

**Nomination of Cory T. Wilson to the United States Court of Appeals for the Fifth Circuit
Questions for the Record
Submitted May 27, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. Your Twitter account contains a number of posts. For instance, you wrote “#CrookedHillary & Co. = embodiment of corruption” and “Couple encouraging rulings today by #SCOTUS, checking overreach: one on compulsory union dues and one on religious freedom under #Obamacare.” (<https://twitter.com/CoryWilsonMS/status/483621591327440896> (June 20, 2014))

During your January nominations hearing, you stated that you decided not to disable your Twitter account despite its partisan contents because you are “an elected official” in addition to being a sitting judge. Canon 2 of the Mississippi Code of Judicial Conduct calls on Mississippi judges to “respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 5 requires that judges “refrain from inappropriate political activity.” (*Code of Judicial Conduct* (Adopted by the Mississippi Supreme Court April 4, 2002))

- a. **How do you understand maintaining an active Twitter account—that includes numerous partisan political posts—to comply with Canons 2 and 5 of the Mississippi Code of Judicial Conduct?**

The referenced tweets were published when I was active in partisan elective politics and when I was serving as an elected member of the Mississippi House of Representatives, not since I began serving as a judge. Since my appointment to the Mississippi Court of Appeals was announced, even before taking the bench, I have endeavored to carefully follow the Mississippi Code of Judicial Conduct, including refraining from any political activity that would be inappropriate.

- b. **The Ethics Committee of the Mississippi Bar provides opinions and guidance on the code of conduct for lawyers and judges. Did you seek guidance from the Ethics Committee or anyone else on whether, as a sitting judge, you should maintain a Twitter feed with partisan commentary? If not, why didn’t you seek guidance on this?**

Please see response to question 1.a. After being contacted by the Mississippi Governor’s Office about the possibility of my appointment to the Court of Appeals, I reviewed the Mississippi Code of Judicial Conduct and other available guidance pertaining to a possible transition from legislative service and law practice to the bench. Specifically related to social media, I also discussed permissible use of social media accounts with sitting judges. I researched decisions and guidance from various jurisdictions to ensure compliance with ethical obligations. Guidance on these issues is not well developed in Mississippi law, but I did not find authority requiring incoming judges to “unpublish” or retract past public statements made before becoming a judge. I have also more recently discussed the issue with

the head of our state judicial college, who is a former legislator, trial judge, and Mississippi Supreme Court justice, and he confirmed my earlier research. Based on that research, and my strict compliance with the Canons since becoming a judge, I was satisfied that a reasonable person knowing all the circumstances would have no ground for questioning my impartiality or conduct as a judge.

c. Do you believe that it is appropriate for a federal judge—someone responsible for rendering justice in an impartial manner based on facts and law—to state publicly that a political candidate is the “embodiment of corruption”?

Please see response to questions 1.a. and 1.b. Since becoming a judge more than a year ago, I have endeavored to carefully follow the Mississippi Code of Judicial Conduct, including refraining from any political activity that would be inappropriate. It would be inappropriate for me, as a sitting judge and nominee, to comment on political candidates or political issues. *See Code of Conduct for United States Judges, Canon 5.*

2. You have made a number of unsubstantiated, disparaging remarks about former President Obama. In a series of articles in the Madison County Journal published between 2011 and 2013, you described President Obama as “petty and small,” “a fit-throwing teenager,” and “King Barack.” You also accused him of “running a cynical, small minded campaign to divide us, vilify political opponents as ‘un-American’ and blame everyone but [himself].” (*Columns in Madison County Journal (2011-2013)*)

a. In what ways did President Obama act like a “fit-throwing teenager”? Please provide specific examples.

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns, not since I began serving as a judge. In these columns, I discussed current events and political issues that provide context to the quoted language (e.g., separation of powers, executive overreach, and the tenor of the 2012 campaign). In contrast with my prior roles as an advocate, candidate, and elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. It would be inappropriate for me, as a sitting judge and nominee, to comment on political candidates or political issues. *See Code of Conduct for United States Judges, Canon 5.*

b. Why did you refer to President Obama as “King Barack”? Would you describe President Trump the same way?

Please see response to question 2.a.

c. Please provide an example of when President Obama vilified his political opponents as “un-American”?

Please see response to question 2.a.

d. Do you think it is ever appropriate for someone seeking appointment to the federal judiciary—a body that is meant to be fair, impartial, and non-partisan—to make nakedly partisan comments?

Please see response to questions 2.a. Since becoming a judge more than a year ago, I have endeavored to carefully follow the Mississippi Code of Judicial Conduct, including refraining from inappropriate political activity. It would be inappropriate for me, as a sitting judge and nominee, to comment on political candidates or political issues. See Code of Conduct for United States Judges, Canon 5.

3. In your column in the Madison County Journal, you claimed that your wife’s parameters for where to celebrate Thanksgiving were “no state that voted Democrat.” (*Blessings* (Nov. 29, 2012)) In another column, you said that an “intellectually honest Democrat” was a “rare sighting” and an “exotic creature.” (*Lost Equity* (May 24, 2012))

If you are confirmed as a federal district court judge, how can the 528,260 Mississippians and 62,611,250 Americans who voted for Barack Obama in 2012 have confidence that you will rule fairly and impartially?

The referenced comments are excerpted from a newspaper column that I wrote when I was active in partisan elective politics and campaigns, not since I began serving as a judge. In the column, I discussed current events and political issues that provide context to the quoted language, which was intended to be humorous. Political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. I will continue to faithfully apply Supreme Court precedent and applicable statutes fairly and impartially, as I have in the more than 500 cases in which I have participated since I became a judge.

4. As Chief of Staff in the Mississippi Secretary of State’s office and in op-eds and speeches, you expressed strong support for voter ID laws. In 2008, for example, you said that “[i]n a world where you show your ID to rent a movie, it’s just not a burden to show it when you exercise the right to vote.” (*Hosemann Expecting Big Election* (June 15, 2008))

And in a 2012 op-ed, you dismissed concerns of voter suppression, referring to “voter suppression” in quotes and disparaging Attorney General Eric Holder’s “faux-concern” and the “hysterical liberal narrative.” (*Suppressing Common Sense* (Nov. 1, 2012))

a. Is it your position that voter suppression is not a problem in Mississippi?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that are the subject of pending or impending litigation or may otherwise come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

b. Is it your position that Mississippi’s voter ID law does not have a disparate impact on older voters, lower-income voters, and voters of color in your state?

As I understand it, Mississippi's voter ID law was based on the Indiana law upheld by the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). Mississippi's law includes provisions for any voter without identification to obtain an ID without cost, and it also includes provisions to allow voters without an ID on Election Day to present identification thereafter and have their votes counted. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

c. Do you personally know anybody for whom voting was made more difficult by voter ID laws?

Please see response to question 4.b. I am not aware that any such issues arose during the implementation of Mississippi's voter-identification law. As I noted during my Committee testimony, the Obama Administration's Justice Department interposed no objection and took no legal action to stop implementation of the law, and the law included safeguards to ensure voters' access to the voting process.

d. Do you believe that all voter ID laws are consistent with the Voting Rights Act?

Please see response to question 4.b.

e. If confirmed as a judge—and given your past comments—how can litigants who appear before you seeking to defend their voting rights trust that you will fairly adjudicate their cases?

Before I became a judge, I spent significant time in both public service and private practice working to expand voters' access to the voting process while also ensuring the integrity of the ballot. I have long agreed that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [such that] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381 (1964). The past comments referenced above were made in the context of partisan elective politics and campaigns. In contrast with my prior roles in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases in my current role as a judge. If confirmed, I will faithfully apply Supreme Court precedent in voting rights cases, as I will in all others. Any party coming before the Court can also have confidence that I will rule fairly and impartially, based on my continuing record in more than 500 cases as a judge on the Mississippi Court of Appeals. I take the judicial oath seriously, and since taking the bench, I have shown my commitment to treating every litigant before the Court with equal dignity and respect. If confirmed, I will continue those practices and remain faithful to my oath as a circuit court judge.

5. In a 2013 speech to a local Republican organization, you claimed that “[v]oter fraud happens, and we proved that voter ID can work to help.” (*Speech to Harrison County GOP Women* (2013))

- a. **At your district court hearing in January, you provided evidence of a single instance of alleged voter fraud of which you had knowledge. What specific evidence can you provide showing widespread voter fraud in the United States?**

In testimony before the Committee, I discussed personal experience in litigating election contests. Those trials involved proof of in-person voter fraud and other serious irregularities that affected the outcome of the elections at issue. From my experience in elections administration and in legislative service, I am also aware of several successful prosecutions for voter fraud in Mississippi elections. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. **What evidence do you have that restrictive measures, such as voter ID requirements, are effective at preventing voter fraud?**

Please see response to question 5.a.

6. In an interview in 2013, you characterized the Obama Administration’s measures to prevent gun violence as “an assault on the Second Amendment.” You added that “Connecticut had some of the strictest gun laws in the country, and it did not prevent what happened at Sandy Hook.” (*Video Interview: WMPN-MS-ETV* (Jan. 31, 2013))

Is it your position that assault weapons bans are ineffective at reducing violence? If so, on what basis have you reached that conclusion?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

7. In a 2015 National Rifle Association (NRA) Candidate Questionnaire, you indicated that you opposed an assault weapons ban, opposed requiring background checks on all private sales, including gun shows, and opposed firearm licensing or registration. (*NRA Candidate Questionnaire* (2015))

- a. **Why do you believe that every person who buys a gun should not be required to undergo a criminal background check?**

When I was active in partisan politics, including the time that I was a candidate for and then served in the legislative branch of government, it was appropriate to take positions on policy issues and represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of

voters) play any part in deciding cases. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

b. Do you stand by the answers that you gave to the NRA on your 2015 Candidate Questionnaire?

Please see response to question 7.a.

8. On your Senate Judiciary Questionnaire, you state that you have been a member of the NRA from 2014 to 2018.

a. Are you currently a member of the NRA?

To the best of my recollection, my membership in the NRA expired in 2018.

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

No. Please see response to question 8.a.

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, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) would require recusal. For other cases, I will carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.

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

I am not familiar with the NRA's publicly stated positions. Regardless, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues. Political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *See* Code of Judicial Conduct for United States Judges, Canon 5.

e. Why did you join the NRA?

My wife and I joined for a variety of reasons, including to learn more about gun safety, hunting, and outdoor activities. I maintained membership during my time in the Mississippi Legislature for the same reasons.

f. If you are no longer a member, why did you allow your membership in the NRA to lapse in 2018?

As I was preparing to leave the Legislature and take the bench, I did not renew membership in a number of organizations, including, for example, the NRA, the Nature Conservancy, and the Madison County Chamber of Commerce.

9. Once you reached the legislature, you supported a number of laws making it easier for Mississippians to obtain and carry guns. One such law you helped pass was HB 786, which allows the carrying of a concealed firearm without a permit or any firearms training and permits guns to be carried in houses of worship. The Mississippi Association of Chiefs of Police opposed the measure, which they said puts “law enforcement officers and all Mississippians directly in harm’s way.” (*Police Chiefs Critical of Latest Gun Bill* (2016))

a. Why did you support HB 786, even after a leading Mississippi law enforcement organization noted it would put “law enforcement officers and all Mississippians directly in harm’s way”?

HB 786, the “Mississippi Church Protection Act,” was a measure aimed at enhancing security and protecting church congregations from gun violence. As I recall, the legislation allowed churches to establish security programs “by which designated members [were] authorized to carry firearms for the protection of the congregation . . . , including resisting any unlawful attempt to commit a violent felony. . . .” The bill required “at a minimum . . . that each participant of the program possess[] a firearms permit” and “complete[] an instructional course in the safe handling and use of firearms. . . .” The bill also allowed churches to include persons with law enforcement or military background to assist in training.

b. Given that you have expressed strong views opposing all gun control measures, will you commit to recusing yourself from any cases involving regulation of guns? If not, please explain how litigants can expect you to rule impartially in any cases involving gun control.

The role of a judge is to decide cases fairly and impartially, based on applicable statutes and precedent—to do justice without respect to persons. I also am keenly aware of the differences between being an advocate or a legislator and serving as a judge. When I was active in partisan politics, including the time that I served in the legislative branch of government, it was appropriate for me to take positions on policy issues and represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of voters) play any part in deciding cases. I take the judicial oath seriously, and, since taking the bench, I have been committed to treating every litigant before the court with equal dignity and

respect and giving each litigant a fair hearing based on the rule of law. If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis.

10. In a 2012 op-ed, you wrote that “gay marriage is a pander to liberal interest groups and an attempt to cast Republicans as intolerant, uncaring and even bigoted.” (*When Tolerance Is Really “Zero Tolerance”* (2012))

a. How is marriage equality “pandering” to liberal interest groups?

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. The column discussed then-current political issues and provides context as to the issues discussed. Respectfully, the quoted language refers to the shifting political positions of candidates during the 2012 campaign season, not the desire of same-sex couples to marry. In the column, I was urging tolerance of both sides in the debate about marriage equality. In contrast with my prior roles as an advocate, candidate, and elected legislator, political issues play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *Obergefell v. Hodges*, decided after I wrote the referenced column, is settled law and binding precedent of the Supreme Court. If confirmed, I will fully and faithfully apply it.

b. How is marriage equality an effort to portray Republicans as intolerant?

Please see response to question 10.a.

11. In 2016, while serving as a Mississippi State Representative, you supported HB 1523, the “Protecting Freedom of Conscience from Government Discrimination Act.” The Act created legal protections for business owners who turn away LGBT people because of a “sincerely held religious belief.” The Human Rights Campaign described the law as “the worst anti-LGBTQ state law in the U.S.” that “enables almost any individual or organization to use religion as a justification to discriminate against LGBTQ Mississippians at work, at school and in their communities.” (*Mississippi’s H.B. 1523 Cleared to Become the Worst Anti-LGBTQ State Law in the U.S.* (June 22, 2017))

In a letter to constituents, you stated that you felt that, “especially given the Obama Administration’s public school transgender bathroom edict, . . . [s]omething needs to be done to protect religious freedom . . . from the rush to intolerance from the left.”

a. How did the Obama Administration’s protections for LGBT rights infringe upon religious freedom?

As noted the referenced comments were made during the time I served in the Mississippi House of Representatives. Other statements I made to constituents provide context for the comments, and these statements reflected political debates and

my votes on legislation. As I also stated at the time, I voted for HB 1523 because it was a measure aimed at protecting religious liberty and balancing those bedrock First Amendment protections of faith with the rights recognized by the Supreme Court in *Obergefell v. Hodges*. When I was active in partisan politics, including the time that I served in the legislative branch of government, it was appropriate for me to take positions on policy issues and represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of voters) play any part in deciding cases. *Obergefell* is settled and binding Supreme Court precedent. As a lower court judge, I will fully and faithfully apply it in pertinent cases.

b. If confirmed as a judge—and given your past comments and support for HB 1523—how can LGBT litigants who appear before you expect you to rule impartially in any cases involving LGBT rights?

Please see response to Question 11.a. *Obergefell* is settled and binding Supreme Court precedent. As a lower court judge, I will fully and faithfully apply it. I take the judicial oath seriously, and since taking the bench, I have shown my commitment to treating every litigant before the Court with equal dignity and respect and to giving each litigant a fair hearing based on the rule of law. If confirmed, I will continue those practices in every case.

12. In 2007, you completed a candidate questionnaire for Mississippi Right to Life. In the questionnaire, you indicated that you supported “the complete and immediate reversal of the *Roe v. Wade* and *Doe v. Bolton* decisions.” You also indicated that you believe abortion should be illegal even when the life of the mother is at stake, in cases of incest, and in cases of forcible rape. (*Mississippi Right to Life Candidate Questionnaire* (June 13, 2007))

Later, once you became a state legislator, you supported HB 519, HB 1510, and HB 732, all of which attempted to deny women in the state of Mississippi the right to control their own healthcare decisions. In a speech in 2018, you proudly described HB 1510, which prohibited abortion after 15 weeks of pregnancy, as the “[m]ost restrictive abortion law in the country.” (*MS Corporate Counsel Association CLE Meeting* (2018))

a. Do you still hold the view that women who become pregnant as a result of rape or incest should not have access to abortion?

When I was active in partisan politics, including the time that I was a candidate for and then served in the legislative branch of government, it was appropriate to take positions on political and policy issues and represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of voters) play any part in deciding cases. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. Do you still hold the view that women whose lives are at risk should not have access to abortion?**

Please see response to question 12.a.

- c. If confirmed as a judge—and given your vocal opposition to abortion in any form—how can litigants who appear before you to enforce their rights under *Roe v. Wade* trust that you will fairly adjudicate their cases?**

Past positions as a candidate for partisan political office and my votes in the Mississippi Legislature were taken in the context of partisan elective politics and campaigns, and while serving in the policymaking branch of government. In contrast with my prior roles in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases. If confirmed, I will fully and faithfully apply all binding Supreme Court and Fifth Circuit precedent, including *Roe v. Wade* and its progeny. Any party coming before the Court can also have confidence that I would rule fairly and impartially, based on my continuing record as a judge in more than 500 cases on the Mississippi Court of Appeals. I take the judicial oath seriously, and since taking the bench, I have shown my commitment to treating every litigant before the Court with equal dignity and respect. If confirmed, I will continue those practices and remain faithful to my oath as a circuit court judge.

13. In an article in 2012, you described the Affordable Care Act’s provision requiring access to contraception as “[an] assault on religious faith” and a “ploy” designed by “failed President [Obama]” to “fire up 50% plus one with freebies and scare tactics.” (*It’s About Freedom* (Feb. 23, 2012))

- a. How is the provision of contraceptives under the Affordable Care Act a “ploy”?**

When I wrote the opinion column referenced above, I was active in partisan elective politics and campaigns. Several columns I wrote pertained to the political and legislative process relating to the Affordable Care Act’s (“ACA’s”) passage and implementation. The columns discussed then-current political issues, including the forthcoming 2012 election campaign, and provide context as to the issues I discussed. In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. If confirmed, I will faithfully apply *NFIB v. Sebelius*, along with all other applicable Supreme Court and Fifth Circuit precedents, and the statutory language of the ACA. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. What are the “scare tactics” that you accuse “failed President [Obama]” of using?**

Please see response to question 13.a.

14. In a 2015 BIPEC Candidate Questionnaire, you indicated that you supported “right to work” laws, opposed allowing government workers to strike, and favored at will employment. You also altered a question, writing that you thought that “the ~~MS State~~ Government” was “too big.” You also indicated that you would favor “reduc[ing] state services.” (*BIPEC Candidate Questionnaire* (2015))

a. Please explain what you meant to convey by striking out “MS State” from the question.

When I was active in partisan politics, including the time that I was a candidate for and then served in the legislative branch of government, I voiced support for limited government, fiscally conservative policies, and reducing waste and inefficiency in government, and worked to further legislation to achieve those goals. I am keenly aware of the differences between being an advocate or a legislator and serving as a judge. As a legislative candidate, it was appropriate to take positions on political and policy issues and represent the preferences of my constituents. In contrast with my prior roles in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases.

b. Do you still think that “the ~~MS State~~ Government” is too big? If so, what do you say to the millions of Americans relying on help from federal, state, and local governments to get by during the COVID-19 crisis? If not, what has changed since you filled out the BIPEC Questionnaire?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5.

c. If you are confirmed as a judge, given your documented opposition to unions, do you commit to recusing yourself in any cases involving collective bargaining rights, the rights to strike or picket, and the collection of union dues? If not, how can litigants who appear before you to enforce their rights under federal labor laws trust that you will fairly adjudicate their cases?

Please see response to question 14.a. Past positions as a partisan political candidate were taken in the context of partisan elective politics and campaigns, and while serving in the policymaking branch of government. In contrast with my prior roles in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases. If confirmed, I will faithfully apply binding Supreme Court precedent, and decide each case based on the law. Any party coming before the Court can also have confidence that I will rule fairly and impartially, based on my continuing record as a judge in more than 500 cases on the Mississippi Court of Appeals. I take the judicial oath seriously, and since taking the bench, I have shown my commitment to treating every litigant before the Court with equal dignity and respect. If confirmed, I will continue those practices, and I will carefully review and

follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis.

15. In a 2012 article, you praised “Bush-era interrogation techniques,” claiming that those techniques “in no small part led to Osama bin Laden.” (*National (In)security* (2012))

a. On what basis did you conclude that Bush-era interrogation techniques “led to Osama bin Laden”? What evidence do you have to back up that claim?

The referenced comments are excerpted from a newspaper column that I wrote when I was active in partisan elective politics and campaigns. In the column, I discussed current events and political issues that provide context to the quoted language. Otherwise, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5. As a sitting judge and if confirmed to the Fifth Circuit, political issues and debates do not and would not play any part in deciding cases.

b. Is it your position that these techniques—stress positions, waterboarding, sleep deprivation—are lawful?

Please see response to question 15.a. 42 U.S.C. § 2000dd(d) defines “cruel, inhuman, or degrading treatment or punishment” as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States[.]” 42 U.S.C. § 2000dd–2(a) prohibits “any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual 2–22.3.” It is my understanding that the Army Field Manual does not, for example, authorize waterboarding. Otherwise, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues; it would likewise not be appropriate for me to opine about the legality of the referenced techniques. *See* Code of Conduct for United States Judges, Canon 5. If confirmed, I will faithfully apply applicable statutory law and precedent in any case that came before the Court.

16. According to your Senate Judiciary Questionnaire, you were a member of the Yale Chapter of the Federalist Society from 1992 to 1995, and then you were a member of the Mississippi Chapter from 1996 to 2005. Then you rejoined the Mississippi Chapter of the Federalist Society about 14 years later, in 2019. During your January nominations hearing, you claimed that you rejoined the Federalist Society in 2019 because “[t]he Mississippi chapter in central Mississippi has been intermittent and it sort of started back up over the last year or so.” According to the website of the Federalist Society, there have been events hosted by the Federalist Society in Jackson, Mississippi every year since, at the latest, 2007. In fact, recent years have had fewer events than previous years. (*Past Events*, FEDERALIST SOCIETY, <https://fedsoc.org/past-events?chapter=mississippi-lawyers-chapter>)

Since the Mississippi Lawyers Chapter of the Federalist Society did not, in fact, go “dormant,” why did you decide to rejoin the Federalist Society in 2019? If the answer

is different than that given during your January hearing, why is your answer different now?

My understanding is that the Mississippi Lawyers Chapter of the Federalist Society has not been active over the last several years. If there were events or programs in the intervening timeframe, I was not aware of them (other than perhaps a couple forums that may have been jointly hosted by several groups including the Federalist Society). When I rejoined the organization in 2019, I was aware of efforts to organize programs on the Gulf Coast and had discussions with Jackson-area lawyers about doing the same in central Mississippi.

17. 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 am not familiar with the quoted statements from the Federalist Society’s webpage, and I do not know what the Federalist Society meant by them. As I testified before the Committee, I first joined the Federalist Society in law school because it provided an interesting forum for speakers and discussion on issues impacting the bench and bar. I joined the Mississippi Lawyers Chapter (and rejoined it) for the same reason.

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

Please see my response to question 17.a. I am not familiar with the quoted statement, and I do not know what the Federalist Society meant by it.

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

Please see my response to question 17.a. I am not familiar with the quoted statement, and I do not know what the Federalist Society meant by it.

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

No.

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

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

It is not appropriate for lower courts to depart from Supreme Court precedent.

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

It is generally not proper for trial court judges to question Supreme Court precedent. During my time on the Mississippi Court of Appeals, I have to date not authored separate opinions questioning or criticizing precedent. In limited circumstances, it may be appropriate to note potential conflicts or inconsistencies in a particular legal doctrine to invite clarification or explanation from the Supreme Court.

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

District courts should consider the law and facts of every case and render decisions consistent with Supreme Court and Circuit Court of Appeals precedent.

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

The Supreme Court has announced some factors it may consider in determining whether to overturn its own precedent. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). However, it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3 (1997). It would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions; the role of a Circuit Judge is to follow Supreme Court precedent in deciding cases.

19. 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 Supreme Court precedent, which is binding on all lower courts. If confirmed, I will faithfully apply *Roe*.

b. Is it settled law?

Yes.

20. 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.

21. 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?

It would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will follow *Heller* and any Supreme Court or Fifth Circuit precedent interpreting *Heller*.

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

In *Heller*, the Supreme Court noted that “the right secured by the Second Amendment is not unlimited.” 554 U.S. 570, 626, 128 S. Ct. 2783 (2008). The Court went on to state that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27, 128 S.Ct. 2783, 2816–17.

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

Please see response to question 21.a.

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

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

In *Citizens United*, the Supreme Court held that "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). It would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions. The role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will follow *Citizens United* and any Supreme Court or Fifth Circuit precedent interpreting *Citizens United*.

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

Please see response to question 22.a.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that "person" under the Religious Freedom Restoration Act included "corporations." 573 U.S. 682, 707–08 (2014). It would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions. The role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will follow *Hobby Lobby* and any Supreme Court or Fifth Circuit precedent interpreting *Hobby Lobby*.

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

As a sitting judge and a judicial nominee, it would be inappropriate and inconsistent with the Canons of the Code of Conduct for United States Judges for me to offer views on issues of pending or impending litigation. See Code of Conduct for United States Judges, Canon 3(A)(6).

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

Please see my response to question 23.

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

Please see my response to question 23.

26. 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?**

No, not that I recall.

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

No, not that I recall.

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

As a sitting judge and a judicial nominee, it would be inappropriate for me to comment on issues related to pending or impending litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will follow Supreme Court and Fifth Circuit precedent involving the interpretation or application of administrative law principles.

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

As a sitting judge and a Fifth Circuit nominee, it would be inappropriate for me to comment on political issues or issues of pending or impending litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

The Supreme Court has held that legislative history should be considered only if a statutory text is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Court also noted that legislative history should not “be used to ‘muddy’ the meaning of ‘clear statutory language.’” *Id.* (citations omitted); *see also Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”). If confirmed, I will faithfully apply Supreme Court and Fifth Circuit precedent on the use of legislative history.

29. 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.

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

I received these questions from the Office of Legal Policy at the Department of Justice. I reviewed the questions, reviewed my Senate Judiciary Questionnaire and related attachments, and considered relevant legal sources before submitting draft responses to the Office of Legal Policy for comment. Thereafter, I reviewed my responses again prior to authorizing submission of my final responses by the Department of Justice.

Written Questions for Cory Todd Wilson
Submitted by Senator Patrick Leahy
May 27, 2020

1. You have long been a proponent of voter ID laws that have *objectively* been shown to disenfranchise minority voters. Millions of Americans who are eligible to vote do not have government issued IDs. Yet you have claimed that these voter ID laws are necessary because “voter fraud happens.”

(a) Can you tell me how often “voter fraud happens” over any given period of time, say, during the last 5 or 10 years? What reliable statistics and reports you are relying upon in making that conclusion?

The referenced comments were made when I was in private law practice and active in partisan elective politics and campaigns. In testimony before the Committee, I briefly discussed personal experience in litigating election contests that involved material departures from election law that affected the outcome of the elections at issue. Those trials occurred in the summer of 2013, and I discussed the trials in several speaking engagements. During the speeches, I also likely discussed recent convictions for voter fraud and other irregularities about which I had personal knowledge. Beyond that, it would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

2. In 2013 you wrote that when you first “heard the idea of ‘gay marriage’...you thought it to be such a fringe idea that it would never merit serious consideration.”

(a) Do you still believe that this constitutional right as recognized by the Supreme Court is still a “fringe idea?”

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. In this particular column, I discussed high school graduations (my own in 1988 and that for the Class of 2013, 25 years later) and referenced many changes and issues that provide context to the quoted language. The quoted language generally refers to the evolution in views about gay marriage from about 1992 until the time I wrote the column, just before the Supreme Court issued its decision in *Obergefell v. Hodges*, which also traced the significant evolution in public perception and acceptance of same-sex marriage. *Obergefell* is settled and binding precedent of the Supreme Court, and, if confirmed, I will faithfully apply it as a circuit court judge. Beyond that, it would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

3. You spent three years as a legislator in the Mississippi House of Representatives. There, you took some highly controversial positions, including, for example, opposing abortions in the case of rape and calling for the “immediate reversal” of *Roe v. Wade*. I don’t fault judicial

nominees for having previously worked in politics. But I need to know that a nominee for the federal bench can keep his politics outside the courtroom.

(a) Can you point to any cases during your tenure on the Mississippi Court of Appeals where you ruled in a way that contradicted a stated position of the Republican Party in Mississippi?

I share your view of the importance of a fair and impartial judiciary. I also am keenly aware of the differences between being an advocate or a legislator and serving as a judge. I have not reviewed the “stated position[s] of the Republican Party in Mississippi,” but neither political debates nor my personal views on issues have played any part in my votes in the more than 500 cases in which I have participated since taking the bench over a year ago. I take the judicial oath seriously and have decided cases fairly and impartially, based on applicable statutes and precedent. I am committed to treating every litigant before the Court with equal dignity and respect—to do justice without respect to persons. If confirmed, I will continue those practices and remain faithful to my judicial oath.

4. Over the last couple of years, your social media activity has been filled with overtly partisan attacks and assertions. You have tweeted negatively about Hillary Clinton more than 15 times, and negatively about Obamacare more than 30 times. You tweeted about Hillary Clinton’s emails, using the hashtags, #CrookedHillary, #basketofdeplorables and #Scandalabra.” Judges must be guided by truth and facts. In fact, partisan statements may stir doubt about a judge’s impartiality in the minds of litigants.

(a) Do you regret or recant any of those tweets?

The referenced tweets were published when I was active in partisan elective politics, and when I was serving as an elected member of the Mississippi House of Representatives, not since I began serving as a judge. Since my appointment to the Mississippi Court of Appeals was announced, even before taking the bench more than a year ago, I have endeavored to carefully follow the Mississippi Code of Judicial Conduct, including refraining from any political activity that would be inappropriate. Beyond that, as a sitting judge and a nominee, it would be inappropriate to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5.

(b) Do you think any of those tweets could cause future litigants to question your ability to remain political neutral or impartial from the bench?

Please see responses to questions 3.a. and 4.a.

(c) Do you believe partisan rhetoric from federal judges is harmful to the judiciary?

Please see response to question 4.a.

5. Last month Supreme Court Justice Neil Gorsuch went on *Fox News*’ morning television show to discuss his judicial philosophy and promote his new book. In a 2012 speech you stated “Now that I am ‘back out’ of government, I have my First Amendment Rights back...I

guess that makes me a ‘pundit’ officially?”

(a) What role, if any, do you believe is appropriate for federal judges to play in the media?

When I gave the speech referenced above, I had left service in state government and wrote newspaper commentary for a time. I was active in partisan elective politics and campaigns (both as a private citizen and as a candidate for office myself). In contrast with those roles as an advocate and elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. Likewise, since becoming a judge, I have been a speaker before bar-related organizations and have talked about the Court of Appeals, but otherwise, my view is that, generally, a judge should not play a “role” in the media.

6. You were highly critical of the amount of time President Obama spent on the golf course, stating his first term could be summarized by an “empty chair” because he “failed to meet with his Jobs council for months and months, though he had time for hundreds of golf outings and fundraisers. Meanwhile, President Trump has already cost tax payers \$102 million to cover security and travel expenses just on his golf trips, only \$12.7 million less than Obama and his family spent on all travel during all eight years in the White House.

(a) Do you feel President Trump has “taken vacationing at taxpayer expense to a whole new level,” as you previously stated about President Obama?

At the time I made those comments, I was active in partisan elective politics and campaigns, both as a private citizen and as a candidate for office myself. But now, as a sitting judge and a nominee, it would be inappropriate for me to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5.

7. While serving in Mississippi’s state legislature, you voted for HB 638, which allowed poison gas, electrocution, and even firing squads to be used to carry out the death penalty if lethal injection is blocked or appealed by a higher court.

(a) How do you think death by poison gas, electrocution, or a firing squad would square with the Eighth Amendment’s prohibition on cruel and unusual punishment?

At the time, I was serving as an elected member of the Mississippi Legislature. But now, as a sitting judge and a nominee, it would be inappropriate for me to comment on political issues or legal issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

8. In an April 2012 column, you accused President Obama of “launch[ing] an orchestrated attack on the legitimacy of the Supreme Court” after the President predicted that the Court would uphold the Affordable Care Act as constitutional. President Trump has consistently tweeted, questioned the legitimacy of, and attacked the Supreme Court and other federal courts. These attacks have included comments questioning a judge’s ability to be impartial

based upon his Mexican ethnicity, and attacking the credibility of judges who ruled against his policies and agenda. He has even gone after Chief Justice Roberts on Twitter for his defense of the independence and integrity of the judiciary.

(a) Does it concern you when political leaders attack the integrity and legitimacy of courts simply for issuing rulings that don't uphold their policy and political agendas?

When I made the referenced comments, I was active in partisan elective politics and campaigns, both as a private citizen and as a candidate for office myself. But now, as a sitting judge and a nominee, it would be inappropriate for me to comment on political issues. Article III enshrines certain protections to ensure the independence of the judiciary, so that judges may faithfully apply statutory language and applicable precedent to “administer justice without respect to persons.” If confirmed, I will continue to follow both statute and precedent as I have done on the Mississippi Court of Appeals.

9. Between 2011 and 2014, while working as an attorney in private practice, you had a column in the Madison County Journal. One such column you wrote appeared to endorse “Bush-style interrogation techniques” as leading to the capture of Osama Bin Laden. The notion that such techniques led to the capture in Bin Laden – or that they generally provides reliable, actionable intelligence – has roundly been rejected, including by our military brass.

(a) What did you mean by “Bush-style interrogation techniques?” Is waterboarding one of the techniques that you support as appropriate and lawful?

The quoted language is drawn from a June 2012 column that discussed current events and political issues related to national security and defense policy. From my best recollection, the language referred generally to the Bush Administration’s conduct of the Global War on Terror. When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. In contrast with my prior roles as an advocate and elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

10. Chief Justice Roberts wrote in *King v. Burwell* that:

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

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

It would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow precedent in deciding cases before the Court. Based on my experience on the Mississippi Court of Appeals, when a statutory provision's meaning is not evident from the text, considering the statutory context surrounding the provision may be instructive as to the particular provision's meaning. *See, e.g., Pritchard v. Pritchard*, 282 So. 3d 809 (Miss. Ct. App. 2019).

11. 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?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues. Article III enshrines certain protections to ensure the independence of the judiciary so that judges may faithfully apply statutory language and applicable precedent to “administer justice without respect to persons.” If confirmed, I will continue to follow both statutes and precedent as I have done on the Mississippi Court of Appeals.

(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 response to question 11.a.

12. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.)

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

The Supreme Court has reviewed presidential actions taken during military conflict or for national defense. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may be the subject of pending litigation. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

13. 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?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

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

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

Justice O’Connor 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.” But it would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. To the extent *Hamdan v. Rumsfeld* is applicable to a case before me, I will faithfully apply it.

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

Please see response to question 14.a.

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

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation. The role of a circuit court judge is to fully and faithfully apply the laws, including the Constitution, any relevant statutes, and all Supreme Court precedent, in deciding cases before the court, including cases arising in the national security context.

16. 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?

In *United States v. Virginia*, 518 U.S. 515, 531 (1996), the Supreme Court stated that under the Equal Protection Clause, “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” If confirmed, I will faithfully apply this and all other applicable Supreme Court and Fifth Circuit precedent on cases involving discrimination. I am not familiar with the referenced interview and cannot speak to Justice Scalia’s views. Generally, it would also be inappropriate for a sitting judge,

or a nominee, to comment on legal issues that may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2 and 3(A)(6).

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

It would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with a Supreme Court Justice’s characterization of a legal provision; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will faithfully apply Supreme Court and Fifth Circuit precedent on cases involving the Voting Rights Act.

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

I have not had occasion to study the Emoluments Clause, its history, or any applicable precedents that may bear on it. In addition, it would be inappropriate for me, as a sitting judge and nominee, to comment on political or legal issues that are the subject of pending litigation under Canons 2, 3(A)(6), and 5 of the Code of Conduct of United States Judges.

19. 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?

From my time on the Mississippi Court of Appeals, appellate courts generally are limited to reviewing the factual record developed in the trial court, applying the applicable standard of review. Legal issues are reviewed de novo. Beyond that, it would not be appropriate for me, as a sitting judge and nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent.

20. 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”?

These Amendments provide that Congress has “power to enforce” them “by appropriate legislation.” U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2. If confirmed, I will faithfully apply all Supreme Court and Fifth Circuit precedent, including those involving these amendments and laws enacted by Congress thereunder.

21. 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?

In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Supreme Court held that the Texas statute at issue “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Lawrence*.

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

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

The role of a lower court judge is to follow Supreme Court precedent in deciding cases, much as my current role on the Mississippi Court of Appeals is to follow and apply Mississippi Supreme Court and U.S. Supreme Court precedent. Whether in my current role or if I am confirmed to the Fifth Circuit, I will be bound to faithfully follow higher court precedent regardless of the type of question before me.

23. 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.

During my time on the Mississippi Court of Appeals, I have recused myself sua sponte in matters on which I personally worked as counsel prior to becoming a judge, matters on which my prior law firm served as counsel of record (at the trial court level or on appeal) while I remained with the firm, and in matters in which my impartiality might be questioned by a reasonable person because of prior relationships with lawyers or parties involved in the case. As one example, I recused myself in a couple of cases involving an entity for which one of my former law firm colleagues serves on the board of directors. If confirmed, I will continue to carefully review and follow applicable law, *see* 28 U.S.C. § 455, and the applicable Canons of the Code of Conduct to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) would require recusal. For other cases,

I will carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.

24. 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.”

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

The referenced footnote states in part: “It is unnecessary to consider now whether 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.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Courts must protect constitutional rights under the rule of law through the fair and impartial application of the law “without regard to persons.” Generally, it is inappropriate for a sitting judge, or a nominee, to comment on legal issues that may come before the Court or may be the subject of pending or impending litigation. But if confirmed, I will fully and faithfully apply Supreme Court and Fifth Circuit precedent applicable to cases before the court.

25. 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.

26. **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?**

The Constitution provides in relevant part that the President “shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” U.S. Const. art. II, § 2. I have not had occasion to study this Clause, its history,

or any applicable precedents that may bear on it. In addition, it would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation under Canons 2, 3(A)(6), and 5 of the Code of Conduct for United States Judges.

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

The scope of congressional power under the Commerce Clause and the Fourteenth Amendment is the subject of extensive case law and doctrine. It would be inappropriate for me, as a sitting judge and nominee, to comment on legal issues that may come before the Court under Canon 3(A)(6) of the Code of Conduct for United States Judges. However, if confirmed, I will faithfully apply Supreme Court and Fifth Circuit precedent concerning the scope of congressional power.

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

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

Trump v. Hawaii is binding Supreme Court precedent that I will faithfully apply if confirmed, along with all other Supreme Court precedent on the weight of factual findings on immigration and constitutional issues. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation. See Canons 2, 3(A)(6), and 5 of the Code of Conduct for United States Judges.

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

The Supreme Court has addressed whether laws constitute an undue burden under *Casey* before. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In *Hellerstedt*, the Supreme Court held that “[u]nnecessary health regulations that have the purpose or effect

of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” 136 S. Ct. at 2309 (quotations and citation omitted). It would be inappropriate for me, as a sitting judge and nominee, to comment on legal issues that may be the subject of pending or impending litigation under Canon 3(A)(6) of the Code of Conduct for United States Judges. But if confirmed, I will faithfully follow Supreme Court and Fifth Circuit precedent on this issue.

30. 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?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation under Canon 3(A)(6) of the Code of Conduct for United States Judges. But if confirmed, I will faithfully follow Supreme Court and Fifth Circuit precedent on this issue.

31. 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?

In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court held that the defendant had a reasonable expectation of privacy in his “cell-site location information,” even though it was stored by a third party, his cell phone company. The Court analogized the case to *United States v. Jones*, 565 U.S. 400 (2012), where the Court held that attaching a GPS tracking device to a vehicle was a Fourth Amendment search. Beyond that, it would be inappropriate for me, as a sitting judge and nominee, to comment on legal issues that may be the subject of pending or impending litigation under Canon 3(A)(6) of the Code of Conduct for United States Judges. But if confirmed, I will faithfully follow *Carpenter* and all other Supreme Court and Fifth Circuit precedent on this issue.

32. 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?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation. *See* Canons 3(A)(6) and 5 of the Code of Conduct for United States Judges. But if confirmed, I will faithfully follow Supreme Court and Fifth Circuit precedent on separation-of-powers questions.

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

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

As Canon 1 of the Code of Conduct states: "An independent and honorable judiciary is indispensable to justice in our society." Judicial independence is enshrined into our constitutional structure and is foundational to our system of government and the rule of law. Judges protect this independence by acting within their role in our constitutional framework—by deciding "cases and controversies" and exercising "judgment" based on statutory texts and applicable precedent, and not exercising "will" or "force." As a former legislator, I am keenly aware of the differences between being a political advocate or a legislator and serving as a judge. Since taking the bench, I have decided cases fairly and impartially, based on applicable statutes and precedent. If confirmed, I will continue those practices and remain faithful to my oath as a Circuit Court Judge—to do justice "without respect to persons."

Senator Dick Durbin
Written Questions for Cory Wilson
May 27, 2020

For questions with subparts, please answer each subpart separately.

1. Do you stand by your past statements regarding the constitutionality of the Affordable Care Act?

When I made the referenced statements, I was active in partisan elective politics and campaigns. Generally, the statements pertained to the political and legislative process relating to the Affordable Care Act's (ACA's) passage and implementation. Opinion columns I wrote discussed then-current political issues and provide context as to the issues discussed. In *NFIB v. Sebelius*, 567 U.S. 519, 575, 132 S. Ct. 2566, 2601 (2012), handed down after I expressed political opinions about the pending case, the Supreme Court stated that "[t]he Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax." In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *NFIB v. Sebelius* is binding precedent, and as a judge, I will faithfully apply that case, other applicable Supreme Court precedent, and the statutory language of the ACA. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

2. Do you regret any of your statements, writings, or tweets about your opposition to the Affordable Care Act?

When I wrote the referenced statements, I was active in partisan elective politics and campaigns (both as a private citizen and as a candidate for office myself). The referenced comments pertained to political and legislative issues relating to the ACA, as well as policy debates that impacted the constituents that I represented in the Mississippi Legislature. In contrast with my prior roles as an "advocate" and elected legislator, as a judge, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. If confirmed, I will faithfully apply Supreme Court and Fifth Circuit precedent as well as the statutory language of the ACA.

3. You have been strident in your support for voter ID laws and critical of efforts to protect against voter suppression. For example, in an October 20, 2011 column, you responded to the Mississippi NAACP's concerns that a proposed voter ID law would suppress the vote by saying: "Poppycock. Unless you count the dead vote."

Are you aware of any impacts that voter ID laws may have on the ability of older, minority, and low-income Americans to vote?

When I wrote the referenced opinion column, I was active in partisan elective politics and campaigns. The column discussed then-current political issues and provides context as to the issues discussed. I also discussed personal experience in elections administration. At the time, I recall that voter ID was a topic of debate. Mississippi's current voter ID law was placed on the ballot by citizen initiative in 2011, and the measure was approved by over 60% of voters in November 2011. Mississippi's law, as I understand it, was based on the Indiana law upheld by the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). Mississippi's law includes provisions for any voter without identification to obtain an ID without cost, and it also includes provisions to allow voters without an ID on Election Day to present identification thereafter and have their votes counted. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

4. On November 1, 2012, you wrote an op-ed entitled "Suppressing Common Sense," where you wrote that concerns about voter suppression are "as phony as the 'war on women.'"

- a. **Why did you say that the war on women and concerns about voter suppression are both phony?**

When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. The columns discussed then-current political issues and provide context as to the issues discussed, including the referenced comments. In contrast with my prior roles as an advocate in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit.

- b. **Does that still represent your views?**

It would be inappropriate for a sitting judge, or a nominee, to express views on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

5. In that same column, you went on to discuss your support for voter ID laws and mentioned that your support for such laws was based on your work for Mississippi Secretary of State Delbert Hosemann. You wrote: "Without ID, anyone can show up for a person on the rolls. We often heard from people who showed up to vote, only to find out that someone had already voted for them. We also documented dead voters who exercised their civic duty from beyond." **Please provide for the Committee any documentation regarding these instances of dead voters voting in person in Mississippi as well as Mississippians who showed up in person to find that someone had already voted for them.**

The referenced column discussed political issues and provides context as to the issues discussed. I also discussed personal experience in elections administration. I recall talking about a specific example of a person who passed away in 2006 or 2007 who nonetheless was recorded as voting the following year, and that example was reflected in speaking materials

from the time. I also recall discussing feedback from constituents from around the state who shared their voting experiences. I have provided all responsive documentation in my possession in response to the Senate Judiciary Questionnaire.

6. You frequently have made public comments in which you criticized President Barack Obama in strident and personal terms. You've referred to President Obama as a "radical leftist." You've called him "King Barack." You've described him as "shrill, dishonest, and intellectually bankrupt." You've called him "President Make-Believe." These types of disparaging comments raise questions about your temperament.

Do you believe these types of comments were appropriate displays of temperament coming from someone seeking a federal judgeship?

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. In these columns, I discussed current events and political issues that provide context to the quoted language (e.g., separation of powers, executive overreach, and the tenor of the 2012 campaign). In contrast with my prior roles as an advocate, candidate, and elected legislator, political issues do not play any part in my current role as a judge, deciding cases before the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. I take the judicial oath seriously, and since taking the bench, I have shown my commitment to treating every litigant before the court with equal dignity and respect. If confirmed, I will continue those practices and remain faithful to my oath as a Fifth Circuit judge.

7. In a June 1, 2012 column you wrote: "gay marriage is a pander to liberal interest groups." **Does this statement still represent your views?**

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. In these columns, I discussed current events and contrasting political positions in the 2012 campaign that provide context to the quoted language. Respectfully, the language refers to the shifting political positions of candidates during that campaign, and in the column, I was urging tolerance of both sides in the debates about marriage equality. In contrast with my prior roles as an advocate, candidate, and elected legislator, political issues do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *Obergefell v. Hodges* is settled law and binding precedent of the Supreme Court that I will faithfully apply. Otherwise, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

8. In a May 24, 2013 column you wrote: "when I first heard the idea of gay marriage, I thought it to be such a fringe idea that it would never merit serious consideration." **Does this statement still represent your views?**

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. In this particular column, I discussed high

school graduations (my own in 1988 and that of the Class of 2013, 25 years later) and referenced many societal changes and issues that provide context to the quoted language. The quoted language generally refers to the evolution in views about gay marriage from around 1992 until just before the Supreme Court issued its decision in *Obergefell v. Hodges*, which is now settled law that I will faithfully apply. Beyond that, it would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

9. In your columns and public statements you have often criticized the media. For example, you wrote in a November 2012 column that “the media are now so slanted as to be dangerously unreliable.” In an October 2012 column you wrote that “the mainstream media seem to be actively rigging the 2012 election.”

If you are confirmed as a federal judge, you may have cases before you involving media companies and First Amendment issues. Do you believe your past comments could make litigants in such cases question your impartiality?

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. In these columns, I discussed current events in the 2012 campaign that provide context to the quoted language. In contrast with my prior roles as an advocate, candidate, and elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. It would otherwise be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

10. **Do you believe that wealthy individuals or special interests that make undisclosed donations to organizations that help choose judicial nominees should make their donations public so that judges can have full information when they make decisions about recusal in cases in which these donors are parties or have an interest?**

It would be inappropriate as a sitting judge, and as a nominee, to comment on political issues. *See* Canon 5, Code of Conduct of United States Judges. If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis.

11.
 - a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network that advocate in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

It would be inappropriate as a sitting judge, and as a nominee, to comment on political issues. *See* Canon 5, Code of Conduct for United States Judges.

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

It would be inappropriate as a sitting judge, and as a nominee, to comment on political issues. *See* Canon 5, Code of Conduct for United States Judges.

12. What does the word “shall” mean in a statute?

“A basic tenet of statutory construction is that ‘shall’ is mandatory and ‘may’ is discretionary.” *Barnett-Phillips v. State*, 195 So. 3d 226, 230 (Miss. Ct. App. 2016) (quoting *Khurana v. Miss. Dep’t of Revenue*, 85 So. 3d 851, 854 (¶ 9) (Miss. 2012)).

13. When do you believe it is appropriate for the Supreme Court to overrule one of its precedents?

The Supreme Court has announced some factors it may consider in determining whether to overturn its own precedent. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). However, it is the Supreme Court’s “prerogative alone to overrule one of its precedents.” *State Oil Co. v. Khan*, 522 U.S. 3 (1997). It would not be appropriate for me, as a sitting judge and a nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases.

14. Should circuit court judges ever write opinions—whether majority opinions, concurrences, or dissents—calling for the Supreme Court to review and consider reversing its own precedents? Or is it improper for lower court judges to opine on what the Supreme Court should do?

It is not appropriate for lower courts to depart from Supreme Court precedent. During my time on the Mississippi Court of Appeals, I have not to date authored separate opinions questioning or criticizing higher-court precedent. In limited circumstances, it may be appropriate to note potential conflicts or inconsistencies in a particular legal doctrine to invite clarification or explanation from the Supreme Court.

15. During your hearing, you were asked by Senator Ernst: “would you consider yourself an originalist?” You responded: “I would, Senator, to the extent that that’s defined as applying the statute as they’re written, applying the Constitution as it’s written based on what the intent behind that language was at the time it was enacted. So yes, I do consider myself an originalist.”

- a. With respect to any provision of the Constitution that has not been altered by amendment, has the “intent behind the language [] at the time it was enacted” subsequently evolved? Or has the original intent remained the same?**

The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). The role of a lower court judge is to follow Supreme Court precedent in deciding cases regardless of whether a given precedent is or is not regarded as “originalist” in approach. Beyond that, it would not be appropriate for me, as a sitting judge and a nominee, to comment on issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2 and 3(A)(6).

b. With respect to the Fourth Amendment, what was the original intent behind that language at the time it was enacted?

I have not had occasion to study this issue, or any applicable precedents that may bear on it. The role of a lower court judge is to follow Supreme Court precedent in deciding cases regardless of whether a given precedent is or is not regarded as “originalist” in approach. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or legal issues that are the subject of pending or impending litigation under Canons 2, 3(A)(6) and 5 of the Code of Conduct for United States Judges.

c. With respect to the Commerce Clause, what was the original intent behind that language at the time it was enacted?

Please see response to question 15.b.

d. With respect to the Eighth Amendment, what was the original intent behind that language at the time it was enacted?

Please see response to question 15.b.

e. With respect to the Constitution’s Foreign Emoluments Clause, what was the original intent behind that language at the time it was enacted?

Please see response to question 15.b.

f. Are there any provisions in the Constitution where the original meaning is unclear or ambiguous? If so, please list all such provisions.

Please see responses to questions 15.a. and b.

g. Are there any provisions in the Constitution where you believe controlling Supreme Court decisions have incorrectly articulated the provision’s original meaning? If so, please list all such provisions.

Please see responses to questions 15.a. and b. Beyond that, it would not be appropriate as a sitting judge, or a nominee, to express agreement or disagreement with Supreme

Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. That is what I do on the Mississippi Court of Appeals and, if confirmed, that is what I would do on the Fifth Circuit.

16. Does the Constitution authorize a president to pardon himself?

I have not had occasion to study this issue, or any applicable precedents that may bear on it. In addition, it would be inappropriate for a sitting judge, or a nominee, to comment on political or legal issues that may be the subject of pending or impending litigation under Canon 3(A)(6) of the Code of Conduct for United States Judges.

17. Was President Trump correct when he said “I have an Article II where I have the right to do whatever I want as President”?

Please see response to question 16.

**Nomination of Cory T. Wilson
to the United States Court of Appeals for the Fifth Circuit
Questions for the Record
Submitted on May 27, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

I had not previously but have in response to your request.

- 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 answer yes or no, and explain your answer.

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation under Canons 3 and 5 of the Code of Conduct of United States Judges.

- 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? Please answer yes or no.

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues under Canon 5 of the Code of Conduct of United States Judges.

- d. 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? Please answer yes or no, and if not, why not?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation under Canons 3 and 5 of the Code of Conduct of United States Judges.

- e. 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, informally or otherwise? If you do, please describe the circumstances.

No.

- f. Have you had any communications with Leonard Leo or a close affiliate to Leonard Leo about your nominations to either the district court or the Fifth Circuit, either before or after your nominations? Please specify.

No.

- g. Have you have any communications with Carrie Severino, President of the “Judicial Crisis Network,” or a close affiliate to Carrie Severino about your nominations to either the district court or the Fifth Circuit? Please specify.

No.

- h. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording? Please answer yes or no, and explain.

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues under Canon 5 of the Code of Conduct of United States Judges.

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

To the extent that Chief Justice Roberts’s metaphor captures the importance of a fair and impartial judiciary, I share that view and have repeated it when talking about my service as a state court judge. As a former legislator, I am keenly aware of the differences between being an advocate or a legislator and serving as a judge. Political issues do not play any part in deciding cases. Since taking the bench, I have decided cases fairly and impartially, based on applicable statutes and precedent, and I am committed to treating every litigant before the Court with equal dignity and respect.

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

The role of a lower court judge is to fully and faithfully apply the laws, including the Constitution, any relevant statutes, and all Supreme Court precedent, in deciding “cases and controversies” before the court. To the extent governing precedent or statutes instruct a circuit court judge to consider consequences of a

particular ruling, then the court should fully and faithfully apply that law in rendering a decision.

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

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

I am not familiar with the referenced book, and I have not read it. Therefore, I cannot speak to the context of the quoted language or the author's meaning of "negotiations and trade-offs." During my time on the Mississippi Court of Appeals, I have discussed cases in three-judge panels, considered case records and oral arguments, reviewed draft and final opinions, and discussed cases with other judges. As a ten-judge court, our judges vote in every case that we hand down and therefore collaborate on the court's opinions. But I have not "negotiated" with other judges when deliberating how to vote on the more than 500 cases in which I have participated.

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

Since joining the Mississippi Court of Appeals, I have decided cases based on the law and applicable precedent, fairly and impartially. I have not, and would not, "condition" my vote in one case on another colleague's vote in another case. *See* Canon 1 of the Code of Conduct of United States Judges ("A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.").

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

Yes, there are principles of my judicial philosophy that I consider non-negotiable. Please see responses to questions 3.a. and b.

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

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

In every case in which I have participated on the Mississippi Court of Appeals, as with the matters I handled in private practice, I am mindful that there are people on both sides of the "v." It is important for judges to remember that, for the people involved in litigation, for clients who are starting a business, for those who stand accused (or convicted), their legal matter is likely the most important thing going on in their lives. Recognition of the people behind cases animates my determination to decide cases fairly, impartially, and according to the rule of law.

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

Please see response to question 4.a. My personal life experience, while helping me to treat every person to come before the court with respect and dignity, does not play a part in deciding cases. Since taking the bench, I have decided cases fairly and impartially, based on applicable statutes and precedent. Similarly, the role of a lower court judge is to faithfully apply the laws and applicable Supreme Court precedent, in deciding the "cases and controversies" that come before the court.

5. 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.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."
 - a. What role does the jury play in our constitutional system?

The jury plays a vitally important role in our system of justice, both in criminal and in civil matters. I am reminded daily of the importance of juries in deciding cases on the Mississippi Court of Appeals, given the deference shown to jury verdicts and fact finding under the applicable standards of review on appeal. If confirmed, I will faithfully apply precedent applicable to the Seventh Amendment and the right to trial by jury while being mindful of the jury's constitutional and historical importance.

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

It would be inappropriate for me, as a sitting judge and a nominee, to comment on legal issues that may be the subject of pending litigation or may come before the Court, under Canon 3(A)(6) of the Code of Conduct of United States Judges.

- 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?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on legal issues that may be the subject of pending litigation or may come before the Court, under Canon 3(A)(6) of the Code of Conduct of United States Judges.

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

From my time on the Mississippi Court of Appeals, appellate courts generally are limited to reviewing the factual record developed in the trial court, applying the applicable standard of review. Legal issues are reviewed de novo. There may be cases in which Supreme Court precedent instructs an appellate court to make factual findings; in such cases, I would faithfully follow such precedent as appropriate.

8. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process? Please answer yes or no.

It would be inappropriate for me, as a sitting judge and a nominee, to comment on legal issues that may be the subject of pending litigation or may come before the Court, under Canon 3(A)(6) of the Code of Conduct of United States Judges.

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

- a. Have you read Advisory Opinion #116?

Yes.

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

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.
- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
- v. Determining whether the seminar is a viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

I commit to following applicable ethical rules before participating in any educational seminars or conferences.

- 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?

I commit to following applicable ethical rules before participating in any educational seminars or conferences.

10. Your questionnaire indicates that you have been a member of the Federalist Society since 1992.

- a. If confirmed, do you plan to remain a member of the Federalist Society?

Yes. As with other local bar organizations in which I am active, I have indicated to local chapter members my willingness to participate in events or forums on issues related to the Mississippi bench and bar.

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

Please see response to question 10.a.

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

No.

- d. Have you had contacts with representatives of the Federalist Society, in either their official or unofficial capacity, in preparation for your confirmation hearing? Please specify.

No.

- e. Were your responses to this questionnaire planned, prepared, drafted or edited in collaboration with anyone in the Federalist Society? If so, who? If there are some people who helped plan, prepare, draft or edit your responses whose membership in the Federalist Society you are unsure of, and others whose membership you are sure of, please list the people who helped plan, prepare, draft or edit these responses who you know to be members of the Federalist Society.

No.

11. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: <https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf>. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

I commit to following applicable ethical rules before participating or maintaining membership in law-related organizations and, pursuant to Commentary to Canon 4 and ethical rules related to Canon 4, to regularly reassess whether involvement in extrajudicial activities related to the law is proper under the Code.

12. Do you agree with the general principle that judges should seek to maintain impartiality, both actual and perceived?

A deeply held view that I have frequently expressed over the years is that the role of a judge is to decide cases fairly and impartially, based on applicable statutes and precedent – to do justice without respect to persons.

13. During your confirmation hearing you stated on several occasions that you were not familiar with the Fourth Circuit’s 2016 in *North Carolina State Conference of NAACP v. McCrory* (831 F.3d 204). For the purposes of answering this question, I request that you review that opinion.

- a. Have you read *North Carolina State Conference of NAACP v. McCrory* (831 F.3d 204)?

Yes.

- b. The 4th Circuit concluded in that case the following: “The State then elaborated on its justification, explaining that “[c]ounties with Sunday voting in 2014 were disproportionately black” and “disproportionately Democratic.” In response, SL 2013-381 did away with one of the two days of Sunday voting. Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges explicitly on race – specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”

Did the facts of this case or the Fourth Circuit’s opinion change your views generally on whether state laws can suppress votes in minority communities? Please explain why or why not.

In *McCrory*, the Fourth Circuit held that an election law enacted by the North Carolina Legislature violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. As the *McCrory* court stated:

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977), the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law, like the one at issue [in *McCrory*], can be motivated by invidious racial discrimination. *Id.* at 264–66, 97 S.Ct. 555. If discriminatorily motivated, such laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race. *Id.*; *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040 (1976).

McCrory, 831 F.3d at 220. In any voting rights case that comes before the Court, I will faithfully follow and apply Supreme Court precedent and relevant statutes. Beyond that, it would be inappropriate for me, as a sitting judge and a nominee, to express views on political issues or legal issues that may be the subject of pending or impending litigation, under Canons 3 and 5 of the Code of Conduct of United States Judges.

Senate Judiciary Committee
“Nominations”
Questions for the Record
May 20, 2020
Senator Amy Klobuchar

Questions for Cory Wilson, Nominee to be Circuit Judge for the Fifth Circuit Court of Appeals

Many states are expanding mail-in voting during the coronavirus pandemic, and I have led the effort in the Senate to remove unnecessary requirements for mail-in ballots in federal elections. In notes that you prepared for a speech you gave in 2009, you wrote that “absentee voter fraud is an area of concern,” and in September 2013, you published an op-ed expressing support for “limiting the number of absentee ballots any one person can witness or notarize.”

- Do you agree that these kinds of restrictions could be applied in a way that disproportionately impacts low-income people, racial and ethnic minorities, the elderly, or people with disabilities in violation of their constitutional rights?

Before I became a judge, I spent significant time in both public service and private practice working to expand voters’ access to the voting process while also ensuring the integrity of the ballot. In the speaking notes and newspaper column quoted above, I was referring to policy proposals and drawing from elections administration experience during the time I served as Deputy Secretary of State and handled elections-law matters in private practice. “A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 7 (2006). However, the restrictions that states use must be “generally applicable, even-handed, politically neutral,” and must “protect the reliability and integrity of the election process.” *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002) (discussing Supreme Court precedent). Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- What do you believe is the proper role of the judiciary in protecting citizens’ constitutional right to vote?

“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [such that] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886) (referring to “the political franchise of voting” as “a fundamental political right, because preservative of all rights”). The proper role of the judiciary in protecting citizens’ fundamental constitutional right to vote is faithfully to apply relevant Constitutional provisions, federal and state statutes, and applicable Supreme Court precedent in voting rights cases.

In May 2015, you filled out a questionnaire for the National Rifle Association in which you indicated your opposition to certain gun safety measures like background checks on private sales.

- Do you believe that requiring a background check on all gun purchases could be a regulation that is constitutionally permissible?

At the time I filled out the candidate questionnaire referenced in this question, I was a candidate for the Mississippi House of Representatives and expressed legislative policy positions as part of that campaign. It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

**Nomination of Cory T. Wilson, to be United States Circuit Judge
for the Fifth Circuit
Questions for the Record
Submitted May 27, 2020**

QUESTIONS FROM SENATOR COONS

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

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

Yes.

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

Yes. The Supreme Court has relied on treaties, common law sources, state constitutions, among other sources. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (instructing that implied fundamental rights be “objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed”).

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

If the right had been previously recognized by binding precedent from either the Supreme Court or the Fifth Circuit, then there would be no need for further inquiry. If there were not binding precedents from those courts, I would also consider precedent from other circuits.

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

Yes.

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

Yes.

- f. What other factors would you consider?

I would look to other relevant cases from the Supreme Court for guidance as to any other factors that should be considered. *See, e.g., Glucksberg*, 521 U.S. at 720–21.

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

The Supreme Court has held that the Fourteenth Amendment applies to both race and gender. *See United States v. Virginia*, 518 U.S. 515 (1996).

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

Please see response to question 2 above.

- 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 have not had occasion to study this question, so I cannot answer why it was not until the Supreme Court decided *United States v. Virginia* that states were required to provide the same educational opportunities to men and women. If confirmed, I will faithfully apply *United States v. Virginia* and all other applicable Supreme Court or Fifth Circuit precedent.

- 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 held that the Fourteenth Amendment requires same-sex couples to be afforded the right to marry “on the same terms accorded to couples of the opposite sex.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

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

It would be inappropriate for me, as a sitting judge and nominee, to comment on legal issues that may be the subject of pending or impending litigation. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges. But if confirmed, I will faithfully follow Supreme Court and Fifth Circuit precedent on this issue.

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

Yes, the Supreme Court has held so. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, the Supreme Court has held so. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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

Yes, the Supreme Court has held so. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

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

Please see responses to questions 3., 3.a., and 3.b. above.

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

The Supreme Court has held that societal changes can be relevant to a court’s analysis in numerous contexts. When the Supreme Court has directed lower courts to consider such evidence, lower courts should do so. If confirmed, I will follow the Supreme Court’s holdings on this issue.

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

Scientific evidence and data are an important part of many cases. The role such evidence plays varies depending on the nature of the legal dispute and issues in a case. Generally, the Supreme Court has held that trial judges act in a “gatekeeping role” for this type of evidence under Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were

defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

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

The Supreme Court has held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry “on the same terms and conditions as opposite-sex couples,” *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Further, the Supreme Court has instructed that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I will faithfully apply this precedent and any Supreme Court or Fifth Circuit precedent applicable to this issue.

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

Please see responses to questions 1.a. through 1.f.

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

I read the Supreme Court’s holding in *Brown* to be consistent with the text and original meaning of the Fourteenth Amendment.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited May 26, 2020).

I have not had occasion to study academic scholarship related to this issue. It would be inappropriate for me, as a sitting judge and nominee, to comment on legal issues that may

be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 3 and 5. However, the role of a lower court judge is to follow Supreme Court precedent in deciding cases, and I would do so regardless of academic debates regarding that precedent.

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

The Supreme Court has recognized the importance of the Constitution's text, structure, and original understanding in interpreting a constitutional provision. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960 (2019); *District of Columbia v. Heller*, 554 U.S. 570 (2008). The role of a lower court judge is to follow Supreme Court precedent in deciding cases, and the Supreme Court's prevailing view of the Constitution is dispositive. If confirmed, I will faithfully follow Supreme Court and Fifth Circuit precedent applicable to constitutional provisions at issue.

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

Please see response to question 6.c.

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

Please see response to question 6.c.

7. In a 2012 column, you praised demonstrations that were held in support of Chick-Fil-A after the chain's president made comments opposing same-sex marriage. You wrote that those demonstrations showed "what it looks like when real Americans have had enough. They are what my dad has called the Silent Majority ever since the Nixon era. It is simple math, for the liberals who must have been watching in horror: there are twice as many conservatives (40%) than liberals (20%) in the country. And the 40% is tired of the chickenfeed being shoveled by the 20%."

- a. Why did you refer to the demonstrators as representing a "Silent Majority"?

The referenced comments are excerpted from a political opinion column that I wrote when I was active in partisan elective politics and campaigns, not since I became a judge. The full column discusses then-current political issues and provides context to the quoted language. I recall that the column pertained to religious liberty, threats, and boycotts of the Chick-Fil-A chain because of political opinions expressed by a company executive, and efforts by others to show support by dining at the restaurants.

- b. Please specify what you were referring to as the "chickenfeed being shoveled by the 20%."

Please see response to question 7.a.

- c. Please specify what you meant by saying that the demonstrations showed “what it looks like when real Americans have had enough.”

Please see response to question 7.a. As reported in the media at the time, crowds of people showed support for the local Chick-Fil-A by showing up to dine in the restaurant.

- d. Why did you refer to opponents of same-sex marriage as “real Americans”?

Please see response to question 7.a. Respectfully, the column, in context, defended those who opposed boycotting a company because of private political views expressed by a company executive, and it expressed support for religious liberty and tolerance of both sides in the debate over marriage equality.

- 8. While serving in the Mississippi House of Representatives, you supported HB 1523, which expressly allowed private companies to discriminate against LGBT individuals.
 - a. Did you make any determination about whether this law would be constitutional before voting for it in the Mississippi legislature? If so, please explain your reasoning.

During the time I served in the Mississippi Legislature, I considered a number of factors when determining how to vote on pending legislation: my constituents’ policy preferences and values; their feedback on a given issue; fiscal and policy impacts of a bill; and, generally, the contours of legislative authority under the state and federal constitutions. I am keenly aware of the different considerations in serving as a legislator, as noted above, and in serving as a judge. The role of a lower court judge is to follow Supreme Court and other binding precedent in deciding cases. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedents applicable to the cases before me.

- b. Did you make any determination about whether this law would be consistent with the Civil Rights Act of 1964? If so, please explain your reasoning.

Please see response to question 8.a. I did not review the Civil Rights Act of 1964 at the time HB 1523 was under consideration in the legislature.

- c. If you did not make either or both of these determinations, please explain why you did not undertake such legal analysis.

Please see response to question 8.a.

- d. Apart from any legal analysis you conducted at the time, please explain your current understanding of when the law permits an individual exercising his or her religious beliefs to interfere with another person’s ability to exercise his or her constitutional rights.

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

9. During the hearing on your district court nomination, you testified that the Obama administration's Department of Justice "signed off" on Mississippi's voter identification law. You testified at the hearing on your Fifth Circuit nomination that this law was implemented "without objection" from the Department of Justice. However, after the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Department of Justice released guidance that stated that it would not make a determination regarding any submissions pursuant to Section 5 of the Voting Rights Act that were pending as of the date of the *Shelby County* decision. The Department of Justice specifically noted that this was not a determination on the merits of any pending change to voting laws.
 - a. Was the Mississippi voter identification change pending before the Department of Justice on June 25, 2013? If so, please explain how the Department of Justice "signed off" on Mississippi's voter identification law.

I cannot recall whether Mississippi's voter-identification law remained pending before the Department of Justice in June 2013 and am not familiar with the specific guidance released by the Department after *Shelby County*. My understanding that the Department "signed off" on the law comes from numerous public statements made by officials who were materially involved in that process and in the law's implementation. I was generally aware that the Department of Justice interposed no objection to the law and that no litigation was filed to prevent the law from going into effect.

- b. When you testified that Mississippi's voter identification law was implemented "without objection" from the Department of Justice, did you know that in fact the Department of Justice did not make any determination on the merits of the requested preclearance?

Please see response to question 9.a.

- c. Did you change your testimony regarding the preclearance of Mississippi's voter identification law because you recognized that the testimony you gave at the hearing on your district court nomination was erroneous? If so, please describe when and how you learned this testimony was erroneous and what, if any, other efforts you made to correct your testimony.

Please see response to question 9.a. Respectfully, I intended to state the same fact in both my January 8, 2020 testimony and May 20, 2020 testimony regarding the implementation of Mississippi's voter-identification law, namely that the Obama Administration's Justice Department interposed no objection and took no legal action to stop implementation of the law, such that the law went into effect.

- d. After the *Shelby County* decision, did Mississippi solicit or receive further input from the Department of Justice about whether this law would have a disproportionate impact on minorities?

I am not aware of whether Mississippi solicited or received further input from the Department of Justice after the *Shelby County* decision, or once the voter-identification law went into effect.

10. You suggested in your testimony that your previously stated views on voter identification laws were informed by your personal experience with election contest cases. Your questionnaire response describes two such cases, and, as to both, you stated that they included “examples of illegal voting and other material departures from the requirements of Mississippi election law.”
 - a. Please provide more details about the “examples of illegal voting and material departures from the requirements of Mississippi election law” in these cases. Which requirements were violated?

In my private practice, I handled a number of election contest matters, including two cases that were tried to verdict in 2013, *Rosamond v. Brown* and *Ware v. Dupree*. *Rosamond* involved a Democratic primary election for alderman in Canton, Mississippi. The proof at trial showed, among other violations of Mississippi’s election code, flagrant intimidation of two African-American poll workers by a member of the local Democratic executive committee, voting by people not listed on the poll books, and destruction of voted paper ballots by the same executive committee member. There were also instances of mishandling and miscounting absentee ballots by the executive committee. The court ordered a new election and referred the executive committee member to the District Attorney for prosecution.

Ware involved the general election for mayor of Hattiesburg, Mississippi. The proof at trial showed voter fraud that included serious mishandling of hundreds of absentee ballots by election officials, illegal absentee voting in the county jail, impersonation voting (proven by a registered voter who appeared as a witness at trial), promises and intimidation of incarcerated persons in exchange for votes, and serious lapses in ballot security. After the jury initially reached a verdict in favor of our client, the jury deadlocked, and the court ordered a mistrial and a new election because of the violations of the election laws.

- b. Please provide the details of any other examples from your personal experience that informed your views about voter identification laws.

As mentioned, I handled a number of other election matters that informed my views about protecting the integrity of the voting process and improving elections administration. In addition, while serving at the Secretary of State’s Office, I was a precinct observer in a number of precincts around the state in various elections, I met frequently with local election officials, and I worked to improve the voting process, access to polling places, and our election laws.

- c. Were any of these violations matters of “in-person” voter fraud for which voter identification requirements could have prevented the violation? Please explain how, if so. If not, please explain why you suggested in your testimony that they informed your views on voter identification laws.

Please see response to question 10.a.

11. As we discussed at your hearing, the Fourth Circuit struck down changes to North Carolina’s voting laws that the court said “target[ed] African Americans with almost surgical precision.” *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

- a. Do you believe that facially neutral voting restrictions can be unlawful?

Yes. *See McCrory*; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (holding that when confronted with a challenge to a facially neutral voting law, a court must “weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule’”).

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

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United States Judges*, Canons 2, 3(A)(6) and 5.

- c. Do you believe that laws passed with the stated purpose of protecting “voter integrity” can suppress the votes of minorities?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United States Judges*, Canons 2, 3(A)(6) and 5.

12. You wrote with reference to the Affordable Care Act that “[t]he liberal mindset views the checks and balances designed by the Founders, and anyone who still adheres to them, as quaint historical relics.”

- a. Why did you suggest that the “liberal mindset” does not respect checks and balances?

When I wrote the language referenced above, I was active in partisan elective politics and campaigns. Several columns I wrote pertained to the political and legislative process relating to the ACA’s passage and implementation. The columns discussed then-current political issues and provide context as to the issues I debated and discussed. In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. And it would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues. *See Code of Conduct for United States Judges*, Canon 5.

b. Do you repudiate this statement today?

Please see response to question 12.a.

13. In 2012, you wrote with respect to same-sex marriage that you “came to see that ‘tolerance,’ as that term is used by liberals, really means zero tolerance for traditional, religious or conservative views.” You suggested that you came to this view soon after you arrived at Yale Law School in 1992.

a. Why did you suggest that liberals are not tolerant of religious views?

I wrote the language referenced above when I was active in partisan elective politics and campaigns, not since becoming a judge. The referenced column discussed then-current political issues and debates and provides context as to the issues I discussed. In the column, I was urging tolerance of both sides in the ongoing debate about marriage equality. In contrast with my prior roles as an advocate and elected legislator, political issues do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. And it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5.

b. After harboring this view for at least 20 years, do you repudiate this statement today?

Please see response to question 13.a.

14. Prior to the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), you described the passage of the Affordable Care Act as akin to “ramming a freedom-infringing mess down our throats.”

a. Please explain in what ways you viewed the Act as “freedom-infringing.”

When I wrote the language referenced above, I was active in partisan elective politics and campaigns. Several columns I wrote pertained to the political and legislative process relating to the ACA’s passage and implementation. The columns discussed then-current political issues and provide context as to the issues I discussed. In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *NFIB v. Sebelius* is binding Supreme Court precedent and, if confirmed, I will fully and faithfully apply it, along with other applicable Supreme Court precedent and the statutory language of the ACA.

b. In your view, has the Supreme Court resolved the issue of whether the Affordable Care Act constitutes an impermissible infringement on freedom?

NFIB v. Sebelius is binding Supreme Court precedent and, if confirmed, I will fully and faithfully apply it. Otherwise, it would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- c. Is it your view that there could be future challenges to the Affordable Care Act that remain unresolved after *NFIB v. Sebelius*?

It would be inappropriate for me, as a sitting judge and nominee, to comment on political issues or legal issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

15. In 2014, after the Supreme Court's decision in *NFIB v. Sebelius*, you labeled the passage of the Affordable Care Act as "illegitimate" and "perverse." Please explain what you meant by these statements.

The quoted language pertained to the political and legislative process relating to the ACA's passage and the law's subsequent implementation. When I wrote the opinion column referenced above, I was active in partisan elective politics and campaigns. In contrast with my prior roles as a political advocate and elected legislator, political issues do not play any part in deciding cases in my current role as a judge. If confirmed, I will faithfully apply Supreme Court and Fifth Circuit precedent and the statutory language of the ACA.

Nominations
Hearing before the Senate Committee on the Judiciary
May 20, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Judge Cory T. Wilson

1. On June 28, 2012, you published an op-ed in the *Madison County Journal*, entitled, “Obama’s Day of Reckoning.”¹

a. Please admit or deny whether you made the following statements in that op-ed. *This is not a question about whether you maintain these views, but rather, only whether you wrote the following words.*

i. “For the sake of the Constitution, I hope the Court strikes down the law.”

The referenced comments are excerpted from a newspaper column that I wrote when I was active in partisan elective politics and campaigns, not since I became a judge. The full column discusses then-current political issues and provides context to the quoted language. The column pertained to the political and legislative process relating to the Affordable Care Act’s (ACA’s) passage and implementation and issues then pending before the Supreme Court.

ii. “If the individual mandate to buy insurance goes, the rest of Obamacare falls of its own weight The mandate is the glue that (supposedly) holds the ungainly law together.”

Please see response to Question 1.a.i.

b. *The following two questions relate only to what you meant at the time you published the aforementioned op-ed. Neither question asks you to opine or comment on whether the individual mandate is unconstitutional now or whether removing the individual mandate now renders the Affordable Care Act unconstitutional. If your answer is that you wrote this statement as a “commentator” before becoming a judge, then please explain what you meant as a “commentator” before becoming a judge. Please explain—*

i. whether, at the time you wrote, “I hope the Court strikes down the law,” you were referring to the Supreme Court’s forthcoming decision in *NFIB v. Sebelius* and the Affordable Care Act. If not, please explain what you were referring to.

¹ Cory T. Wilson, *Obama’s Day of Reckoning*, MADISON COUNTY JOURNAL (June 28, 2012) [see Senate Judiciary Questionnaire Attachments 12(a) at p. 193].

Please see response to Question 1.a.i. The column refers to the Supreme Court's forthcoming decision in *NFIB v. Sebelius* and the end of the Supreme Court's current term in June 2012.

- ii. **whether, at the time you wrote, “If the individual mandate to buy insurance goes, the rest of Obamacare falls of its own weight The mandate is the glue that (supposedly) holds the ungainly law together,” you were arguing that the individual mandate is not severable from the remainder of the Affordable Care Act. If not, please explain what you were arguing.**

Please see response to Question 1.a.i. The full column discusses then-current political issues and provides context to the quoted language. The quoted language pertained to political and policy issues relating to the ACA's passage, structure, and implementation, and not an analysis of the legal severability of the law's provisions.

At your nomination hearing, you testified, “I view *NFIB v. Sebelius* as settled precedent, and I would follow it as I would all Supreme Court precedent.”

- c. **Please identify on which courts *NFIB v. Sebelius* is binding and on which court(s) it is not.**

NFIB v. Sebelius is Supreme Court precedent, which is binding on all lower courts. If confirmed, as I testified during my confirmation hearing, I will faithfully apply *NFIB*.

- d. **Is *NFIB v. Sebelius* binding on the specific issue of whether the individual mandate is severable from any part or the entire remainder of the Affordable Care Act? *This question is not asking you to opine or comment on whether the individual mandate is severable from any part or the entire remainder of the Affordable Care Act, but rather what “Supreme Court precedent,” as you testified at your nomination hearing, says on this specific issue under existing precedent.***

- i. **If so, in what way is *NFIB v. Sebelius* binding on the specific issue of whether the individual mandate is severable from any part or the entire remainder of the Affordable Care Act?**

Please see response to Question 1.c. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on issues that may come before the Court or on pending or impending litigation. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- ii. **If not, how do you reconcile your testimony that you “view *NFIB v. Sebelius* as settled precedent” and that you “would follow it” with the fact that *NFIB v. Sebelius* is not binding on the specific issue of whether the individual mandate is severable from any part or the entire remainder of the Affordable Care Act?**

Please see response to Question 1.d.i.

At your nomination hearing, you also testified, with respect to statements you had made before becoming a judge, “I think many of the questions I debated and discussed . . . were unsettled questions at that time. Mostly, politically unsettled. But as soon as the Supreme Court handed down *NFIB v. Sebelius* . . . those issues are settled for courts to apply that precedent faithfully and I would do so.” At another point in your testimony, you said that your “commentary” on the Affordable Care Act “was more about the policies, the way the Affordable Care Act was enacted, and other aspects of that law back when those were . . . live items for debate before, largely, the Supreme Court settled the legal issues in *Sebelius*.”

- e. Please identify the “unsettled questions” that you “debated and discussed . . . at that time,” distinguishing between “politically unsettled” questions from other unsettled questions.

When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. Several columns I wrote pertained to the political and legislative process relating to the ACA’s passage and implementation. The columns discussed then-current political issues and provide context as to the issues I debated and discussed. In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. I will faithfully apply *NFIB v. Sebelius*, other applicable Supreme Court precedent, and the statutory language of the ACA. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- f. Please identify which “live items” and “legal issues” the Supreme Court “largely . . . settled” in *NFIB v. Sebelius* and which, if any, it did not, including—

- i. whether the individual mandate was constitutional.

In *NFIB v. Sebelius*, 567 U.S. 519, 575, 132 S. Ct. 2566, 2601 (2012), the Supreme Court stated that “[t]he Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.”

- ii. whether the individual mandate was severable from the Affordable Care Act.

The majority in *NFIB* did not address the severability of the individual mandate.

- A. In addition, please describe the doctrine of severability under existing Supreme Court precedent notwithstanding the Supreme Court’s

forthcoming decision in *Barr v. American Association of Political Consultants, Inc.*, No. 19-631 (oral argument May 6, 2020), including—

- **the standard for determining the severability of an unconstitutional provision in a federal statute.**

The Supreme Court discussed the standard for severability in *NFIB*:

The Court has applied a two-part guide as the framework for severability analysis. The test has been deemed “well established.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. *See id.*, at 685, 107 S.Ct. 1476. . . . Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. [citing authority].

NFIB v. Sebelius, 567 U.S. 519, 692–94, 132 S. Ct. 2566, 2668–69 (2012).

- **the standard for determining whether the statute, absent the unconstitutional provision, will function in a manner consistent with Congress’s intent.**

Please see the above response.

- B. Since *NFIB v. Sebelius*, has any court ruled that (i) the individual mandate is unconstitutional and/or (ii) that the individual mandate is not severable from the Affordable Care Act? If so, please identify the case(s) and the court(s). *This question is not asking you to opine or comment on whether those cases were correctly or incorrectly decided, but only to identify whether any court has made such rulings notwithstanding the Supreme Court’s decision in NFIB v. Sebelius.***

I have not comprehensively researched jurisdictions for potentially responsive cases, but in *Texas v. United States*, the Fifth Circuit held that:

In *NFIB*, the individual mandate—most naturally read as a command to purchase insurance—was saved from unconstitutionality because it could be read together with the shared responsibility payment as an option to purchase insurance or pay a tax. It could be read this way because the shared responsibility payment produced revenue. It no longer does so. Therefore, the most straightforward reading applies: the mandate is a command. Using that meaning, the individual mandate is unconstitutional.

Texas v. United States, 945 F.3d 355, 393 (5th Cir. 2019), *as revised* (Dec. 20, 2019), *as revised* (Jan. 9, 2020), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020), and *cert. granted sub nom. Texas v. California*, 140 S. Ct. 1262 (2020).

At your nomination hearing, you were asked about op-eds you had published and comments you had made on the Affordable Care Act, including the aforementioned statements you wrote in *Obama’s Day of Reckoning*, prior to becoming a judge. You testified, “When I wrote those columns . . . I was in the policy-making realm or political realm.” You also testified, “Mainly, I was writing about the political questions and policy issues related to the Affordable Care Act.”

g. Please explain—

- i. whether the constitutionality of the individual mandate is a “political question” or “policy issue.” Why or why not?**

Several columns I wrote pertained to the political and legislative process relating to the ACA’s passage and implementation. The columns discussed then-current political issues and provide context as to the issues I debated and discussed. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- ii. whether the doctrine of severability is a “political question” or “policy issue.” Why or why not?**

Please see response to Question 1.g.i.

- h. At your nomination hearing, I asked whether you continue to believe the Affordable Care Act was bad policy. You testified, “My beliefs at the moment have no part in serving as a judge and I have not expressed that belief since becoming a judge.” Is it your testimony that, in the “policy-making realm” before “becoming a judge,” you believed that the Affordable Care Act was, in fact, bad policy?**

- i. If so, please explain those beliefs.**

During my hearing, I noted that when I was active in partisan elective politics, increased access to healthcare was an issue I felt was important. I also noted that during that time, people of good faith who agreed that healthcare was an important policy issue could nonetheless disagree about aspects of the ACA. In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. As a judge, I will faithfully apply *NFIB v. Sebelius*, other applicable Supreme Court precedent, and the statutory language of the ACA. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment

on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- ii. **If not, please explain what you meant by “I have not expressed that belief since becoming a judge.”**

Please see response to Question 1.h.i.

- 2. **In March 2020, the Supreme Court granted certiorari in *California v. Texas*, on appeal from the Fifth Circuit Court of Appeals—the court to which you have been nominated. During the October 2020 term, the Supreme Court will consider, in part, whether the Affordable Care Act’s individual mandate is unconstitutional and whether it is severable from the rest of the Affordable Care Act.²**

The Trump Administration has long maintained that individual mandate is unconstitutional, and, since May 2019, has argued that, “[u]nder severability principles, in the absence of the mandate, Congress would not have intended to retain . . . the rest of the [Affordable Care Act], which involves numerous other interdependent provisions . . . designed to work together to expand health-insurance coverage and to shift healthcare costs.”³ Accordingly, the Trump Administration contends that the Affordable Care Act must be struck down in its entirety. Just two weeks before your nomination hearing, President Trump himself said as much, promising, “We want to terminate health care under [the Affordable Care Act].”⁴

- a. **At any point (1) prior to your nomination to the District Court for the Southern District of Mississippi, (2) between your nomination to the District Court for the Southern District of Mississippi and your nomination to the Court of Appeals for the Fifth Circuit, and (3) since your nomination to the Court of Appeals for the Fifth Circuit—**

- i. **have you spoken with any person in the Trump Administration, including the White House and the Department of Justice, regarding the Administration’s arguments, position, or strategy in *California v. Texas*? If so—**

No.

- A. **please list with whom you spoke.**

Please see response to Question 2.a.i.

- B. **please explain the capacity in which you spoke with them.**

² *See generally California v. Texas*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/california-v-texas/>.

³ Brief for the Federal Defendants, at 18, *Texas v. California*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011).

⁴ Devlin Barrett, *Trump Vows Complete End of Obamacare Law Despite Pandemic*, WASH. POST (May 6, 2020), https://www.washingtonpost.com/world/national-security/trump-obamacare-supreme-court/2020/05/06/4a53ba54-8fe1-11ea-9e23-6914ee410a5f_story.html.

Please see response to Question 2.a.i.

C. please provide a summary of what you spoke about.

Please see response to Question 2.a.i.

- ii. **have you made any assurances or been asked to make any assurances by the Trump Administration, including the White House and the Department of Justice, about how you would rule on *California v. Texas*, if you are confirmed, should the Supreme Court remand any part or all of the case to the Fifth Circuit?**

No.

- b. **At any point (1) prior to your nomination to the District Court for the Southern District of Mississippi, (2) between your nomination to the District Court for the Southern District of Mississippi and your nomination to the Court of Appeals for the Fifth Circuit, and (3) since your nomination to the Court of Appeals for the Fifth Circuit—**

- i. **have you spoken with any Senator or staffer regarding the Trump Administration's arguments, position, or strategy in *California v. Texas*? If so—**

No.

A. please list with whom you spoke.

Please see response to Question 2.b.i.

B. please explain the capacity in which you spoke with them.

Please see response to Question 2.b.i.

C. please provide a summary of what you spoke about.

Please see response to Question 2.b.i.

- ii. **have you made any assurances or been asked to make any assurances by any Senator or staffer about how you would rule on *California v. Texas*, if you are confirmed, should the Supreme Court remand any part or all of the case to the Fifth Circuit?**

No.

c. **At any point (1) prior to your nomination to the District Court for the Southern District of Mississippi, (2) between your nomination to the District Court for the Southern District of Mississippi and your nomination to the Court of Appeals for the Fifth Circuit, and (3) since your nomination to the Court of Appeals for the Fifth Circuit—**

i. **have you spoken with any party or party representative challenging the constitutionality of the individual mandate or the Affordable Care Act in *California v. Texas*? If so—**

No.

A. **please list with whom you spoke.**

Please see response to Question 2.c.i.

B. **please explain the capacity in which you spoke with them.**

Please see response to Question 2.c.i.

C. **please provide a summary of what you spoke about.**

Please see response to Question 2.c.i.

ii. **have you made any assurances or been asked to make any assurances by any party or party representative challenging the constitutionality of the Affordable Care Act about how you would rule on *California v. Texas*, if you are confirmed, should the Supreme Court remand any part or all of the case to the Fifth Circuit?**

No.

3. **You provided the Committee with notes from remarks you made at a Winona Rotary Club Meeting on October 2, 2009.⁵ In those notes, you wrote, “Our voting system will never be perfect, but we have several areas of concern.” You then outlined the following concerns: “[b]loated voter rolls have the potential for voter fraud,” “failure to provide security for . . . ballot boxes,” “illegally completing absentee ballots” and “[a]bsentee ballot fraud,” and “[a]ssistance voting.”**

a. **Were the “areas of concern” you outlined in the aforementioned notes your only concerns about “[o]ur voting system”? If not, why did you choose to speak to only these “areas of concern”? *These questions relate to only what you included in your notes at the time you wrote them, not whether you still have these concerns today.***

⁵ Cory T. Wilson, Speech at Winona Rotary Club (Oct. 2, 2009) [see Senate Judiciary Questionnaire Attachments 12(d) at pp. 977-81].

When I spoke to the Winona Rotary Club in October 2009, I was serving as Deputy Secretary of State. I do not recall the exact remarks I gave, and I used the speaking notes as a general outline of my remarks. The speaking notes touched on current events related to, among other things, the Secretary of State's role as Mississippi's chief elections officer and were not intended to be a comprehensive list of topics. To the best of my recollection, the speaking notes included then-current policy priorities of the Mississippi Secretary of State's Office.

Your notes notably fail to address other longstanding and well-documented concerns about “[o]ur voting system,” including voter registration problems, voter purges, voter intimidation and harassment, voter discrimination, poll closures and long lines, malfunctioning voting equipment, and voter health and safety, among many others.

b. Did you consider these to be “areas of concern” as well? Please explain why or why not. *This question relates only to what you considered to be an “area[] of concern” at the time you made these notes, not whether you consider them to “areas of concern” today.*

During my time serving in the Secretary of State's Office, I spoke a number of times to civic groups and frequently met with local elections officials as part of the office's efforts to improve our voting system statewide and to expand voters' access to the voting process, while also ensuring the integrity of the ballot. The issues I recall discussing included ballot security and accessibility, voter registration, voter roll maintenance, polling place operations and accessibility, improved poll worker training, and compliance with federal and state elections laws.

c. Do you consider these to be “areas of concern” now? Please explain why or why not.

Please see responses to Questions 3.a. and b. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

In those same notes, you proposed a solution for the “areas of concern” that you did identify in your remarks. You wrote, “We need voter ID so people have confidence in our system.”

d. Please describe the basis, at the time you made this note in 2009, for your solution that “[w]e need voter ID so people have confidence in our system,” including—

i. the facts and data both in support of and against your position that “voter ID” would lead to “people [having] confidence in our system.”

Please see response to Question 3.a. I recall that, at the time, voter ID was a topic of debate in the Mississippi Legislature as well as among many constituents across the state, who strongly supported such a measure. My speaking notes from the time reflected the policy priorities of the Secretary of State's Office as well as significant experience in observing

the elections process statewide and feedback from constituents with concerns about the integrity of the elections process.

ii. the principles and methods by which you came to the conclusion that “[w]e need voter ID so people have confidence in our system.”

Please see response to Question 3.d.i. In *Crawford v. Marion Cty. Election Bd.*, the Supreme Court set forth the following principles, of which I was aware when I gave the referenced speech:

There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear. . . . [P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”

Crawford, 553 U.S. 181, 196–97, 128 S. Ct. 1610, 1619–20 (2008).

At your nomination hearing, you were asked whether you acknowledge that voter identification laws can result in voter suppression. You testified, “I don’t want to prejudge an issue that may come before the court.”

e. At the time you made the note that “[w]e need voter ID,” were you aware that voter identification laws have been shown to disproportionately impact low-income Americans, racial and ethnic minorities and communities of color, the elderly, and people with disabilities? If so, please explain whether you considered the disproportionate impact of voter identification laws when you made the note “[w]e need voter ID so people have confidence in our system.” *This question does not ask you to “prejudge” any issue “that may come before the court.” This question is only asking you whether you were aware that voter identification laws have been shown to disproportionately impact these populations in 2009 when you noted, “We need voter ID so people have confidence in our system.”*

Please see response to Question 3.d.i. As I noted in testimony before the Committee, Mississippi’s voter ID law includes safeguards to ensure that all voters have access both to acceptable identification as defined in the statute, at no cost, as well as to the voting process. It is my recollection that those safeguards were part of the proposed voter ID measures that were being debated at the time I spoke on the issue in 2009.

Questions for the Record for Cory T. Wilson
From Senator Mazie K. Hirono

1. At your hearing as a district court nominee only a few months ago, I asked you about your extremely partisan statements. For example, in 2016, you tweeted “#CrookedHillary & Co. = embodiment of corruption.” In 2013, you wrote: “Republicans are the adults in the room; Obama & Co. are increasing shrill, dishonest and intellectually bankrupt.”

You agreed these statements would not be “appropriate for a judge.” Yet, when I pointed out that you are currently a sitting state court judge and you have kept your partisan tweets online, you responded that you are “an elected official as well, and so, that’s the reason I’ve kept it up.”

How is the requirement for impartiality in your role as a sitting state court judge different from the requirement for impartiality as a federal judge that supports your reason for maintaining your highly partisan and demeaning tweets online?

I share your view of the importance of a fair and impartial judiciary, whether as a state court judge or, if confirmed, as a federal judge. In Mississippi, state court judges are elected officials, so upon my appointment, I maintained my social media accounts. The quoted statements and tweets were published when I was active in partisan elective politics and when I was serving as an elected member of the Mississippi House of Representatives, not since I began serving as a judge. Leading up to taking the bench on the Mississippi Court of Appeals, I reviewed the Code of Judicial Conduct and other available guidance pertaining to the transition from legislative service and law practice to the bench. Related to social media, I also discussed permissible use of social media accounts with sitting judges and researched guidance from various jurisdictions to ensure compliance with ethical obligations. I have also more recently discussed the issue with the head of our state judicial college, who is a former legislator, trial judge, and Mississippi Supreme Court justice. I did not find authority requiring incoming judges to “unpublish” or retract past public statements made before becoming a judge. Based on my research, and compliance with the Canons since becoming a judge, including refraining from any political activity that would be inappropriate, I am satisfied that a reasonable person knowing all the circumstances would have no ground for questioning my impartiality or conduct as a judge.

2. You have previously called the passage of the Affordable Care Act “perverse” and “illegitimate.” You have said that you “hope the [Supreme] Court strikes down the law.” The ACA provided health care coverage to tens of millions of Americans, including those with pre-existing conditions. When asked about these statements and other controversial statements at your recent district court nomination hearing, you said you were merely “commenting on policy issues of the day” as an “advocate” and that “those policy debates are behind me now as a judge.”
 - a. When previously asked about your statements attacking the Affordable Care Act, you said you were only commenting on policy issues. But your statement that you hope the Supreme Court strikes down the ACA was about a legal issue. Were you making a legal judgment that you thought the ACA was invalid or were you hoping the Court would act regardless of the law?

When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. Several columns I wrote pertained to the political and legislative process relating to the Affordable Care Act's (ACA's) passage and implementation. The columns discussed then-current political issues and provide context. One referenced column refers to the Supreme Court's forthcoming decision in *NFIB v. Sebelius*, and the end of the Supreme Court's current term in June 2012. In contrast with my prior roles as an "advocate" and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. The Supreme Court has since resolved those questions and, as a result, *NFIB v. Sebelius*, like other applicable Supreme Court precedent, is binding on lower courts. If confirmed, I will faithfully apply *NFIB*, all other applicable precedent, and the statutory language of the ACA.

- b. At the hearing, I asked if, given your statements attacking the Affordable Care Act, you would recuse yourself if you were confirmed as a Fifth Circuit judge and the challenge to the ACA that is now before the Supreme Court came back to the Fifth Circuit. You would not to commit to recusing yourself and merely stated that you would apply the federal recusal statute. Under 28 U.S.C. 455, a judge must recuse "himself in any proceeding in which his impartiality might reasonably be questioned." Would you agree your impartiality might be reasonably questioned if a case before you requires you to decide the constitutionality of a law whose passage you called "perverse" and "illegitimate" and you explicitly hoped the Supreme Court would strike down?

If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) would require recusal. For other cases, I will carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.

3. You have repeatedly argued in favor of voter ID laws, dismissing concerns that they disenfranchise large numbers of voters as "[p]oppyclock." At your district court nomination hearing, you were asked about a study showing how extremely rare voter fraud is. Specifically, a recent study found that between 2000 and 2014, there were only 31 credible

allegations of voter impersonation – the type of fraud that photo IDs could prevent – during a period of time in which more than 1 billion ballots were cast. In response, you just pointed to a few anecdotal cases. When asked “Can a Voter ID law ever result in voter suppression in your view?”, you responded: “I don’t want to comment on policy discussions or debate as a sitting judge.”

- a. When I asked you why, as a sitting judge, you kept your partisan tweets online, you claimed it was because you were also an “elected official.” But when asked about your statements on voter ID laws, you claimed you couldn’t talk about such “policy discussions” because you are a sitting judge. Which provisions of the judicial code of conduct allows you to maintain partisan statements online but prohibit you from answering our questions about voter ID laws?

Please see my response to question 1. Beyond discussing my past personal experience, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. How is merely acknowledging that a voter ID law could result in voter suppression a question of “policy” rather than fact? In your view, is there a credible argument that voter ID laws cannot result in voter suppression?

Beyond discussing my past personal experience, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- c. Studies have shown that minority voters are disproportionately less likely to own government-issued IDs. For example, one study found that up to 25% of African-American voting age citizens lack government-issued photo ID, compared to only 8% of white voting age citizens. By contrast, evidence of in-person voter fraud is extremely rare – as the study above found, 31 cases among more than one million ballots cast. Is it your view that the minute risk of in-person voter fraud justifies a voter ID law that risks disenfranchising thousands of people who are disproportionately minorities?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

4. As a private lawyer, you defended companies against tort claims. As a state politician, you voted for a bill that would prohibit the state Attorney General’s office from suing private businesses for taking actions allowed by state or federal regulations.
 - a. In your view, who is in the best position to bear the risks of liability for injuries or harms caused by businesses – the businesses themselves or workers and consumers?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. In your view, are actions taken by businesses always safe for consumers and workers so long as their actions are not directly prohibited by a regulation or law?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

5. In November 2018, you tweeted about how you reminded a Republican women’s group “how imp[ortant] it is to work for victory on Nov 27 for Senator [Hyde-Smith] and conservative judicial candidates!”

- a. Why do you think it is important to “work for victory” to ensure conservative judicial candidates become judges?

When I wrote the statement referenced above, I was active in partisan elective politics and campaigns, and I was serving in the Mississippi Legislature. The comments pertained to particular campaigns and candidates on the ballot at the time. Now that I am a sitting judge and a nominee, it would be inappropriate to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5.

- b. You said you consider yourself an “elected official” as a sitting state court judge. Do you consider yourself a ‘conservative’ judicial candidate or judge? If so, how does that make you different from other Mississippi judges you serve with?

I believe that the role of a judge is to decide cases fairly and impartially, faithfully applying statutes as written and following precedent, while exercising judicial restraint in reaching only those issues necessary for deciding a particular case. State court judges in Mississippi are popularly elected in nonpartisan elections. I am not currently a judicial candidate, as the next judicial election for District 3, Position 2 on the Mississippi Court of Appeals occurs in November 2022.

6. At your hearing, I asked you about your application for the endorsement of Mississippi Right to Life in 2007. In their state candidate questionnaire, you indicated that you support “complete and immediate reversal of the *Roe v. Wade*” decision. When you became a state legislator, you described yourself as “strongly pro-life,” and voted for several bills severely restricting abortion rights. One of the bills you voted for was a ban on abortions when a fetal heartbeat is detected. A fetal heartbeat can be detected as early as six weeks of pregnancy—before many women even know they are pregnant. These “heartbeat bills” have been struck down by several courts for being clearly unconstitutional under *Roe v. Wade* and subsequent Supreme Court cases.

- a. As a state legislator, did you vote for any bills that you thought were unconstitutional on their face?

During the time I served in the Mississippi Legislature, I considered a number of factors when determining how to vote on pending legislation: my constituents’ policy preferences and values; their feedback on a given issue; fiscal and policy impacts of a bill; and, generally, the contours of legislative authority under the state and federal constitutions. I am keenly aware of the different considerations in serving as a legislator, as noted above, and in serving as a judge. The role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will faithfully apply *Roe*

and all other Supreme Court precedent applying *Roe*.

- b. Pregnancy can usually be detected after four weeks of pregnancy. Is it your view that restricting abortions to only two weeks – between weeks four and six of pregnancy – is constitutional under *Roe v. Wade*?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.*

- c. At your hearing, you said you would “apply precedent fairly and fully.” Is it your view that the *Roe v. Wade* line of cases are ambiguous about whether banning abortions as early as at six weeks of pregnancy is permissible?

It would be inappropriate for me, as a sitting judge and a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.*

7. In your Mississippi Right to Life state candidate questionnaire, you were asked, “[u]nder what circumstances, if any, do you believe that abortion should be legal.” Your options were to select that you believed abortion should be legal “[o]nly to prevent the death of the mother” or “[t]o prevent the mother’s death, in cases of incest, and in reported cases of forcible rape.” You selected neither option and you did not indicate you had another view.

Is it your view that there are no circumstances in which abortion should be legal?

When I was active in partisan politics, including the time that I served in the legislative branch of government, it was appropriate for me to take positions on policy issues and to represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of voters) play any part in deciding cases. And it would not be appropriate for me, as a sitting judge and a nominee, to comment on political issues or legal issues that may be the subject of pending or impending litigation. The role of a lower court judge is to follow Supreme Court precedent in deciding cases. *Roe v. Wade* and its related progeny are binding Supreme Court precedent. If confirmed, I will faithfully apply *Roe* and all other Supreme Court and Fifth Circuit precedent applying *Roe*.

8. In 2016, you voted for a bill that allowed public and private businesses to legally refuse service to LGBTQ people based on the owner’s religious belief. When asked about this at your recent district court nomination hearing, you stated that the “driving factor” for your vote was “religious liberty.” When a district court blocked the law, it said the following about the law: “[u]nder the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity.”

In your view, can religious liberty ever be used as a pretext for sanctioning discrimination?

During my time in the Legislature, I was aware of the District Court’s decision in *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016). I was also aware that the Fifth Circuit reversed the District Court’s injunctive relief and dismissed the case for lack of jurisdiction based on the holding that “the plaintiffs ha[d] not shown an injury-in-fact caused by HB 1523 that would empower the district court or this court to rule on its constitutionality.” 860 F.3d 345, 358 (5th

Cir. 2017), *cert. denied sub nom. Campaign for S. Equal. v. Bryant*, 138 S. Ct. 671 (2018). As a sitting judge and a judicial nominee, it would be inappropriate to express agreement or disagreement with the quoted opinion or to comment on issues that could be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5. However, if confirmed, I will faithfully follow Supreme Court precedent applicable to cases involving allegations of discrimination.

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

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

It is the fundamental duty of a judicial officer to treat every litigant equally and with dignity, respect, and fairness. As a sitting judge and if confirmed to the Fifth Circuit, I will faithfully adhere to the judicial oath of office and maintain the impartiality of the judiciary.

- b. Have you ever taken such training?

Please see response to question 9.a. I have had judicial training, at least tangentially, related to implicit bias. When in the House of Representatives, we also had annual training on preventing harassment and fostering workplace sensitivity.

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

Please see my responses to questions 9.a. and 9.b. Judges are bound to decide cases impartially and fairly, without bias or prejudice. As a sitting judge, and if confirmed to the Fifth Circuit, I commit to faithfully adhering to the judicial oath of office and to maintaining the impartiality of the judiciary.

Nomination of Cory T. Wilson
United States Court of Appeals for the Fifth Circuit
Questions for the Record
Submitted May 27, 2020

QUESTIONS FROM SENATOR BOOKER

1. The COVID-19 pandemic has threatened Americans' lives and livelihoods and disrupted our way of life. At the time of your hearing, the death toll in the United States from COVID-19 had surpassed 90,000. Since then, it has topped 100,000 and continues to climb. But instead of holding a hearing on any of the many urgent problems relating to this pandemic, this Committee held a hearing last week on your nomination to the Fifth Circuit.
 - a. Do you think it was appropriate for the Committee to hold a hearing on your nomination last week?

It is inappropriate for a sitting judge to comment on political issues, including the procedures of the United States Senate and the Senate Judiciary Committee. *See* Code of Conduct for United States Judges, Canon 5.

- b. Did you indicate any objection or concern to anyone in the Administration or on the majority side of the Committee about the scheduling of your confirmation hearing?

No. Please see response to Question 1.a.

2. Since the Supreme Court's 2013 decision in *Shelby County v. Holder*,¹ states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.² 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.³

You have made no secret of what you think of voter ID laws. When you were the chief of staff to Mississippi's Secretary of State from 2008 to 2011, you were an outspoken advocate for stringent voter ID laws. In a 2011 newspaper column, you wrote that concerns that voter ID laws could lead to voter suppression were "poppycock, unless you count the dead vote."⁴ In a 2012 column, you reiterated that any such concerns were "as phony as the 'war on women.'"⁵ And in a 2013 column, you described voter ID laws as "neutral," and you criticized the Obama Administration's scrutiny of these laws as "tyranny."⁶

¹ 570 U.S. 529 (2013).

² *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

³ *Id.*

⁴ Cory Wilson, *Desperate Times, Desperate Measures*, MADISON CTY. J., Oct. 20, 2011, at A4, in SJQ Attachments

to Question 12(a), at 258.

⁵ Cory Wilson, *Supressing [sic] Common Sense*, MADISON CTY. J., Nov. 1, 2012, at A4, in SJQ Attachments to Question 12(a), at 164.

⁶ Cory Wilson, *Voter ID, DOJ, and the IRS's Presidential Enemies List*, PRESS-REGISTER (Mobile, Ala.), June 9, 2013, in SJQ Attachments to Question 12(a), at 118.

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

It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. What did you mean when you said that voter ID laws were “neutral” and opposition to them was “tyranny”?

When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. The columns discussed then-current political issues and provide context as to the issues discussed. I also discussed personal experience in elections administration. At the time, I recall that voter ID was a topic of debate in the Mississippi Legislature as well as among many constituents across the state, who strongly supported such a measure. Mississippi’s current voter ID law was placed on the ballot by citizen initiative in 2011, and the measure was approved by over 60% of voters. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- c. Are you aware of evidence showing that restrictive voter ID laws can suppress the vote in poor and minority communities?

In testimony before the Committee, I discussed personal experience in elections administration and in legislative service, including the passage of Mississippi’s voter ID law by citizen ballot initiative. Mississippi’s law, as I understand it, was based on the Indiana law upheld by the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). Mississippi’s law includes provisions for any voter without identification to obtain an ID at no cost, and it also includes provisions to allow voters without an ID on Election Day to present identification thereafter and have their votes counted. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- d. Do you believe that in-person voter fraud is a widespread problem in American elections? Please submit to this Committee the studies, research, and evidence you rely on, if any, to support your claims.

In testimony before the Committee, I discussed personal experience in litigating election contests. Those trials involved proof of in-person voter fraud and other serious irregularities that affected the outcome of the elections at issue. From my experience in elections administration and in legislative service, I am also aware of several successful prosecutions for voter fraud in Mississippi elections. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- e. If you are confirmed, why should a litigant challenging a voter ID law expect you to be a fair and impartial judge, in light of your record on this issue?

In contrast with my prior roles as an advocate in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. I will faithfully apply Supreme Court precedent in voting rights cases and all others. Any party coming before the Court can also have confidence, based on my continuing record as a judge on the Mississippi Court of Appeals, that I would rule fairly and impartially. I take the judicial oath seriously, and since taking the bench, I have been committed to treating every litigant before the Court with equal dignity and respect. If confirmed, I will continue those practices and remain faithful to my oath as a circuit court judge.

- f. Given your record on this issue, would you recuse yourself from any cases involving voter ID laws?

If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) would require recusal. For other cases, I would carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.

3. In describing your advocacy for stringent voter ID laws during your time in the Mississippi Secretary of State's office, you wrote, "The only votes we were interested in 'suppressing' were the illegal ones."⁷

- a. Do you still believe, as you wrote in that 2012 column, that the only votes suppressed by voter ID laws are "illegal" votes?

Please see response to Question 2.b.

- b. A study by the Brennan Center found that as many as 11 percent of U.S. citizens who are otherwise eligible to vote do not have a valid and up-to-date government-issued photo ID.⁸ Are their votes "illegal," in your view?

It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

4. You are seeking to become a judge on the Fifth Circuit, a court that is supposed to serve as one of the last lines of defense for the voting rights of minority voters in the Deep South.

- a. Given your extensive record of advocating for restrictive measures like voter ID laws, why should you be entrusted with that responsibility?

Please see response to Question 2.e.

- b. In many of your newspaper columns, you expressed deep skepticism about claims of voter suppression. Please provide an example of a recent voter suppression case in the Fifth Circuit—since the Supreme Court decided *Shelby County* in 2013—and explain why, in your view, the claims of voter suppression there were wrong. (If you

⁷ Cory Wilson, *Supressing* [sic] *Common Sense*, MADISON CTY. J., Nov. 1, 2012, at A4, in SJQ Attachments to Question 12(a), at 164.

⁸ BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3* (Nov. 2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

are unable to provide an example from the Fifth Circuit, please explain why, and you may provide an example from another circuit instead.)

It would be inappropriate for a sitting judge, or a nominee, to comment on issues that may come before the Court or on pending litigation. *See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.*

5. In a 2012 column, you disparaged concerns about restrictions on early voting. My colleague and friend Dick Durbin had just held a hearing on the emergence of restrictive voting laws in the South, including voter ID laws. You wrote, “What are the outrages for which Durbin is spending your money to stage show hearings? Florida’s voter law reduces the number of days for early voting from 14 to eight, restricts the ability of voters to change their addresses at the polls, and imposes tough new guidelines for voter-registration drives and penalties for those who violate them. Oh, the outrage.”⁹

- a. What is your understanding of why states have provided for early voting, and why early voting is important? Please explain how your answer is consistent with what you wrote in 2012.

When I wrote the opinion column referenced above, I was active in partisan elective politics and campaigns. The column discussed then-current political issues and provides context as to the issues discussed. I also discussed personal experience in elections administration. When I later served in the Mississippi Legislature, I supported legislation to establish no-excuse early voting in Mississippi and handled a couple such bills on the House floor. At the time of both my 2012 column and my legislative service, I recall that enhancing voters’ access to the voting process, modernizing our state’s election laws, and protecting the integrity of the voting process were topics of political debate. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.*

- b. Can you explain why restrictions on early voting can be problematic?

It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.*

- c. Given the new barriers to voting created by the COVID-19 pandemic, do you think expansion of early voting (and voting my mail, for that matter) would be appropriate? Under these conditions, would it be problematic for a state to restrict early voting?

What if any justification can you offer, in the face of a global pandemic, for restrictions on early voting?

It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See Code of Conduct for United*

States Judges, Canons 2, 3(A)(6) and 5.

6. In a 2012 column, you wrote that “gay marriage is a pander to liberal interest groups.”¹⁰

In *Obergefell v. Hodges*, the landmark Supreme Court decision that recognized same-sex couples’ right to marry, Justice Kennedy’s opinion for the Court said the following of these couples: “It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law.”¹¹

- a. Why is the desire of same-sex couples for equal dignity under the law “a pander to liberal interest groups,” in your view?

The referenced comments are excerpted from newspaper commentary that I wrote when I was active in partisan elective politics and campaigns. The column discussed then-current political issues and provides context as to the issues discussed. Respectfully, the quoted language refers to the shifting political positions of candidates during the 2012 campaign season, not the desire of same-sex couples to marry. In the column, I was urging tolerance of both sides in the debate about marriage equality. In contrast with my prior roles as “advocate,” candidate, and elected legislator, political issues play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *Obergefell v. Hodges*, decided after I wrote the referenced column, is settled law and binding precedent of the Supreme Court that I will faithfully apply.

- b. Given your position on this issue, why should a same-sex couple or an LGBTQ person in your courtroom expect you to be a fair and impartial judge in their case?

Please see response to Question 6.a. *Obergefell* is settled and binding Supreme Court precedent. If confirmed, I will faithfully apply it as a lower court judge. I take the judicial oath seriously, and since taking the bench, I have been committed to treating every litigant before the Court with equal dignity and respect and giving each litigant a fair hearing based on the rule of law. If confirmed, I will continue those practices in every case.

7. In 2015, you completed a National Rifle Association (NRA) questionnaire and proclaimed your support for many NRA-endorsed positions. You flatly opposed new gun safety

⁹ Cory Wilson, *Supressing [sic] the Truth*, MADISON CTY. J., Feb. 2, 2012, at 4, in SJQ Attachments to Question 12(a), at 237.

¹⁰ Cory Wilson, *When Tolerance Is Really ‘Zero Tolerance,’* PRESS-REGISTER (Mobile, Ala.), June 1, 2012, in SJQ Attachments to Question 12(a), at 200.

¹¹ 576 U.S. 644 (2015).

measures of any kind. You uniformly opposed commonsense legislation to reduce gun violence, including an assault weapons ban, universal background checks, and firearm licensing.¹²

- a. If you're confirmed, why should a litigant defending a gun safety measure expect you to be a fair and impartial judge, in light of your record on this issue?

I believe that the role of a judge is to decide cases fairly and impartially, based on applicable statutes and precedent – to do justice without respect to persons. I also am keenly aware of the differences between being an advocate or a legislator and serving as a judge. When I was active in partisan politics, including the time that I served in the legislative branch of government, it was appropriate for me to take positions on policy issues and represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of voters) play any part in deciding cases. I take the judicial oath seriously, and, since taking the bench, I have been committed to treating every litigant before the court with equal dignity and respect and giving each litigant a fair hearing based on the rule of law. If confirmed, I will continue those practices and remain faithful to my oath as an appellate judge.

- b. Given the positions you have taken on Second Amendment rights, would you recuse yourself from any cases involving the Second Amendment if you are confirmed?

If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) would require recusal. For other cases, I will carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.

8. In a 2007 candidate questionnaire for Mississippi Right to Life, you indicated that you supported “the complete and immediate reversal of the *Roe v. Wade* and *Doe v. Bolton* decisions.”

- a. Given your unambiguously staked out position on this issue, would you recuse yourself from any cases involving the application of *Roe v. Wade*¹³ and other cases that have arisen from it?

I believe that the role of a judge is to decide cases fairly and impartially, based on applicable statutes and precedent – to do justice without respect to persons. *Roe v. Wade* and its progeny are binding Supreme Court precedent, which I will apply faithfully. When I was active in partisan politics, including the time that I served in the legislative branch of government, it was appropriate for me to take positions on policy issues and represent the preferences of my constituents. In contrast, as a judge, neither past political debates nor my personal views (or those of voters) play any part in deciding cases. If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28

U.S.C. § 455(b)(3) would require recusal. For other cases, I will carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.

- b. If you're confirmed, why should a litigant defending women's reproductive rights expect you to be a fair and impartial judge, given that you have supported the "complete and immediate reversal" of *Roe v. Wade*?

Please see response to question 8.a. I take the judicial oath seriously, and since taking the bench, I have been committed to treating every litigant with equal dignity and respect, giving each litigant a fair hearing based on the rule of law. If confirmed, I will continue those practices in every kind of case that comes before the Court.

9. In a 2014 column, you called the Affordable Care Act (ACA) "perverse" and "illegitimate."¹⁴ At your confirmation hearing, Ranking Member Feinstein referenced these and other criticisms you have made about the ACA and specifically asked about your previous call to strike down the ACA. You responded: "Senator, when I wrote those columns, again, I was in the policymaking realm or political realm. And since *NFIB v. Sebelius* was handed down, I view that as binding precedent, certainly binding on all the lower courts." Later, when she asked you whether it would be "your intent to strike down the Affordable Care Act," you said, "No, Senator, because I think many of the questions that I debated and discussed in the commentary that you referred to were unsettled questions at that time—mostly politically unsettled."

But you called the ACA "perverse" and "illegitimate" in 2014, two years *after* the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* upholding the individual mandate.¹⁵

- a. Please explain what you meant when you called the ACA "perverse" and "illegitimate."

The referenced comments are excerpted from a newspaper column that I wrote when I was active in partisan elective politics and campaigns, not since I became a judge. The full column discusses then-current political issues and provides context to the quoted language. The referenced comments pertained to the political and legislative process relating to the Affordable Care Act's (ACA's) passage and implementation. In contrast with my prior roles as an advocate and elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. *NFIB v. Sebelius* is binding Supreme Court precedent, and I will faithfully apply that case and other applicable Supreme Court precedent and the statutory language of the ACA.

¹² Cory Wilson, *National Rifle Association Candidate Questionnaire* (May 5, 2015), in SJQ Attachments to Question 12(c), at 450-53.

¹³ 410 U.S. 113 (1973).

¹⁴ Cory Wilson, *ACA: Big, Intrusive Government*, MADISON CTY. J., Feb. 20, 2014, at A4, in SJQ Attachments to Question 12(a), at 76.

¹⁵ 567 U.S. 519 (2012).

- b. Have any developments since 2014 “settled” the claims you made in that column about the ACA’s legitimacy? If you wish to cite *King v. Burwell*,¹⁶ please explain specifically how that decision addressed your “perverse” and “illegitimate” claim.

Please see response to Question 9.a.

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

Yes, to the extent that “originalism” means construing laws according to their plain text and meaning at the time they were enacted. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). The role of a lower court judge is to follow Supreme Court precedent in deciding cases regardless of whether a given precedent is or is not regarded as “originalist” in approach.

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

Yes, to the extent that “textualism” means construing laws according to their plain text as enacted by Congress. Based on my experience on the Mississippi Court of Appeals, when a statutory provision’s meaning is not evident from the specific text, considering the statutory context surrounding the provision may be instructive as to the particular provision’s meaning. *See, e.g., Pritchard v. Pritchard*, 282 So. 3d 809 (Miss. Ct. App. 2019).

12. 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, I would be willing to consider legislative history in appropriate cases. The Supreme Court has held that legislative history should be considered only if statutory text is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Court also noted that legislative history should not “be used to ‘muddy’ the meaning of ‘clear statutory language.’” *Id.* (citations omitted); *see also Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”). If confirmed, I will faithfully apply Supreme Court and Fifth Circuit precedent on the use of legislative history.

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

Please see response to question 12.a.

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

Yes. I consider “judicial restraint” to mean that judges should decide only the “cases” and “controversies” before them. Judges should refrain from legislating from the bench or substituting their own policy preferences for the meaning expressed in statutes. In the words of *Federalist No. 78*, judicial restraint is an important value to ensure that judges do not veer from exercising “judgment” into exercising “will” or “force.”

- a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.¹⁷ Was that decision guided by the principle of judicial restraint?

It is not appropriate as a sitting judge, or a nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will faithfully apply *Heller* and any Supreme Court or Fifth Circuit precedent interpreting *Heller*.

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.¹⁸ Was that decision guided by the principle of judicial restraint?

It is not appropriate as a sitting judge, or a nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will faithfully apply *Citizens United* and any Supreme Court or Fifth Circuit precedent interpreting *Citizens United*.

- c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹⁹ Was that decision guided by the principle of judicial restraint?

It is not appropriate as a sitting judge, or a nominee, to express agreement or disagreement with Supreme Court decisions; the role of a lower court judge is to follow Supreme Court precedent in deciding cases. If confirmed, I will faithfully apply *Shelby County* and any Supreme Court or Fifth Circuit precedent interpreting *Shelby County*.

14. 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.²⁰ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.²¹ These

¹⁶ 576 U.S. 988 (2015).

¹⁷ 554 U.S. 570 (2008).

¹⁸ 558 U.S. 310 (2010).

¹⁹ 570 U.S. 529 (2013).

²⁰ 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>.

²¹ *Id.*

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.²² In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²³

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

It is the fundamental duty of a judicial officer to treat every litigant equally and with dignity, respect, and fairness. I have not specifically studied the question of implicit racial bias in the criminal justice system. If confirmed, I will continue to be conscious of the potential for implicit racial bias and work to exclude it from the courtroom.

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

Yes, it is my understanding that statistics bear out this conclusion.

- 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 formally studied the issue of implicit racial bias in our criminal justice system. During my tenure as a state court judge, I have had judicial training at least tangentially related to implicit bias. I have reviewed information on the topic during these judicial training programs, but I cannot recall specific articles or seminar topics.

- 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.²⁴ Why do you think that is the case?

I have not closely studied this issue, so I am not qualified to offer an opinion on this issue. Beyond that, as a sitting judge and a judicial nominee, it would be inappropriate to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- 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.²⁵ Why do you think that is the case?

I have not closely studied this issue, so I am not qualified to offer an opinion on this issue. Beyond that, as a sitting judge and a judicial nominee, it would be inappropriate to comment on political issues or issues that may come before the Court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

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

All judges must be mindful of the potential for implicit biases to affect their decisions. I am committed to treating every litigant with equal dignity and respect and giving

each litigant a fair hearing based on the rule of law.

15. 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.²⁶ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁷

- 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 closely studied this specific issue, so I am not qualified to offer an opinion on this issue. In my legislative service, I worked on criminal justice reforms aimed at decreasing recidivism and reducing burdens to re-entry faced by those released from incarceration. Beyond that, as a sitting judge and a judicial nominee, it would be inappropriate to comment on political issues or issues that may come before the court. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

²² 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>.

²³ *Id.*

²⁴ 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.

²⁵ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

²⁶ 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>.

²⁷ *Id.*

- 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 response to question 15.a.

16. 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.

17. 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.

18. Do you believe that *Brown v. Board of Education*²⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

19. Do you believe that *Plessy v. Ferguson*²⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

20. 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.

21. 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."³⁰ Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Recusal and disqualification questions are governed by 28 U.S.C. § 455 and the Code of Conduct for United States Judges. Beyond that, it is inappropriate for a sitting judge, or a nominee, to comment on political candidates or political issues. See Code of Conduct for United States Judges, Canon 5.

22. 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."³¹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

If confirmed, I will faithfully follow Supreme Court and Fifth Circuit precedent applicable to immigration and constitutional issues. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”) (citations omitted). Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues, or legal issues that are the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

²⁸ 347 U.S. 483 (1954).

²⁹ 163 U.S. 537 (1896).

³⁰ 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>.

³¹ 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 May 27, 2020
For the Nomination of

Cory Wilson, to be United States Circuit Judge for the Fifth Circuit

1. In multiple articles, you have referred to “voter suppression” in quotes. You have also written that federal election observers who monitor polling places for voter suppression are “chasing agendas that aren’t there.”

- a. **Do you believe that voter suppression exists in Mississippi?**

When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. The columns discussed then-current political issues and provide context as to the issues discussed. I also discussed personal experience in elections administration. In contrast with my prior roles as an advocate in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. I will faithfully apply Supreme Court precedent in voting rights cases, and all others. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- b. **Can you cite a specific instance or example of voter suppression in Mississippi?**

In a recent Section 2 Voting Rights Act case, the plaintiffs alleged that the 2012 redistricting plan for Senate District 22 “diluted African-American voting strength and deprived African-American voters of an equal opportunity to elect candidates of their choice.” *See Thomas v. Bryant*, 938 F.3d 134, 140 (5th Cir. 2019), *reh’g en banc granted*, 939 F.3d 629 (5th Cir. 2019). Applying *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), the district court agreed. *Id.* at 142. The Fifth Circuit affirmed the district court’s decision via a three-judge panel. *Id.* at 161. While the Fifth Circuit has granted rehearing en banc, the Mississippi Legislature redistricted Senate District 22 and adjoining districts in advance of the 2019 state elections, in compliance with the rulings.

2. You have written articles that express doubt about the existence of voter suppression as recently as October 2013—less than eight years ago.

- a. **How can residents of Mississippi—particularly African American residents, who make up 38% of the state—believe that you will be fair and impartial on matters relating to voting rights?**

In contrast with my prior roles as an advocate in partisan elective politics and as an elected legislator, political issues and debates do not play any part in deciding cases

before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. Any party coming before the Court can also have confidence that I would rule fairly and impartially, based on my continuing record as a judge on the Mississippi Court of Appeals. I will faithfully apply Supreme Court precedent in voting rights cases, and all others. I take the judicial oath seriously, and since taking the bench, I have shown my commitment to treating every litigant before the Court with equal dignity and respect. If confirmed, I will continue those practices and remain faithful to my oath as a circuit court judge.

3. In June 2013, you published an article titled “Voter ID, DOJ, and the IRS’s Presidential Enemies List.” The article described former Attorney General Eric Holder as “whining that voter ID laws are part of an illegitimate, orchestrated effort by Republicans to suppress poor and minority voting.”

Nationally, up to 25% of the voting age African American population lacks government-issued photo ID, compared to only 8% of the white voting age population.¹ In 2014, the Government Accountability Office found that voter ID laws depressed turnout among racial minorities and worsened the participation gap that already exists between voters of color and white voters.²

a. **Do you agree that voter ID laws have a disparate impact on minority voters?**

Please see response to question 1.a. It would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

4. Mississippi now has one of the strictest voter ID laws in the country, which you have publicly supported for many years.

In a focus group study conducted by Mississippi Votes and One Voice, African Americans in Yazoo City, Mississippi reported having difficulty obtaining state-issued photo ID. In some cases, African American voters reported needing to travel almost 50 miles to obtain a state-issued photo ID. Some of these residents also reported that they lacked access to public transportation or transportation of their own.

a. **Do you believe these voters are “whining” when they complain of diminished access to the polls?**

In testimony before the Committee, I discussed personal experience in elections administration and in legislative service, including the passage of Mississippi’s voter ID law by citizen ballot initiative. Mississippi’s law, as I understand it, was based on

¹ Brennan Center for Justice, *Citizens without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

² Government Accountability Office, *Issues Related to State Voter Identification Laws*, report to Congressional requesters, September 2014, <http://www.gao.gov/assets/670/665966.pdf>.

the Indiana law upheld by the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). Mississippi’s law includes provisions for any voter without identification to obtain an ID without cost, and it also includes provisions to allow voters without an ID on Election Day to present identification thereafter and have their votes counted. Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

5. In October 2011, you wrote a column titled “Desperate Times, Desperate Measures,” which responded to a member of the Mississippi chapter of the NAACP who had expressed concerns that a proposed voter ID law would suppress the vote. You responded that the concern was “poppycock, unless you count the dead vote.” This response was an apparent reference to voter fraud.

According to a 2007 Brennan Center report, “only a tiny portion of the claimed illegality is substantiated—and most of the remainder is either nothing more than speculation or has been conclusively debunked.”³ In addition, President Trump’s now-disbanded voting integrity commission uncovered no evidence to support claims of widespread voter fraud.⁴

b. Do you have any evidence to substantiate that voter fraud is more prevalent than voter suppression?

In testimony before the Committee, I discussed personal experience in litigating election contests and handling election matters. Those trials involved proof of in-person voter fraud, absentee balloting fraud, misconduct by local elections officials, and other serious irregularities that affected the outcome of the elections at issue. From my experience in elections administration and in legislative service, I am also aware of several successful prosecutions for voter fraud in Mississippi elections. Of course it is also important to recognize that “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [such that] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886) (referring to “the political franchise of voting” as “a fundamental political right, because preservative of all rights”). Beyond that, it would be inappropriate for a sitting judge, or a nominee, to comment on political issues or issues that may come before the Court. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

³ Brennan Center for Justice, *The Truth About Voter Fraud*, https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.

⁴ Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, AP News (Aug. 3, 2018), <https://apnews.com/f5f6a73b2af546ce97816bb35e82c18d/Report:-Trump-commission-did-not-find-widespread-voter-fraud>.

6. After the U.S. Supreme Court’s decision upholding the constitutionality of the Affordable Care Act, you wrote an article stating that “Obamacare retains an air of illegitimacy, dating back to its passage.” In 2014, you wrote an article where you described the Affordable Care Act as “perverse” and “illegitimate.”

- a. **Do you believe that your comments cast doubt about your ability to fairly and impartially decide cases relating to the constitutionality of the ACA?**

When I wrote the opinion columns referenced above, I was active in partisan elective politics and campaigns. Several columns I wrote pertained to the political and legislative process relating to the Affordable Care Act’s (ACA’s) passage and implementation. The columns discussed then-current political issues and provide context as to the issues I debated and discussed. In contrast with my prior roles as an advocate and elected legislator, political issues and debates play no part in deciding cases before either the Mississippi Court of Appeals or, if confirmed, the Fifth Circuit. If confirmed, I will faithfully apply *NFIB v. Sebelius*, other applicable Supreme Court precedent, and the statutory language of the ACA.

- b. **If confirmed, will you agree to immediately consult with the Administrative Office of the U.S. Courts and request a public opinion as to whether you should recuse from any case involving the constitutionality of the ACA?**

If confirmed, I will carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) would require recusal. For other cases, I will carefully evaluate the standards set forth in the statute and Canon 3C, as well as any relevant authority interpreting those provisions.