginia et al. v. EPA*, 136 S.Ct. 1000, No. 15A773 (2016); SJQ Attachment 16(e) at p. 2678.

¹⁶ SJQ at p. 31.

¹⁷ SJQ at p. 50.

- b. As you understand it, what is the relationship between human activities, particularly greenhouse gas emissions, and climate change?

Please see my answer to Question 7(a).

- c. In your assessment, can efforts to reduce greenhouse gas emissions today have an impact on climate change?

Please see my answer to Question 7(a).

- d. If a corporation has contaminated the environment and jeopardized the public health of an American community, should residents of that community be able to seek justice in our courts?

If confirmed as a district judge, I would fully and faithfully follow and apply all controlling precedents from the Supreme Court and the Eighth Circuit regarding the viability of claims in the circumstances your question posits.

- e. How would you approach issues of recusal in cases involving alleged injuries relating to the effects of climate change, including cases in which clients you previously represented are the defendants?

I would consult the statutes and canons regarding recusal and make a determination as to whether recusal is necessary or appropriate.

- f. Research has shown that climate change disparately impacts poor communities¹⁸ and indigenous communities.¹⁹ Do you agree? Have you ever studied the issue?

I have not studied the issue.

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

Yes, as an academic matter. Originalism means interpreting a provision of the Constitution by determining the original public meaning of the language in the provision—the public meaning at the time of adoption of the provision.

If confirmed as a district judge, I would fully and faithfully follow controlling precedents of the Supreme Court and the Eighth Circuit, without regard to whether or not those precedents are grounded in originalism.

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

Yes, as an academic matter. A textualist interprets a statutory provision by determining the public meaning of its words at the time of passage (or, as appropriate, at the time of amendment). A textualist looks to the plain meaning of the words used in the statutory provision, bearing in mind the context and structure of the remaining statutory language.

If confirmed as a district judge, I would fully and faithfully follow controlling precedents of the Supreme Court and the Eighth Circuit, without regard to whether or not those precedents are grounded in textualism.

10. 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?

Yes, as, when, and how controlling precedents of the Supreme Court and the Eighth Circuit say to do so.

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?

Yes, it is reasonable and appropriate to evaluate all arguments made by counsel.

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

For district judges, I think the primary and overriding value must be a commitment to fully and faithfully following and applying controlling precedents of the Supreme Court and the relevant superior circuit court.

¹⁸ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 Harv. C.R.-C.L. L. Rev. 445, 447 (Fall 2018).

¹⁹ Rebecca A. Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. Colo. L. Rev. 1652, 1628 (Fall 2007).

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.²⁰ Was that decision guided by the principle of judicial restraint?

As a judicial nominee to the district court, it would be inappropriate for me to grade or give a thumbs up or thumbs down to a particular decision of the Supreme Court.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.²¹ Was that decision guided by the principle of judicial restraint?

Please see my answer to Question 11(a).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.²² Was that decision guided by the principle of judicial restraint?

Please see my answer to Question 11(a).

12. 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.²³ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.²⁴ 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.²⁵ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²⁶

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

I believe people in general are subject to implicit biases, including racial. Because our criminal justice system is made up of people, it is also subject to implicit biases.

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

I understand that to be the case, yes.

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

I have not studied it in any systematic way.

- 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.²⁷ Why do you think that is the case?

I have not studied the issue sufficiently to have an opinion at this time.

²⁰ 554 U.S. 570 (2008).

²¹ 558 U.S. 310 (2010).

²² 570 U.S. 529 (2013).

²³ 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>.

²⁴ *Id.*

²⁵ 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>.

²⁶ *Id.*

²⁷ 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.

- 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.²⁸ Why do you think that is the case?

Please see my answer to Question 12(d).

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

As a nominee to a federal district court, I do not think it is my place to tell appellate court judges what they can do to address implicit bias.

13. 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.²⁹ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.³⁰

- 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 the issue sufficiently to have an opinion at this time.

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

Please see my answer to Question 13(a).

14. 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.

15. 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.

16. Do you believe that *Brown v. Board of Education*³¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

17. Do you believe that *Plessy v. Ferguson*³² was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

18. 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.

²⁸ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

²⁹ 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>.

³⁰ *Id.*

³¹ 347 U.S. 483 (1954).

³² 163 U.S. 537 (1896).

19. 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.”³³ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Nothing in the statutes or canons governing recusal or disqualification suggest race or ethnicity would or should be a basis for recusal or disqualification.

20. 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.”³⁴ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

If confirmed as a district judge, I will fully and faithfully follow controlling precedents of the Supreme Court and the Eighth Circuit regarding the application of the due process clause in different circumstances.

³³ 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>.

³⁴ 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 August 7, 2019
For the Nomination of**

Lee Philip Rudofsky, to the U.S. District Court for the Eastern District of Arkansas

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?**

I would carefully review and consider the Presentence Investigation Report, the defendant's and Government's sentencing submissions, letters and other documents provided in support of the defendant, victim statements, a defendant's allocution if any, and all other relevant information.

After calculating the Sentencing Guidelines range and considering whether a departure was justified, I would also consider each different objective of sentencing in 18 U.S.C. § 3553. My goal would be to find a sentence sufficient but not greater than necessary to achieve the purposes of sentencing identified by Congress.

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

Please see my answer to Question 1(a). Additionally, if confirmed, I plan on discussing with my colleagues on the bench—in the abstract and not in a case-specific way—their sentencing experiences when they first joined the court and how additional time and experience has altered their views (if at all). I also think reviewing sentencing data and other supplemental materials from the Sentencing Commission will help.

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

I would consult Part K, Chapter 5, of the Guidelines and 18 U.S.C. § 3553 to evaluate whether it would be appropriate to deviate.

- 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>

As a judicial nominee, I think it is inappropriate for me to opine on what should be a legislative policy debate on mandatory minimum sentences.

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

Please see my answer to Question 1(d)(i).

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

Please see my answer to Question 1(d)(i).

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.¹ **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?**

I would be very hesitant to include such *dicta* in my opinions. But I do not want to be absolutist here. I think it would depend on the egregiousness of the injustice and my understanding of my ethical obligations. I might include such *dicta* in a truly extraordinary circumstance.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

Before I would do this, I would want to ensure it was ethically appropriate behavior for a judge. If allowable, I would consider reaching out to discuss a charging policy where there was a policy I regarded as truly unjust.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

Before I would do this, I would want to ensure it was ethically appropriate behavior for a judge. If allowable, I would consider reaching out to discuss clemency considerations in circumstances I

¹ 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>

believed exceptionally warranted clemency.

- 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?**

Yes.

- 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.

- 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.**

Yes, such as disparate rates of incarceration between racial groups.

- 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?**

I am committed to ensuring diversity in my chambers and in the courthouse. I will ensure my hiring practices are conducted so as to give qualified minority applicants and women applicants serious consideration for each and every position.