No. 20-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,

Plaintiffs-Appellees,

v.

Ron DeSantis, in his official capacity
as Governor of the State of Florida, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Florida, Case No. 4:19-cv-300-RH/MJF

APPELLEES' MOTION TO DISQUALIFY JUDGES ROBERT LUCK, BARBARA LAGOA, AND ANDREW BRASHER

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CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellees hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida on July 14, 2020 is complete and correct.

Dated: July 15, 2020

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INTRODUCTION

The *Raysor* and *McCoy* Appellees respectfully request that Circuit Judges Robert Luck, Barbara Lagoa, and Andrew Brasher be disqualified from participating in this case. This case will determine whether three-quarters of a million Floridians can vote; it is especially important the judges deciding this case are themselves qualified to vote on it.

Judges Luck and Lagoa stated in written testimony to the Senate Judiciary Committee they would recuse from any case involving the Florida Supreme Court while they were Justices or in which they played any role—commitments that are triggered here. Their disqualification is required not only because they said so in seeking confirmation, but because the Code of Conduct for United States Judges, incorporated by this Court's Internal Operating Procedures, requires disqualification when judges participated, in a prior judicial position, concerning the litigation. Their failure to adhere to their broad commitments to the Senate Judiciary Committee (and the public), and to the Code of Conduct, would cause their impartiality to "reasonably be questioned," 28 U.S.C. § 455(a). Federal law therefore likewise requires their disqualification.

Judge Brasher served as Solicitor General of Alabama, and in that capacity was counsel of record in *Thompson v. Alabama*, No. 16-cv-783-ECM-SMD (M.D. Ala.), a case challenging the same government policy challenged by plaintiffs in this

case, and which all parties have designated as a "related case." In that capacity, Judge Brasher wrote and signed multiple briefs arguing the same legal positions advanced by Appellants in this case. His co-counsel at the time, whom he supervised, remains counsel for defendants in that case, and has filed an *amicus* brief supporting Appellants here. In seeking confirmation from the Senate, Judge Brasher pledged to recuse from any case involving a government policy that he previously defended, and for two years to recuse from any case in which the Alabama Attorney General's Office represents a party. His recusal is required in keeping with his public commitment, the Code of Conduct, and federal law.

FACTS AND PROCEDURAL HISTORY

I. The Florida Supreme Court Proceeding

In 2018, Floridians adopted a constitutional amendment automatically restoring the right to vote to people with past felony convictions upon "completion of all terms of sentence including probation and parole."[1] Fla. Const. Art. VI, § 4. The legislature then enacted Senate Bill 7066, defining "completion of all terms of sentence" to include full payment of legal financial obligations ("LFOs") ordered by a court as part of the sentence. Fla. Stat. § 98.0751(2)(a).

[1] The Amendment does not apply to those convicted of murder or a felony sexual offense. Fla. Const. Art. VI, § 4.

Appellees, in three suits, brought claims alleging, *inter alia*, that conditioning rights restoration on payment of LFOs constitutes wealth discrimination in violation of the Fourteenth Amendment, and constitutes a poll or other tax in violation of the Twenty-Fourth Amendment; and that Florida's system for administering the LFO requirement violates due process. The cases were consolidated under *Jones v. DeSantis*, 4:19-cv-300.[2] Throughout the litigation, including this appeal, Appellants Governor DeSantis and Secretary Lee[3] have contended that voters would not have enacted Amendment 4 but for its requirement that people pay off their LFOs even if they cannot afford to do so, and that the pay-to-vote requirement.

In September 2019, Appellant Governor DeSantis requested an Advisory Opinion from the Florida Supreme Court as to whether the phrase "all terms of sentence" under article VI, section 4 of the Florida Constitution included payment of LFOs. *See* Request for Advisory Opinion, No. SC19-1341 (Fla. Aug. 9, 2019).

[2] The consolidated cases were initially before Judge Walker of the Northern District of Florida. Judge Walker recused himself weeks into the litigation because Appellant Secretary Lee retained additional counsel from the law firm Holland & Knight, at which Judge Walker's wife is a partner. *See* Order of Recusal at 1-2, 4:19-cv-300, ECF 86 (finding that Secretary Lee's conduct was "deeply troubling," and citing a past instance where the firm was disqualified from a case in his court given, *inter alia* "the potential for manipulation of the judicial system [and] the lack of need by Defendants for this particular counsel.").

[3] For ease of reference, we refer to the Governor and Secretary as "the State."

The Florida Supreme Court, including then-Justices Luck and Lagoa, set oral argument for November 6, 2019.

The *Raysor* Plaintiffs briefed the precise constitutional questions at issue in this matter in the Florida Supreme Court proceedings, contending that because an LFO requirement would violate the United States Constitution, the Florida Supreme Court had an obligation to interpret the relevant state constitutional provision to avoid a conflict with the United States Constitution.[4] The *Raysor* and *Gruver* Plaintiff and counsel organizations also briefed the issue of the voters' intent in passing Amendment 4, including whether voters intended to allow rights restoration only for those able to pay off their LFOs.

During oral argument, counsel for the *Raysor* and *Gruver* Plaintiffs engaged in colloquies with both Justice Luck and Justice Lagoa about the importance of interpreting Amendment 4 in light of the United States Constitution, as well as the application of this Court's and the United States Supreme Court's precedent with respect to both wealth discrimination and poll taxes to the challenged provision.

[4] *Raysor* Br., *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, No. SC19-1341 (Fla. Sept. 18, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/1341/2019-1341_brief_134897_initial20brief2dmerits.pdf; *Raysor* Reply Br., (Oct. 3, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/1341/2019-1341_brief_135131_reply20brief2dmerits.pdf.

On October 15, 2019, after the advisory opinion was requested but before participating in oral argument, Justices Luck and Lagoa were nominated to seats on this Court. Each submitted written testimony to the Senate Judiciary Committee. *See* Ex. A (Lagoa QFR Reponses); Ex. B (Lagoa Questionnaire Reponses); Ex. C (Luck QFR Responses); Ex. D (Luck Questionnaire Responses). Judge Luck pledged to recuse "from *any case where I ever played any role*." Ex. D at 56 (Luck Questionnaire Responses) (emphasis added). Judge Lagoa pledged to recuse "from cases . . . *involving* either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either court." Ex. A at 24 (Lagoa QFR Responses) (emphasis added). After participating in oral argument, Judge Luck was confirmed to this Court on November 19, 2019, and Judge Lagoa on November 20, 2019. The Florida Supreme Court released its Advisory Opinion on January 16, 2020.

II. The *Thompson v. Alabama* Related Case

Appellants Governor DeSantis and Secretary Lee noticed *Thompson v. Alabama*, No. 2:16-cv-783 (M.D. Ala.), as a related case in this action.[5] *Thompson*, filed in 2016, challenges Alabama's rights restoration scheme, and plaintiffs challenged the same governmental policy at issue here, namely that Alabama's

[5] Appellees agree *Thompson* is a related matter and this Court's decision may be dispositive of issues pending in *Thompson*.

requirement that individuals pay their LFOs as a condition of rights restoration violates the Fourteenth Amendment as applied to those unable to pay, and constitutes a poll tax in violation of the Twenty-Fourth Amendment. The case is still pending in the Middle District of Alabama.

Judge Andrew L. Brasher of this Court served as lead counsel for the Defendants in *Thompson* from October 12, 2016 through July 7, 2018 in his capacity as Solicitor General for the State of Alabama, including by presenting oral argument for the State in the case. Judge Brasher was confirmed to this Court on February 11, 2020, and was sworn into this Court on June 30, 2020. Before being elevated to this Court, Judge Brasher was confirmed as a U.S. District Court Judge for the Middle District of Alabama on May 1, 2019.

ARGUMENT

I. Legal Standard

A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). And, "the standard for recusal under § 455(a) is whether an objective, disinterested, lay observer, fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the

judge's impartiality." *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989). (internal quotations omitted); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 & n.12 (11th Cir. 1988) (emphasizing that the test is whether a "lay observer," and not one "trained in the law," would reasonably question the judge's impartiality). Under this standard, all doubts must be "resolved in favor of recusal." *Id*. Further, "objective standards may also require recusal whether or not actual bias exists or can be proved." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886 (2009) (citing *In re Murchison*, 349 U.S. 133, 136 (1955), for the proposition that "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"). Thus, 455(a) "clearly mandates . . . a judge err on the side of caution and disqualify himself in a questionable case." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980). Section 455(a)'s disqualification requirement "expand[s] the protection" of the specifically required disqualification scenarios of § 455(b).[6] *Liteky v. United States*, 510 U.S. 540, 552 (1994).

The Code of Judicial Conduct for United States Judges is more explicit with respect to prior judicial roles: it provides that judges *shall* be disqualified based upon

[6] For example, under §455(b), a judge must recuse "where he served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy," *id.*, § 455(b)(3).

a prior position as a judge related to the matter. Under Canon 3(C)(1), a judge must disqualify

> in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge . . . has served in governmental employment and *in that capacity participated as a judge (in a previous judicial capacity)* [or] counsel . . . *concerning the proceeding*.

Canon 3(C)(1)(a), (e) (emphasis added). A "proceeding" is defined broadly, and includes "pretrial, trial, appellate review, or *other stages of litigation*." *Id*. 3(C)(3)(d) (emphasis added). Because Canon (3)(C)(1) states the "judge's impartiality might reasonably be questioned," if he or she participates in a proceeding after this type of prior involvement, the Canon ties back to Section 455(a), which *requires* disqualification when such reasonable questions are possible.

Finally, the Code also instructs judges to "avoid impropriety and the appearance of impropriety in all activities," Canon 2, and specifically 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 2(A). "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances . . . would conclude that the judge's honesty, impartiality, temperament, or fitness to serve as a judge is impaired." Commentary to Canon 2(A). Violations of the Code may, on their own, be sufficient to "destroy[] the appearance

of impartiality and thus violate[] § 455(a)." *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 114-15 (D.C. Cir. 2001).

Under the Eleventh Circuit's Internal Operating Procedures, "[a] judge is disqualified under circumstances set forth in 28 U.S.C. § 455 or in accordance with Canon 3C, Code of Conduct for United States Judges as approved by the Judicial Conference of the United States, April 1973, as amended." Fed. R. App. P. 47, 11th Cir. IOP 9.

II. Judges Luck and Lagoa Are Disqualified from Participating in this Appeal.

Judges Luck and Lagoa are disqualified from participating in this case. Both judges pledged in written responses to the Senate Judiciary Committee that they would recuse from cases involving the Florida Supreme Court during their service in that Court. This is such a case. The Code of Judicial Conduct, adopted by this Court's Internal Operating Procedures, specifically requires their recusal, and their failure to adhere to their Senate confirmation testimony and the Code's provisions would cause their impartiality to "reasonably be questioned." 28 U.S.C. § 455(a).

In her written responses to the Questions for the Record from the Senate Judiciary Committee, Judge Lagoa pledged, "If confirmed, I would conscientiously review and follow the standards for judicial recusal set forth in 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges." Ex. A at 24 (Lagoa QFR Responses). She further stated, "In terms of specific examples of the types of cases

I would recuse from if confirmed, I would recuse from cases in which my husband or his law firm appeared, as well as cases *involving* either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either court." *Id*. (emphasis added). In her response to the Judiciary Committee's Questionnaire for Judicial Nominees, Finally, Judge Lagoa stated, "Although unlikely to occur, I would recuse myself from any case in which I participated as a justice on the Supreme Court of Florida." Ex. B at 54 (Lagoa Questionnaire Responses).

In his written responses to the Questions for the Record from the Senate Judiciary Committee, Judge Luck wrote, "The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. . . . I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges . . . . I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I served as a lawyer, or as a trial or appellate judge." Ex. C at 15-16 (Luck QFR Responses). In his response to the Judiciary Committee's Questionnaire for Judicial Nominees, Judge Luck categorically stated, "If confirmed, I will recuse myself from any case where I *ever played any role*." Ex. D at 56 (Luck Questionnaire Responses) (emphasis added).

This case falls squarely within the Judges' recusal commitments. The Florida Supreme Court's Advisory Opinion proceeding was a stage of this litigation.

Appellant Governor DeSantis cited the federal lawsuit as his reason for requesting an Advisory Opinion regarding Amendment 4,[7] the parties to this case were parties to the Florida Supreme Court proceeding,[8] and counsel in this case argued the case in the Florida Supreme Court proceeding. The *Raysor* Plaintiffs' briefing in the Florida Supreme Court raised all the same arguments that are before this Court in urging the Florida Supreme Court to employ constitutional avoidance principles in interpreting Amendment 4.[9] And the voters' intent in adopting Amendment 4 was central to both the Florida Supreme Court's proceeding and to the severability argument the State raises here. It is therefore no surprise Appellants Governor DeSantis and Secretary Lee listed the Advisory proceeding as "involv[ing] an issue that is substantially the same, similar, or related to an issue in this appeal" during

[7] Request for Advisory Opinion, Voting Restoration II, No. SC19-1341 (Fla. Aug. 9, 2019).

[8] The *Raysor* Plaintiffs, who are the representatives of the certified class in this action, the *Gruver* Plaintiff and counsel organizations, Appellant Governor DeSantis, and Appellant Secretary Lee all appeared as parties in the Florida Supreme Court proceeding. *See Advisory Opinion to the Governor Re: Implementation of Amendment 4*, No. SC19-1341 (Fla. 2019), http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseTypeSelected=All&CaseYear=2019&CaseNumber=1341.

[9] *Raysor* Br., *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, No. SC19-1341 (Fla. Sept. 18, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/1341/2019-1341_brief_134897_initial20brief2dmerits.pdf.

their appeal of the preliminary injunction. *See* Civil Statement, *Jones v. Governor*, No. 19-14551 (11th Cir. Dec. 13, 2019).

Indeed, the State has repeatedly invoked the Florida Supreme Court proceedings in its appeal. *See* State's Brief at 1, 8-9, 54.[10] In particular, the State contends that if the district court's constitutional rulings are affirmed, then Amendment 4 must be invalidated as non-severable. *Id.* at 54. The State's argument regarding the voters' intent in passing Amendment 4 is the precise argument it made to the Florida Supreme Court, and it relies on the Florida Supreme Court's Advisory Opinion to advance its argument on appeal.[11] *Id.* (suggesting that the "district court's contention that the payment of financial terms was not 'critical to a voter's decision' is belied by the Florida Supreme Court's [Advisory Opinion]").[12]

Moreover, then-Justices Luck and Lagoa actively participated in argument on both the constitutional avoidance issues raised by the *Raysor* Plaintiffs and the question of the voters' intent in adopting Amendment 4—issues Appellants have

[10] The State filed an opening brief on appeal pursuant to the initial briefing schedule, which has been superseded by the *en banc* briefing schedule. The State has not yet filed its *en banc* brief.

[11] The State is wrong that a severability analysis is necessary. In any event, any infirm provisions would be severable as the *Jones I* panel and the district court found. Regardless, the State's repeated invocation of the Florida Supreme Court proceedings to advance its arguments underscores the necessity for disqualification here, regardless of the lack of merit to the State's argument.

[12] The State cited the Florida Supreme Court's Advisory Opinion more than any other source in its Trial Brief. *See* ECF No. 336 at 2, 3, 7, 8, 10, 28.

raised repeatedly in the district court and on appeal. *See* Fla. Supreme Court Official YouTube Channel Video Recording, *SC19-1341 Advisory Opinion to the Governor Re: Implementation of Amendment 4, (Voting Restoration)*, https://www.youtube.com/watch?v=jbsNFmdZnEk&t=3253s at 1:01:20-57 (Justices Luck and Lagoa commenting that the inability to pay principle announced by this Court in *Johnson v. Governor*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*) did not apply to restitution); *id.* at 18:27-34 (Justice Lagoa stating that "voters were also told . . . in different editorials and opinion pieces throughout the state" that Amendment 4 included LFOs); *id.* at 44:16-58 (Justice Lagoa reading from a voter guide and an op-ed suggesting Amendment 4 contained required payment of LFOs and saying "this is what was told to the voters of Florida"); *id.* at 51:13-34 (Justice Luck suggesting that the voters would have had a "plain understanding" of Amendment 4's inclusion of LFOs because of the "natural reading" of the Amendment using both plural and singular of "term" in different sentences of the provision); *id.* at 53:23-54:04 (Justice Lagoa commenting on 'the public's understanding" of Amendment 4 and holding up printouts of "reams . . . of op-ed pieces and editorials from different papers all over the State of Florida that made it clear this included restitution and fines"—material that was not part of the record of the proceedings, and that did not include the contrary examples voters also saw during the campaign); *id.* at 1:04:27-49 (Justice Luck commenting that reading

"articulated by Justice Lagoa after looking at everything" would require payment of LFOs); *id.* at 1:03:36-2:04:08 (Justice Lagoa reading from an editorial mentioning LFOs); *id.* at 1:10:36-1:11:55 (Justice Lagoa reading from letter sent after Amendment 4's adoption).

Then-Justice Lagoa pointedly raised the severability argument that the State has advanced both in the district court and this Court, even though that argument was not before the Florida Supreme Court. When counsel suggested that if the Amendment was ambiguous, it must be read consistent with the United States Constitution, Justice Lagoa asked, "Well, should we do that, or should it be stricken?" *Id.* at 52:33-53:05.

This is plainly a case "involving the Supreme Court of Florida" while Judge Lagoa "was a member of [that] court." Ex. A at 24 (Lagoa QFR Reponses). Likewise, it is plainly a case where Judge Luck "ever played any role." Ex. D at 56 (Luck Questionnaire Responses). Both judges pledged to the Senate (and the public) in seeking confirmation that they would recuse in precisely this type of case, and must do so here.

Even absent explicit pledges to recuse, Judges Luck and Lagoa would still be disqualified from participating in this case by the Code of Conduct for United States Judges, which provides judges shall be disqualified if they "ha[ve] served in governmental employment and in that capacity participated as a judge (in a previous

judicial capacity) . . . concerning the proceeding." Canon 3(C)(1). "[P]roceeding is broadly defined to include "pretrial, trial, appellate review, or *other stages of litigation*." *Id*. 3(C)(3)(d) (emphasis added). The Florida Supreme Court proceeding fits squarely within the Code's definition of a proceeding in which Judges Luck and Lagoa participated in a previous judicial capacity.

The Code encompasses the Florida Supreme Court's proceeding in two ways. First, Canon 3(C)(1)'s plain text reaches not just a judge's prior role *in the specific case*, but rather any prior judicial role *concerning* the proceeding. *See* Black's Law Dictionary (Online 2d ed.) (defining "concerning" to be "relating to; pertaining to; affecting; involving; or taking part in"); *cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (defining "relating to" as "to stand in relation; to have bearing or *concern*; to pertain" and finding that "the ordinary meaning of these words is a broad one.") (emphasis added). This broad language encompasses the related Florida Supreme Court proceeding initiated by the Governor in response to the proceedings below. Second, "proceeding" is broadly defined to include "other stages of litigation." Canon 3(C)(3)(d). The Florida Supreme Court's proceeding was closely intertwined with the federal case, as demonstrated by the State's briefing in the federal case—including now on appeal—and the *Raysor* Plaintiffs' briefing before the Florida Supreme Court. Any objective lay observer would conclude the Florida Supreme Court's Advisory Opinion proceeding was a "stage[ ] of litigation"

in the dispute pending before this Court. The Code requires that Judges Luck and Lagoa be disqualified. So too do this Court's Internal Operating Procedures. *See* 11th Cir. IOP 9.

Moreover, under 28 U.S.C. § 455(a), judges "shall disqualify [themselves] in any proceeding in which [their] impartiality might reasonably be questioned." Judges Lagoa and Luck pledged broadly to recuse from any case involving the Florida Supreme Court while they were Justices, or cases in which they had participated in any way. Given their breadth, any objective layperson would conclude these commitments—made to secure confirmation by the Senate—reach the judges' participation in the Florida Supreme Court proceeding in this matter. The State has placed that proceeding at center stage in this appeal, relying upon it to contend—erroneously—that Amendment 4 should be invalidated in its entirety if the State cannot maintain its pay-to-vote system.

Given the sweeping recusal commitments made to the Senate Judiciary Committee (and the public), the judges' failure to recuse would lead an objective lay observer to question *why* they abandoned those pledges. Failing to follow those commitments (and the Code) would thus cause their impartiality to "reasonably be questioned," 28 U.S.C. § 455(a), requiring their disqualification. This is particularly so given this is not a case of random assignment, but rather one in which the active judges have made an affirmative choice to hear the case.

III. Judge Brasher Is Disqualified from Participating in this Appeal.

Judge Brasher is disqualified because as Solicitor General of Alabama he participated as lead counsel in *Thompson*, which all parties agree is a related case in this appeal and in which then-Solicitor Brasher raised the same legal arguments to defend against plaintiffs' wealth discrimination and poll tax claims as the State does here. *Thompson*'s outcome on those claims will likely be controlled by the decision in this case. Judge Brasher's disqualification is required for several reasons.

First, Judge Brasher made a sweeping commitment to the Senate Judiciary Committee (and the public) to recuse in cases such as this: "I intend to recuse from any current or future case that challenges *a government law or policy* that I have previously defended." Ex. E at 48 (Brasher Circuit Questionnaire Responses) (emphasis added). Moreover, Judge Brasher stated, "For a reasonable period of time, I anticipate recusing in cases in which the Office of the Alabama Attorney General represents a party" and to "evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary. *Id.* at 48. Likewise, during his confirmation to the Middle District of Alabama, Judge Brasher pledged to recuse from "all cases" where the Office of the Alabama Attorney General represents a party "for a period of two years." Ex. F at 39 (Brasher District Questionnaire Responses).

This broad commitment to the Senate Judiciary Committee (and the public) requires his recusal in this matter. This case involves the same "government law[s] or polic[ies]" he defended as Solicitor General—that conditioning automatic rights restoration on payment of LFOs constitutes wealth discrimination in violation of the Fourteenth Amendment and violates the Twenty-Fourth Amendment. Judge Brasher filed several motions arguing the merits of the legal issues currently before this Court, including *inter alia*, the application of the Equal Protection Clause and the Twenty-Fourth Amendment to rights restoration schemes, the constitutionality of conditioning rights restoration on payment of LFOs, the standard of scrutiny applicable to wealth discrimination claims, and the application of Supreme Court and this Circuit's precedent to these issues. *See, e.g.*, Def.'s Mot. to Dismiss at 63, *Thompson v. Alabama*, 2:16-cv-00783 (M.D. Ala. Mar. 15, 2018), ECF No. 43 (attached here as Ex. G) ("Requiring felons to pay LFOs does not violate the Equal Protection Clause."); *see also*, *id.* at 63-64 (arguing rights restoration schemes are subject to rational basis review and that conditioning voting on payment of LFOs serves rational state interests, because, *inter alia*, "only those convicted felons who have fully paid restitution are sufficiently rehabilitated to be entitled to vote"); *id.* at 64 ("A requirement to pay all LFOs also does not violate the Twenty-Fourth Amendment."); *id*. at 65 (arguing that "fees imposed on the restoration of felon voting rights are not poll taxes because they are not a condition to exercise a

constitutional right but a condition to regain a right that was constitutionally removed."); *id*. at 68 (submitted and signed by Andrew L. Brasher).

Second, even if Judge Brasher had not committed to recuse in cases such as this, the closeness of the *Thompson* case to this case would compel his disqualification. *See In re Hatcher*, 150 F.3d 631 (7th Cir. 1998) (disqualifying a judge even though the potential for bias arose out of separate proceeding, when "the earlier proceedings were so close to the case now before the judge that disqualification under § 455(a) was the only permissible option."); *see* 28 U.S.C. § 455(b)(3) (requiring disqualification where judge "has served in governmental employment and in such capacity participated as counsel . . . concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy"); *see also* Code of Judicial Conduct for United States Judges, Canon 3(C)(1)(e).

Third, Judge Brasher is disqualified because Alabama, represented by the Office of the Alabama Attorney General (in particular, counsel Judge Brasher supervised as Solicitor General in the *Thompson* case), has appeared as an *amicus* in support of the State in this appeal. *See* Br. of Alabama, et al, as *Amici Curiae* at 10-11, *Jones v. DeSantis*, No. 20-12003 (June 9, 2020) ("Since 2016, Alabama has been defending its reenfranchisement system against arguments that States cannot constitutionally require each felon to satisfy his entire sentence before regaining the

franchise") (citing *Thompson v. Alabama*, No, 2:16-cv-783, Compl. at ¶¶ 245-252 (N.D. Ala. filed Sept. 26, 2016)); *see Variable Annuity Life Ins. Co. v. Clark*, 13 F.3d 833, 835 (5th Cir. 1994) (noting that the *amici* and their counsel had caused a number of judges to be recused, making *en banc* review impossible, and noting that "counsel are advised that the participation as amici curiae . . . can result in the recusal of judges because of the identity of the amici and/or their counsel") (Smith, J., dissenting from denial of reh'g *en banc*). This is the second time Judge Brasher's former colleagues have appeared on behalf of Alabama as an *amicus* in this case. *See Jones v. DeSantis*, No. 19-14551 (11th Cir. Mar. 4, 2020). Alabama's participation in this appeal to advance its interest in litigation Judge Brasher previously spearheaded requires his disqualification both as a matter of law and because he committed to recuse for a two-year period in matters involving the Alabama Office of the Attorney General. Finally, Alabama's brief raises the precise "government law or policy" that he defended—the law challenged in *Thompson*. Ex. E at 48 (Brasher Circuit Questionnaire Responses)

Fourth, Judge Brasher's disqualification is required by § 455(a). If Judge Brasher were to participate in this case, an objective lay observer would reasonably question his impartiality. Such an observer would wonder why he participated in this case contrary to his commitment to the Senate Judiciary Committee (and the public) to recuse from any case involving a government law or policy he had defended and

any case involving the Office of the Alabama Attorney General. It would reasonably give rise to a belief that his participation was motivated by partiality. Moreover, Judge Brasher's service as lead counsel in *Thompson* for nearly two years and through multiple rounds of briefing defending against nearly identical legal claims, and raising the same legal arguments advanced by the State here, would lead a reasonable and objective lay observer to "entertain a significant doubt about [his] impartiality." *Kelly*, 888 F.2d at 745. And those doubts would only multiply given that the attorneys Judge Brasher supervised as lead counsel in *Thompson* have appeared in this case, in support of the State, to advance Alabama's interests in the case where he previously served as lead counsel.

CONCLUSION

Disqualification is required for each of the judges. Any attempt to avoid recusal by parsing the text of the judges' commitments to the Senate would itself give rise to an obligation to disqualify, given Congress's command that questionable cases be resolved in favor of disqualification. This case, determining whether approximately 750,000 individuals have a right to vote, will be subject to close public scrutiny whatever the result. The Court must ensure that the legitimacy of its decision is not at issue.

July 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with the type-volume limitations of Fed. R. App. P. 27 because it contains 5,027 words.

This Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Response has been prepared in a proportionally spaced typeface using Microsoft Word for Office in 14-point Times New Roman font.

Date: July 15, 2020

/s/ Paul M. Smith
Paul M. Smith
Counsel for Raysor Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on July 15, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: July 15, 2020

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EXHIBIT A

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

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

   No.

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

   No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is never appropriate for lower courts to depart from Supreme Court precedent. *See e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

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

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

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

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

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

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

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

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

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

b. Is it settled law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Please see my answer to Question 13(b).

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

Please see my answer to Question 13(b).

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

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

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

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

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

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

No, not to my recollection.

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

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

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

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

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

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

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

No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

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

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

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

   Please see my answer to Question 7(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

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

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

16. How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?

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

17. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

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

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

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

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

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

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

19. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the

standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

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

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

20. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

(a) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have

fair and effective representation and the consequences that would result if it failed to do so?

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

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

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

    Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For questions with subparts, please answer each subpart separately.

Questions for Barbara Lagoa

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

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

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

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

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

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

2.

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

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

b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I,

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

> …no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

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

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

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

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

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

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

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

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

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

Please see my response to Question 3(b)

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

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

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

Please see my response to Question 3(b).

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

Please see my response to Question 3(b).

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

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

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

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

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

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

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

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

      Please see my response to Question 4(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.

a. **Is waterboarding torture?**

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

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

I have not had occasion to study this issue closely, but my understanding is that under 42 U.S.C. § 2000dd-2(a)(2), no person in the custody or under the control of the United States government may be subjected to any interrogation technique not authorized in the Army Field Manual. It is also my understanding that the Army Field Manual does not authorize waterboarding.

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

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

9.

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

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

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

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

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

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

10.

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

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

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

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

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

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

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

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

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

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

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

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

    I am not aware of any such advocacy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    a. Have you read Advisory Opinion #116?

    Yes, as requested in order to answer these questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTIONS FROM SENATOR COONS

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

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

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

      Yes.

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

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

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

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

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

Yes.

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

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

f. What other factors would you consider?

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

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

The Supreme Court has held that the Fourteenth Amendment's Equal Protection Clause applies to gender as well as race. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

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

As a sitting justice on the Supreme Court of Florida and a judicial nominee, it would be inappropriate for me to grade or opine on the decisions of the Supreme Court. If confirmed, I would faithfully apply *United States v. Virginia*, 518 U.S. 515 (1996).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

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

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

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

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

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

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

Please see my response to Question 6(c).

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

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

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

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

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

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

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

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

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

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

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

Please see my response to Question 7(a).

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

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

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

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

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

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

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

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

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

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

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

   No.

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

   No.

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

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

   Yes.

   b. Have you ever taken such training?

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

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

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

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

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

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

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

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

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

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

Please see my answer to Question 3(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTIONS FROM SENATOR BOOKER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See my response to Question 3(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    Please see my response to Question 8(a).

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

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

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

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

    Please see my response to Question 9(a).

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

equivalent of poll taxes?

Please see my response to Question 9(a).

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

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

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

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

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

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

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

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

I have not studied this issue.

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

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

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

Please see my response to Question 10(d).

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

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

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

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

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

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

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

Please see my response to Question 11(a).

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

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

    Yes.

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

    Yes.

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

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

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

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

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

    No.

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

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

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

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

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

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

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

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

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

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

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

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

    Please see my answer to Question 1(a).

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

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

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

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

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

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

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

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

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

EXHIBIT B

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Barbara Lagoa

2. **Position**: State the position for which you have been nominated.

   United States Circuit Judge for the Eleventh Circuit Court of Appeals

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: The Supreme Court of Florida
   500 South Duval Street
   Tallahassee, Florida 32399

   Residence: Coral Gables, Florida

4. **Birthplace**: State year and place of birth.

   1967; Miami, Florida

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1989 – 1992, Columbia University School of Law; J.D., 1992

   1985 – 1989, Florida International University; B.A. (with honors), 1989

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2019 – present
   The Supreme Court of Florida
   500 South Duval Street

Tallahassee, Florida 32399
Justice

2006 – 2019
Third District Court of Appeal
2001 South West 117th Avenue
Miami, Florida 33175
Chief Judge (2019)
Judge (2006 – 2019)

2003 – 2006
United States Attorney's Office for the Southern District of Florida
99 North East 4th Street
Miami, Florida 33132
Assistant United States Attorney

1998 – 2002
Greenberg Traurig
333 South East 2nd Avenue, Suite 4400
Miami, Florida 33131
Associate

1994 – 1998
Cohen Berke Bernstein Brodie & Kondell, P.A.
[firm no longer exists]
2601 South Bayshore Boulevard, 19th Floor
Miami, Florida 33133
Associate

1993 – 1994
Schulte Blum McMahon Joblove & Haft
[firm no longer exists]
200 South Biscayne Boulevard, Suite 3150
Miami, Florida 33131
Associate

1992 – 1993
Morgan Lewis & Bockius LLP
200 South Biscayne Boulevard, Suite 5300
Miami, Florida 33131
Associate

Summer 1991
Jordan Schulte & Burchette
[firm no longer exists]
701 Brickell Avenue

Miami, Florida 33131
Summer Associate

Spring 1991
Honorable Robert P. Patterson Jr.
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007
Intern

Summer 1990
Valdes-Fauli, Cobb, Petrey & Bischoff
[firm no longer exists]
One Biscayne Tower
2 South Biscayne Boulevard, Suite 3400
Miami, Florida 33131
Summer Associate

Summer 1990
Miami-Dade State Attorney's Office
1350 North West 12th Avenue
Miami, Florida 33136
Legal Intern

Other Affiliations (uncompensated)

2019 – present
Florida Supreme Court Historical Society
1947 Greenwood Drive
Tallahassee, Florida 32303
Member

2008 – 2019
Third District Court of Appeal Historical Society
c/o Charles M-P George, President
Law Offices of Charles M-P George
1172 South Dixie Highway, Number 508
Coral Gables, Florida 33146
Member

2000 – 2003
United Way of Dade County
Young Leaders Society
3250 South West 3rd Avenue
Miami, Florida 33129

Member

1999 – 2001
YWCA of Greater Miami-Dade, Inc.
351 North West 5th Street
Miami, Florida 33128
Director

1997 – 2001
Film Society of Miami
Miami Film Festival
300 North East 2nd Avenue
Miami, Florida 33132
Director

1996 – 1998
Kristi House
1265 North West 12th Avenue
Miami, Florida 33136
Director

1996 – 1998
Florida International University Alumni Association
Florida International University
Office of Alumni Relations & Annual Giving
11200 South West 8th Street, MARC 210
Miami, Florida 33199
Director

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I was not required to register for selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Judicial Leadership Award, National Hispanic Bar Foundation (2019)

Women Making History, Miami-Dade Chapter, Florida Association of Women Lawyers (2019)

Rosemary Barkett Award for Judicial Excellence, American Inns of Court (2019)

Miami-Dade County Proclamation, Miami-Dade County Office of the Mayor and Board of County Commissioners, "Barbara Lagoa Day" (2019)

Florida International University Medallion of Honor, Outstanding Alumna Award (2010)

Outstanding Women of Color Award, Justice Peggy A. Quince Chapter, Black Law Students Association & Caribbean Law Students Association, St. Thomas University School of Law (2010)

Columbia Law Review
Associate Editor (1991 – 1992)
Member (1990 – 1992)

Phi Kappa Phi Honor Society, Florida International University (1989)

Dean's List, Florida International University (1986, 1987, 1988)

National Dean's List, Florida International University (1989)

Hispanic Leadership Opportunity Program, Ford Foundation (1988, 1989)

Student Honors Mentor Program (1987)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Florida Court System Advisory Committees, Florida Supreme Court Liaison
Florida District Court of Appeal Budget Commission (2019 – present)
Steering Committee on Families and Children in the Court (2019 – present)
Steering Committee on Problem-Solving Courts (2019 – present)
Criminal Court Steering Committee (2019 – present)
Committee on Standard Jury Instructions in Criminal Cases (2019 – present)

Florida Supreme Court Committee on Family Law Forms (2019 – present)

The Florida Bar Criminal Procedure Rules Committee, Florida Supreme Court Liaison (2019 – present)

The Florida Bar Family Law Rules Committee, Florida Supreme Court Liaison (2019 – present)

The Florida Bar Juvenile Court Rules Committee, Florida Supreme Court Liaison (2019 – present)

Florida Judicial Ethics Advisory Committee (2011 – 2019)
Chair (2015 – 2016)
Vice Chair (2014 – 2015)

Florida Conference of District Court of Appeal Judges
Member (2006 – 2019)
Election Committee Chair (2009 – 2019)

Florida District Court of Appeal Budget Commission (2017 – 2019)

Florida Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases (2013 – 2016)

Federal Judicial Nominating Commission, United States District Court for the Southern District of Florida (2001 – 2003)

American Bar Association (approx. 1994 – 2000, 2002 – 2003)

Dade County Bar Association (approx. 1998 – 2004)

Florida Association of Women Lawyers, Miami-Dade Chapter (2019)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Florida, 1992

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

U.S. Circuit Court of Appeals for the Eleventh Circuit (1996 – 2006)
U.S. District Court for the Southern District of Florida (1993 – present)
U.S. District Court for the Middle District of Florida (1995 – 2004)

My membership in the bar of the United States Court of Appeals for the Eleventh Circuit lapsed during my service on the Third District Court of Appeal. My membership in the bar of the United States District Court for the Middle District of Florida lapsed during my service as an Assistant United States Attorney. There has been no lapse in membership in the bar of the United States District Court for the Southern District of Florida.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

The Florida Supreme Court Historical Society (2019 – present)

Third District Court of Appeal Historical Society (2008 – 2019)

United Way of Dade County, Young Leaders Society (2000 – 2003)

YWCA of Greater Miami-Dade, Inc., Board of Directors (1999 – 2001)

The Federalist Society for Law and Public Policy Studies (approx. 1998 – present)

Film Society of Miami, Board of Directors (1997 – 2001)

Kristi House, Board of Directors (1996 – 1998)

Florida International University Alumni Association, Board of Directors (1996 – 1998)

Junior League of Miami (1994 – 2004)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I am a sustaining (inactive) member of the Junior League of Miami, a charitable service organization that restricts its membership to women. I was an active member from 1994 to 2004 and became a sustaining member in 2004. I did not take any action to change its policy. To the best of my knowledge, no other organization listed above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

History of the League's Involvement with Children's Issues, prepared for the Junior League of Miami, published on its website at http://www.jlmiami.org/our-history/. Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Comment of the Judicial Ethics Advisory Committee, Case No. SC18-648, July 9, 2018. Copy supplied.

Comment of the Judicial Ethics Advisory Committee, Case No. SC17-680, June 26, 2017. Copy supplied.

Comment of the Judicial Ethics Advisory Committee, Case No. SC16-63, March 29, 2016. Copy supplied.

Comment of the Judicial Ethics Advisory Committee, Case No. SC15-465, May 8, 2015. Copy supplied.

Joint Report of the Committees on Standard Jury Instructions: Jurors' Use of Electronic Devices, Committee Report 2014-01 (Civil), Committee Report 2014-04 (Criminal), Committee Report 2014-01 (Contract and Business), Case No. SC14-623, March 31, 2014. Copy supplied.

Comment of the Judicial Ethics Advisory Committee, Case No. SC13-1951, December 16, 2013. Copy supplied.

Comment of the Judicial Ethics Advisory Committee, Case No. SC13-1732, October 31, 2013. Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

As a member of the Judicial Ethics Advisory Committee from 2011 to 2019, I participated in meetings of the Committee. I have supplied minutes of the following meetings I attended:

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 15, 2018. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 23, 2017. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 17, 2016. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, March 15, 2016. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 26, 2015. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 27, 2014. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, February 25, 2014. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 28, 2013. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, February 7, 2013. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, June 22, 2012. Copy supplied.

Judicial Ethics Advisory Committee, Meeting Agenda and Minutes, February 23, 2012. Copy supplied.

As a member of the District Court of Appeal Budget Commission from 2017 to 2019, I participated in meetings of the Committee. I have supplied minutes of the following meetings I attended:

District Court of Appeal Budget Commission, Video Conference Call Meeting Minutes, June 18, 2018. Copy supplied.

District Court of Appeal Budget Commission, Video Conference Call Meeting

Minutes, May 22, 2018. Copy supplied.

District Court of Appeal Budget Commission, Video Conference Call Meeting Minutes, August 3, 2017. Copy supplied.

District Court of Appeal Budget Commission, Video Conference Call Meeting Minutes, June 20, 2017. Copy supplied.

As a member of the Florida Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases, I participated in a meeting of the Committee. Minutes supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

Since I became a judge I have spoken to many students and legal groups. I compiled the list below by reviewing my records and searching publically available databases. However, it is possible that there are additional events that I am unable to recall.

July 25, 2019: Speaker, Future Latino Leaders Summer Institute, National Hispanic Bar Foundation, Washington, D.C. Copy supplied.

July 19, 2019: Speaker, Investiture Ceremony for Jacqueline Becerra, United States Magistrate Judge for the Southern District of Florida, Miami, Florida. Copy supplied.

June 28, 2019: Participant, Criminal Procedure Rules Committee of The Florida Bar, The Florida Bar, Boca Raton, Florida. This committee meeting took place during the 2019 Annual Convention of The Florida Bar. I attended the meeting briefly as the liaison Justice for the Supreme Court of Florida. I gave brief remarks thanking the members for their service. I have no notes, transcript, or recording. The address of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399.

June 28, 2019: Participant, Young Lawyers Division, Law Student Division Meeting of The Florida Bar, The Florida Bar, Boca Raton, Florida. This meeting took place during the 2019 Annual Convention of The Florida Bar. I attended the meeting and spoke to the students about my career and the legal profession. I also

took questions from the students. I have no notes, transcript, or recording. The address of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399.

June 27, 2019: Panelist, "Discussion With the Supreme Court," Appellate Practice Section, The Florida Bar, Boca Raton, Florida. Following the finals of the Orseck moot court competition before the Supreme Court of Florida, this question-and-answer session took place during the 2019 annual convention of The Florida Bar. I have no notes, transcript, or recording. The address of the Appellate Practice Section of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399. Press report supplied.

June 27, 2019: Participant, Juvenile Court Rules Committee of The Florida Bar, Boca Raton, Florida. This committee meeting took place during the 2019 Annual Convention of The Florida Bar. I attended the meeting briefly as the liaison Justice for the Supreme Court of Florida. I gave brief remarks thanking the members for their service. I have no notes, transcript, or recording. The address of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399.

June 27, 2019: Participant, Labor and Employment Law Section of The Florida Bar, Reception Honoring Supreme Court Justices, The Florida Bar, Boca Raton, Florida. This reception took place during the 2019 Annual Convention of The Florida Bar. I received a book award at this reception and gave brief remarks thanking the Labor and Employment section of The Florida Bar. I have no notes, transcript, or recording. The address of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399.

June 26, 2019: Panelist, "How She Did It: unCONVENTIONal Paths to Leadership," The Florida Bar, Boca Raton, Florida. This panel took place during the 2019 Annual Convention of The Florida Bar and addressed different paths to success for women lawyers. I have no notes, transcript, or recording. The address of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399. Press report supplied.

June 25, 2019: Participant, Supreme Court of Florida and Florida Bar Summit, The Florida Bar, Boca Raton, Florida. This meeting took place during the 2019 Annual Convention of The Florida Bar and addressed different issues relating to The Florida Bar including the changing legal marketplace, the rulemaking process, lawyer regulation, and lawyer discipline. I have no notes, transcript, or recording. The address of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399. Agenda supplied.

June 15, 2019: Panelist, Dade County Bar Association Installation of Officers and Directors Dinner, Miami, Florida. I was a panelist with a group of judges discussing career paths to the judiciary. I also administered the oath of office to the incoming officers and directors of the Dade County Bar Association. I have

no notes, transcript, or recording. The address of the Dade County Bar is 123 North West 1st Avenue, Miami, Florida 33128. Invitation and oath supplied.

June 7, 2019, Participant, Dean's Summit, Florida Board of Bar Examiners, Delray Beach, Florida. This was a meeting between the attendees at the Florida Board of Bar Examiners policy retreat and the deans (or their representatives) of sixteen law schools to discuss revisions to the Florida bar examination and application process. I have no notes, transcript, or recording. The address of the Florida Board of Bar Examiners is Tippin-Moore Building, 1891 Eider Court, Tallahassee, Florida 32399. Agenda supplied.

June 6 – 9, 2019: Participant, Florida Board of Bar Examiners Policy Retreat, Delray Beach, Florida. The Florida Board of Bar Examiners is an administrative board of the Supreme Court of Florida which governs admission to The Florida Bar. This policy retreat consisted of meetings between members of the Supreme Court of Florida and the Florida Board of Bar Examiners to discuss different issues relating to the Board's budget, its policy manual, Florida bar examination results, and revisions to the bar application. I have no notes, transcript, or recording. The address of the Florida Board of Bar Examiners is Tippin-Moore Building, 1891 Eider Court, Tallahassee, Florida 32399. Agenda supplied.

May 17, 2019: Speaker, Commencement Address, Florida International University College of Law, Miami, Florida. Copy supplied.

May 10, 2019: Interview, Investiture Ceremony for Barbara Lagoa, Florida Supreme Court, Tallahassee, Florida. Video available at https://thefloridachannel.org/videos/5-10-19-investiture-of-florida-supreme-court-justice-barbara-lagoa/. Copy supplied.

April 1, 2019: Speaker, Florida Women's Hall of Fame, 2019 LEAD Summit on Women's Leadership. Video available at https://www.youtube.com/watch?v=M4jcCmVmHUY.

March 19, 2019: Speaker, Women Making History & Scholarship Awards Event, Miami-Dade Chapter of the Florida Association for Women Lawyers, Miami, Florida. Copy supplied.

March 14, 2019: Speaker, Reception Hosted by Florida International University President Dr. Mark Rosenberg, Miami, Florida. Outline supplied.

February 18, 2019: Speaker, "More Than Words … The Courts and the Constitution," Florida Supreme Court Teacher Institute, Tallahassee, Florida. The Supreme Court of Florida sponsors a program for teachers in Florida's public middle and high schools regarding the role of the judiciary in our state and federal systems. PowerPoint supplied.

January 26, 2019: Speaker, 45th Annual Gala, Cuban American Bar Association,

Miami, Florida. Copy supplied.

January 9, 2019: Speaker, Press Conference, Appointment of Barbara Lagoa to the Supreme Court of Florida, Miami, Florida. Copy supplied. Video available at https://youtu.be/PZCrIhm0dB8

May 10, 2018: Speaker and Panelist, Statewide Judicial Candidate Forum, Judicial Ethics Advisory Committee, Miami, Florida. PowerPoint supplied.

March 5, 2018: Panelist, Discussion with Students from Ransom Everglades High School, American Board of Trial Advocates (ABOTA), Miami Chapter, Miami, Florida. I participated in ABOTA's Third DCA Program, where high school students meet with the panel following oral argument for a question and answer session. I have no notes, transcript, or recording. The address for ABOTA's Third DCA Program is c/o Steven Kellough, 5800 South West 120th Street, Miami, Florida 33156 and Thomas H. Robertson, Bercow, Radell, Fernandez & Larkin, 200 South Biscayne Boulevard, Suite 850, Miami, Florida 33131.

March 13, 2017: Panelist, Discussion with Students from Our Lady of Lourdes High School, American Board of Trial Advocates (ABOTA), Miami Chapter, Miami, Florida. I participated in ABOTA's Third DCA Program where high school students meet with panel following oral argument for a question and answer session. I have no notes, transcript, or recording. The address for ABOTA's Third DCA Program is c/o Steven Kellough, 5800 South West 120th Street, Miami, Florida 33156 and Thomas H. Robertson, Bercow, Radell, Fernandez & Larkin, 200 South Biscayne Boulevard, Suite 850, Miami, Florida 33131.

January 27, 2017: Speaker, Invocation, Retirement Ceremony, Judge Linda Ann Wells, Third District Court of Appeal, Miami, Florida. Copy supplied.

November 16, 2016: Panelist, Discussion with Students from Law Enforcement Officers Memorial High School, American Board of Trial Advocates (ABOTA), Miami Chapter, Miami, Florida. I participated in ABOTA's Third DCA Program where high school students meet with panel following oral argument for a question and answer session. I have no notes, transcript, or recording. The address for ABOTA's Third DCA Program is c/o Steven Kellough, 5800 South West 120th Street, Miami, Florida 33156 and Thomas H. Robertson, Bercow, Radell, Fernandez & Larkin, 200 South Biscayne Boulevard, Suite 850, Miami, Florida 33131.

October 5, 2016: Speaker, Invocation, Induction Ceremony of Candidates for Admission to The Florida Bar, Third District Court of Appeal, Miami, Florida. Copy supplied.

May 12, 2016: Speaker and Panelist, Statewide Judicial Candidate Forum, Judicial Ethics Advisory Committee, Miami, Florida. PowerPoint supplied.

March 14, 2016: Panelist, Discussion with Students from John A. Ferguson Senior High School, American Board of Trial Advocates (ABOTA), Miami Chapter, Miami, Florida. I participated in ABOTA's Third DCA Program where high school students meet with panel following oral argument for a question and answer session. I have no notes, transcript, or recording. The address for ABOTA's Third DCA Program is c/o Steven Kellough, 5800 South West 120th Street, Miami, Florida 33156 and Thomas H. Robertson, Bercow, Radell, Fernandez & Larkin, 200 South Biscayne Boulevard, Suite 850, Miami, Florida 33131.

February 19, 2016: Speaker, Investiture Ceremony of Charles Johnson, Circuit Court Judge, 11th Judicial Circuit in and for Miami-Dade County, Miami, Florida. Copy supplied.

February 10, 2016: Panelist, Discussion with Students from Law Enforcement Officers Memorial High School, American Board of Trial Advocates (ABOTA), Miami Chapter, Miami, Florida. I participated in ABOTA's Third DCA Program where high school students meet with panel following oral argument for a question and answer session. I have no notes, transcript, or recording. The address for ABOTA's Third DCA Program is c/o Steven Kellough, 5800 South West 120th Street, Miami, Florida 33156 and Thomas H. Robertson, Bercow, Radell, Fernandez & Larkin, 200 South Biscayne Boulevard, Suite 850, Miami, Florida 33131.

October 29, 2015: Panelist, Annual Seminar, Appellate Section, Dade County Bar Association. The panel conducted a mock oral argument followed by a question-and-answer session entitled "Best Practices for Oral Arguments." The moderator of the panel was attorney Laura K. Wendell. I have no notes, transcript, or recording. The address of the Dade County Bar Association is 123 North West 1st Avenue, Miami, Florida 33128.

October 20, 2015: Panelist, "Paving the Way to Judicial Success," 2nd Annual Judicial Panel, H.T. Smith Chapter, Black Law Students Association, Florida International University College of Law, Miami, Florida. This panel discussed each panelist's path to the bench and provided law students with information regarding paths to judicial clerkships and career placement. I have no notes, transcript, or recording. The address of the H.T. Smith Chapter, Black Law Students Association is Florida International College of Law, Student Services, Associate Dean Angelique Ortega Fridman, 11200 South West 8th Street, RDG 2015, Miami, Florida 33199. Program materials supplied.

July 9, 2015: Speaker, Invocation, Passing the Gavel Ceremony, Judge Richard Suarez, Third District Court of Appeal, Miami, Florida. Copy supplied.

February 28, 2015: Moderator, "Developments in Florida Tort and Business

Law," 1st Annual Florida Chapters Conference, Federalist Society for Law and Public Policy Studies, Orlando, Florida. I have no transcript or recording. Introduction notes supplied.

February 6, 2015: Panelist, "Tips for Effective Petitions and Briefs" and "Plenary Session: Questions and Answers," Practicing Before the Third District Court of Appeal Seminar, The Florida Bar Continuing Legal Education Committee, the Appellate Practice Section of The Florida Bar, and the Dade County Bar Association. This seminar consisted of a series of panels comprised of judges from the Third District Court of Appeal, with a final plenary question-and-answer session consisting of all of the panelist judges. I have no notes, transcript, or recording. The address of The Florida Bar Continuing Legal Education Committee and the Appellate Practice Section of The Florida Bar is 651 East Jefferson Street, Tallahassee, Florida 32399, and the address of the Dade County Bar Association is 123 North West 1st Avenue, Miami, Florida 33128. Seminar program supplied.

April 26, 2014: Speaker and Panelist, Statewide Judicial Candidate Forum, Judicial Ethics Advisory Committee, Miami, Florida. I used the same PowerPoint as for the May 12, 2016 session.

October 8, 2014: Speaker, Remarks and Administration of Oath, Induction Ceremony of Candidates for Admission to The Florida Bar, Third District Court of Appeal, Miami, Florida. Copy supplied.

September 9, 2011: Speaker, Keynote Address and Administration of Oath, Installation Luncheon for Incoming Officers and Directors, Broward County Women Lawyers' Association, Fort Lauderdale, Florida. Copy supplied.

February 17, 2011: Panelist, "Leadership in the Courtroom and Beyond: A Judicial Roundtable," Mid-Year Meeting, National Association of Women Lawyers, Miami, Florida. This panel discussion addressed effective leadership and advocacy skills. I have no notes, transcript, or recording. The address for the National Association of Women Lawyers is 312 North Clark Street, Chicago, Illinois 60654. Event program supplied.

December 14, 2010: Speaker, Commencement Address, Florida International University School of Arts & Sciences, Miami, Florida. Copy supplied.

September 13, 2010: Speaker, "Dos and Don'ts of Merit Retention," Continuing Judicial Education Program, District Court of Appeal Appellate Conference, Office of State Courts Administrators, Ponte Vedra Beach, Florida. This presentation, given to those judges attending the annual conference of Florida's district courts of appeal, summarized the rules governing Florida judicial retention elections. I have no notes, transcript, or recording. The address of the Office of State Courts Administrators is 500 South Duval Street, Tallahassee, Florida

32399.

May 3, 2010: Speaker, Induction Ceremony of Candidates for Admission to The Florida Bar, Third District Court of Appeal, Miami, Florida. Copy supplied.

March 21, 2010: Speaker, Annual Spring Gala, Black Law Students Association & Caribbean Law Students Association, St. Thomas University School of Law, Miami, Florida. Copy supplied.

April 4, 2008: Panelist, "Preserving Error: The Tension Between Strategy and Appealability," 25th Annual Third District Court of Appeal Seminar, Dade County Bar Association. I have no notes, transcript, or recording. The address of the Dade County Bar Association is 123 North West 1st Avenue, Miami, Florida 33128. Outline prepared by attorney panelists supplied.

November 3, 2006: Speaker, Investiture Ceremony for Barbara Lagoa, Judge, Third District Court of Appeal, Miami, Florida. Copy supplied.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Rachel Kamoutsas, *From Hialeah to Tallahassee: A Journey Powered by Mentorship and Dedication*, Florida Association of Women Lawyers Journal, Spring/Summer 2019. Copy supplied.

Gary Blankenship, *Justice Lagoa Sworn In*, Florida Bar News, May 13, 2019. Copy supplied.

Edward Pozzuoli, *DeSantis Charges Out of the Gate*, Fort Lauderdale Sun-Sentinel, February 6, 2019. Copy supplied.

Dara Kam, *Flexing Some Executive Muscle*, News Service of Florida, January 16, 2019. Copy supplied.

Roberto Martinez, *Justice Lagoa Will Make All Floridians Proud*, Miami Herald, January 11, 2019. Copy supplied.

Anthony Man, *Court Begins Shift to Right*, Orlando Sentinel, January 10, 2019. Copy supplied.

David Ovalle, *Miami's Lagoa First Hispanic Woman on Florida Supreme Court*, Miami Herald, January 10, 2019. Copy supplied.

Jessica Chasmar, *Ron DeSantis, Republican Governor, Appoints 1st Hispanic*

Woman to Serve on Florida Supreme Court, The Washington Times, January 10, 2019. Copy supplied.

Jim Ash, *Lagoa Joins the Florida Supreme Court*, Florida Bar News, January 9 2019. Copy supplied.

Andrew Pantazi, *Before Next Governor is Chosen, Florida Supreme Court Hopefuls Face Ideological Test*, Florida Times-Union, November 4, 2018. Copy supplied.

Deroy Murdock, *Clinton Régime Outdoes Itself by Snatching Elian Gonzalez,* Cato Institute, April 24, 2000. Copy supplied.

Rick Bragg, *Standoff Continues Over Elian*, New York Times, April 18, 2000. Copy supplied.

Rick Bragg, *Federal Judge Fails to Rule on Fate of Cuban Youngster*, New York Times, March 10, 2000. Copy supplied.

Wilfredo Cancio Isla and Rui Ferreira, *En la Batalla por Elián un Abogado de Clinton Representa al Padre*, El Nuevo Herald, March 10, 2000. Copy supplied.

Armando Villafranca, *Fate of Shipwrecked Boy Still Hangs in the Balance,* Houston Chronicle, March 10, 2000. Copy supplied. Reprinted in multiple outlets.

Laurie Goering, *Elian Judge Hints at Long Battle*, Chicago Tribune, March 10, 2000. Copy supplied. Reprinted in multiple outlets.

David Adams, *Court Debate Key to Cuban Boy's Fate,* St. Petersburg Times, March 10, 2000. Copy supplied.

Phillip Davis, *Federal Judge Hears Case Brought By Relatives of Elian Gonzalez,* All Things Considered, National Public Radio, March 9, 2000. Transcript supplied.

Celia Dugger, *Exile Ties Deepen in New Miami*, Miami Herald, December 25, 1988. Copy supplied. Reprinted in multiple outlets.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

From January 9, 2019, to the present, I have served as a Justice of the Supreme Court of Florida. I was appointed to this position by Governor Ron DeSantis. The Supreme Court of Florida is the highest appellate court in Florida. Much of the Supreme Court of

Florida's jurisdiction is discretionary. The Court may only exercise its discretionary jurisdiction based on the grounds enumerated in the Florida Constitution and not by way of petition for writ of certiorari. The Court has mandatory jurisdiction over appeals from decisions by the district courts of appeal declaring a state statute or constitutional provision invalid and has mandatory and exclusive jurisdiction over appeals in cases in which the death penalty is imposed, appeals of final judgments entered in proceedings for validation of bonds or certificates of indebtedness, and appeals in cases involving Public Service Commission action relating to rates or service of utilities providing electric, gas, or telephone service. The Court has nonexclusive original jurisdiction over certain extraordinary writs, including writs of mandamus, prohibition, habeas corpus, and quo warranto. Finally, the Court has exclusive jurisdiction over the regulation of The Florida Bar (including attorney discipline), admission to membership in The Florida Bar, creating and amending the Florida Rules of Court, and the discipline of judges.

From June 2006 to January 2019, I served as a judge on the State of Florida Third District Court of Appeal. I was appointed to this position by Governor Jeb Bush. I was retained in 2008 and 2014. The district courts of appeal are Florida's intermediate appellate courts with jurisdiction to hear appeals from final judgments or orders of trial courts and administrative agency decisions (except those final judgments or orders directly appealable to the circuit court or to the Supreme Court of Florida), appeals from enumerated non-final orders of trial courts, and original proceedings, including petitions for writs of certiorari, prohibition, and habeas corpus. There are five district courts of appeal in Florida. The Third District has jurisdiction over matters arising in Miami-Dade and Monroe Counties.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

Because I have not served as a trial court judge, I have not presided over any cases that have gone to verdict or judgment. As a judge on the Third District Court of Appeal, I participated in 12,534 cases, including 360 cases in which I authored an opinion (including concurrences and dissents). As a Justice on the Supreme Court of Florida, I have participated in 524 cases.

i. Of these, approximately what percent were:

jury trials:	0%
bench trials:	0%
civil proceedings:	48%
criminal proceedings:	52%

For purposes of the calculation above, I have included post-appeal and habeas corpus proceedings in the criminal category, even though they are technically civil in nature.

b. Provide citations for all opinions you have written, including concurrences and

dissents.

Please see the attached list.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Israel v. DeSantis*, 269 So. 3d 491 (Fla. 2019)

I authored the majority opinion affirming the trial court's dismissal of the appellant's petition for writ of quo warranto, which had challenged the governor's authority under the Florida Constitution to suspend the appellant from office. Our opinion establishes the limited role of Florida's judiciary in reviewing the exercise of the governor's power to suspend a constitutional officer and the legislature's power to remove or reinstate a suspended officer under the structure established by the Florida constitution.

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2. *Jackson v. DeSantis*, 268 So. 3d 662 (Fla. 2019)

I authored a concurring opinion in this denial of a petition for writ of quo warranto, which challenged the governor's authority under the Florida Constitution to suspend the petitioner from office. In the concurrence, I examined whether the Florida Constitution imposed a temporal restriction on the executive power to suspend. As the constitutional provision at issue did not contain such a restriction, I noted that the Florida Constitution reserved to the Florida Senate the power to conclude whether the particular facts and circumstances merited removal or reinstatement and that an earlier advisory opinion from the Florida Supreme Court had inserted the judiciary into a process that was constitutionally reserved to the executive and legislative branches.

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3. *Estes v. Rodin*, 259 So. 3d 183 (Fla. 3d DCA 2018)

I authored the unanimous panel opinion that affirmed the trial court's dismissal of the complaint against certain out-of-state defendants for lack of personal jurisdiction. Plaintiffs brought claims of defamation based on comments made by certain defendants in social media chat rooms. This case involved the interplay of Florida's long-arm statute with constitutional due process. In our opinion, we contrasted the reach of the long-arm statute with the constitutional norms of due process and also considered and distinguished decisions from other district courts of appeal that had found personal jurisdiction in cases involving intentional torts arising in the context of the Internet.

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4. *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056 (Fla. 3d DCA 2018)

I authored the majority decision affirming in part and reversing in part the trial court's dismissal with prejudice of the plaintiffs' claims against the City of Miami Beach. The owner and operator of a nightclub on Miami Beach alleged that members of the City's code and zoning enforcement department initiated a campaign of harassment that involved improper citations, inspections, and cease-

and-desist orders, and asserted claims for violations of procedural and substantive due process. Our decision explained and clarified the scope of Florida's continuing tort doctrine (in this case, how that doctrine relates to the accrual of causes of action and the running of the statute of limitations), and also applied United States Supreme Court and Eleventh Circuit Court of Appeals precedent to conclude that plaintiffs could not assert a cognizable claim for violation of substantive due process.

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5. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689 (Fla. 3d DCA 2018)

I authored the unanimous panel decision reversing the trial court's denial of appellants' motion to compel arbitration. One party to a commercial contract initiated arbitration proceedings pursuant to the contract's mandatory arbitration clause. At the same time that it filed its counterclaim in the arbitration proceeding, the other party filed a complaint in civil court asserting a claim for unjust enrichment. The trial court denied a motion to compel arbitration, concluding that a claim for unjust enrichment was equitable and therefore fell within an exception to the contractual arbitration mandate. Our decision required an analysis of the nature of the relief sought in the litigation (i.e., legal or equitable), rather than a reliance on the general description of unjust enrichment as "equitable in nature." In concluding that the particular relief sought was legal in nature, our opinion clarified an area of Florida law with widespread application

to commercial contracts.

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6. *Aguilar v. State*, 239 So. 3d 108 (Fla. 3d DCA 2018)

I authored the unanimous opinion affirming the defendant's conviction and sentence for various DUI crimes arising out of a multi-vehicle accident that resulted in the death of one person and serious bodily injury to two others. The primary issue in this appeal was whether the trial court erred in admitting the results of blood alcohol tests performed on blood draws obtained from Aguilar while he was hospitalized for injuries sustained in a multi-vehicle accident. Resolution of this issue depended on the application of the exigent circumstances to the Fourth Amendment's warrant requirement. We concluded that the blood draws did not violate the Fourth Amendment and that the trial court properly denied Aguilar's motion to suppress.

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7. *Harris v. State*, 238 So. 3d 396 (Fla. 3d DCA 2018)

I wrote the unanimous opinion in this case, which reversed the trial court's denial of the defendant's motion to suppress the results of a search of his backpack after his arrest for reckless driving and driving an unregistered vehicle (in this case, a dirt bike). This case was released on the same day as *Aguilar v. State* and, like *Aguilar*, addressed an exception to the Fourth Amendment's warrant requirement. At issue in this case were the exceptions related to searches incident to arrest and searches of automobiles/compartments of automobiles incident to arrest. We concluded that because the defendant had been secured and separated from his backpack at the time of the search, the trial court erred in denying the motion to suppress on those grounds. We noted that on remand the trial court remained free to consider whether the defendant had consented to the search of his backpack. Consent had been raised below in opposition to the motion to suppress, but the trial court did not make any findings of fact on that issue once it concluded that the search was a valid search incident to arrest.

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8. *Abeid-Saba v. Carnival Corporation*, 184 So. 3d 593 (Fla. 3d DCA 2016)

I wrote the unanimous decision in this case, which arose out of a cruise ship accident in Italy. Two groups of passengers filed separate lawsuits, which proceeded before separate trial court judges. The defendants moved to dismiss each case for *forum non conveniens*. We consolidated the separate appeals of trial courts' orders and addressed them in a single decision. The central issue was whether the trial courts had abused their discretion in their evaluation of the

private and public factors relevant to *forum non conveniens*. Our decision analyzed the nature of *forum non conveniens* under Florida law, and considered the application of that law to the record before the trial courts. As to the trial court order that dismissed the case as to both foreign and United States plaintiffs, we concluded that there was no abuse of discretion. As to the trial court order that dismissed the case as to the foreign plaintiffs but not as to the United States plaintiffs, we concluded that the trial court abused its discretion because it failed to consider the nature of the evidence necessary to prove and disprove each element of plaintiffs' causes of action, as well as the accessibility of the evidence, as required by precedent.

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9. *Valenzuela v. Globeground North America, LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009)

I wrote the unanimous opinion in this employment discrimination case, which affirmed entry of summary judgment in favor of the defendant. The defendant, a provider of aircraft refueling services at Miami International Airport, hired the plaintiff to fuel aircraft and operate refueling equipment. Federal, state, and local regulations required plaintiff to possess a commercial driver's license to operate fueling equipment at the airport. Plaintiff did not have a license, although she

stated that she held one on her employment application. Plaintiff failed to obtain a license during her probationary period and was terminated. Plaintiff filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission, which found no probable cause and dismissed the charges. Plaintiff then filed a lawsuit in state court alleging gender discrimination in violation of the Florida Civil Rights Act, which is patterned after Title VII of the federal Civil Rights Act of 1964. Our decision sets forth a detailed analysis of the standards governing claims of employment discrimination under the Florida Civil Rights Act, leading to our conclusion that the plaintiff had not carried her burden of showing that the defendant's proffered reasons for terminating the plaintiff were a pretext for gender discrimination and that the trial court properly granted summary judgment.

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[The Florida Bar's website indicates that Mr. Capua was disbarred in 2011 and is no longer eligible to practice law in Florida]

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10. *United Automobile Insurance Company v. Salgado*, 22 So. 3d 594 (Fla. 3d DCA 2009)

I authored the unanimous opinion in this case granting a petition for writ of certiorari and quashing the trial court's opinion. The primary issue in this case was whether Florida's Motor Vehicle No-Fault Law abrogated an insurer's statutory right to recission under Florida's insurance code. Our decision discussed relevant principles of statutory construction and concluded that, based on the plain meaning of the Motor Vehicle No-Fault Law, the Florida Legislature had not abrogated the insurer's statutory right to recission set forth in the insurance code. We also analyzed the difference between recission and cancellation of contracts.

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Attorney for Appellee:
Christian Carrazana
Christian Carrazana, P.A.
Post Office Box 900520
Homestead, Florida 33090
(786) 226-8205

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

These cases are listed in chronological order, beginning with the most recent. Regarding the attorneys listed, I have provided their most recent contact information, based on an online search, which may differ from their address at the time that they appeared in the listed case.

1. *Israel v. DeSantis*, 269 So. 3d 491 (Fla. 2019)

Attorneys for Appellant:
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Attorneys for Appellee:
Joe Jacquot
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John MacIver
Colleen Ernst
James Uthmeier
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The Capitol, PL-05
400 South Monroe Street
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(850) 717-9310

2. *Jackson v. DeSantis*, 268 So. 3d 662 (Fla. 2019)

Attorneys for Petitioner:
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3. *Estes v. Rodin*, 259 So. 3d 183 (Fla. 3d DCA 2018)

Attorneys for Appellants:
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(305) 255-7500

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Attorneys for Appellees:
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Miami, Florida 33126
(305) 774-9966

Sean M. McCleary
Waldman Barnett, P.L.
3250 Mary Street, Suite 102
Miami, Florida 33133
(305) 371-8809

Melinda S. Thornton
Cole, Scott & Kissane, P.A.
Dadeland Centre
9150 South Dadeland Boulevard, Suite 1400
Miami, Florida 33156
(305) 350-5300

4. *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056 (Fla. 3d DCA 2018)

Attorneys for Appellants:
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Thomas A. Ronzetti

Tal J. Lifshitz
Kozyak Tropin & Throckmorton
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Attorneys for Appellee:
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Robert F. Rosenwald
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(305) 673-7470

Alix Cohen
Wilkie D. Ferguson Jr. United States Courthouse
400 North Miami Avenue
Room 13-2
Miami, Florida 33128
(305) 523-5520

5. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689 (Fla. 3d DCA 2018)

Attorneys for Appellants:
J. Raul Cosio
Rebecca M. Plasencia
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Attorneys for Appellees:
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Ilana Tabacinic Gorenstein
Erika Shuminer Willis
Akerman LLP
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6. *Aguilar v. State*, 239 So. 3d 108 (Fla. 3d DCA 2018)

Attorneys for Appellant:
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Annabelle Nahra Nadler
Diego Weiner
Jeffrey S. Weiner, P.A.
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Attorney for Appellee:
Michael W. Mervine
Assistant Attorney General
Office of the Attorney General
SunTrust International Center
1 South East 3rd Avenue, Suite 900
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7. *Harris v. State*, 238 So. 3d 396 (Fla. 3d DCA 2018)

Attorney for Appellant:
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(512) 774-4208

Attorney for Appellee:
Kayla H. McNab
Assistant Attorney General
Office of the Attorney General
SunTrust International Center
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Miami, Florida 33131
(305) 377-5441

8. *Abeid-Saba v. Carnival Corporation*, 184 So. 3d 593 (Fla. 3d DCA 2016)

Attorney for Appellants:
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Washington, D.C. 20001
(202) 942-5000

John D. Kimball
Blank Rome LLP
1271 Avenue of the Americas
New York, New York 10020
(212) 885-5000

9. *Valenzuela v. Globeground North America, LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009)

Attorneys for Appellant:
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Law Offices of Peter Marcellus Capua LLC
19 West Flagler Street, Suite 301
Miami, Florida 33130
(305) 374-6518
[The Florida Bar's website indicates that Mr. Capua was disbarred in 2011 and is no longer eligible to practice law in Florida]

Jorge A. Calil
Calil Law, P.A.
Law Center at Brickell Bay
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(305) 373-5529

Attorneys for Appellee:
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Upchurch, Watson, White & Max
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Fort Lauderdale, Florida 33301
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Ronnie Guillen
Winget, Spadafora & Schwartzberg, LLP
14 North East 1st Avenue, Suite 600
Miami, Florida 33132
(305) 830-0600

10. *United Automobile Insurance Company v. Salgado*, 22 So. 3d 594 (Fla. 3d DCA 2009)

Attorney for Appellant:
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Office of the General Counsel
United Automobile Insurance Company
1313 North West 167th Street
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Attorney for Appellee:
Christian Carrazana
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Post Office Box 900520
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e. Provide a list of all cases in which certiorari was requested or granted.

Long v. State, 271 So. 3d 938 (Fla. 2019), *cert. denied*, 139 S. Ct. 2645 (2019)

Bowles v. State, 44 Fla. L. Weekly S199 (Fla. Aug. 13, 2019), *cert. denied*, 2019 WL 397767 (Aug. 22, 2019)

Fleitas v. State, 3 So. 3d 351 (Fla. 3d DCA 2008), *rev. denied*, 14 So. 3d 241 (Fla. 2009), *cert. denied*, *Fleitas v. Florida*, 558 U.S. 996 (2009)

Thomas v. Pub. Health Tr. of Miami-Dade Cty., 124 So. 3d 1040 (Fla. 3d DCA 2013), *rev. denied*, *Thomas v. Jackson Health Care Sys.*, 147 So. 3d 350 (2014), *cert. denied*, 135 S. Ct. 408 (2014)

Jimenez v. State, 196 So. 3d 499 (Fla. 3d DCA 2016), *rev. denied*, 2016 WL 5718938 (Fla. September 27, 2016), *cert. denied*, *Jimenez v. Florida*, 137 S. Ct. 1230 (2017)

Rodriguez v. Bank of Am., N.A., 246 So. 3d 541 (Fla. 3d DCA 2018) (per curiam affirmance), *petition dismissed*, 2018 WL 3853539 (Fla. August 7, 2018), *cert. denied, Rodriguez v. Bank of Am., N.A.*, 139 S. Ct. 1178 (2019)

Gil v. State, 239 So. 3d 69 (Fla. 3d DCA 2018) (per curiam affirmance), *petition dismissed*, 2018 WL 1639694 (Fla. April 5, 2018), *cert. denied, Gil v. Florida*, 139 S. Ct. 1332 (2019)

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

As a judge on the Third District Court of Appeal, I authored 360 opinions. The Supreme Court of Florida reversed the following 3 cases:

1. *Johnson v. State*, 10 So. 3d 680 (Fla. 3d DCA 2009), *quashed by* 53 So. 3d 1003 (Fla. 2010)

In a 4-3 decision, the Supreme Court of Florida held that the district court erred in applying a harmless-error standard to the trial court's incorrect instruction to a jury that, prior to deliberations, it cannot have testimony read back, and that such improper jury instruction constitutes per se reversible error.

2. *Am. Educ. Enters., LLC v. Bd. of Trustees of Internal Improvement Tr. Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010), *quashed by Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450 (Fla. 2012)

The Supreme Court of Florida held that the district court erred in providing interlocutory relief, via writ of certiorari, to correct a trial court's order that had permitted overly broad discovery.

3. *Mauna Loa Invs., LLC v. Santiago*, 122 So. 3d 520 (Fla. 3d DCA 2013), *quashed by Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752 (Fla. 2016)

This matter arose out of two premises liability suits brought by the same plaintiff and which had been consolidated before the trial court. The Supreme Court of Florida held that the district court erred in holding that exhibits attached by the plaintiff to the complaint in the first consolidated case and that contradicted plaintiff's allegations in the second consolidated complaint could be considered for purposes of a motion to vacate a default judgment entered in the second consolidated action.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished

opinions are filed and/or stored.

All of my opinions are published.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

Israel v. DeSantis, 269 So. 3d 491 (Fla. 2019) (Art. IV, §7, Fla. Const.)

Jackson v. DeSantis, 268 So. 3d 662 (Fla. 2019) (Art. IV, §7, Fla. Const.)

Chakra 5, Inc. v. City of Miami Beach, 254 So. 3d 1056 (Fla. 3d DCA 2018) (U.S. Const. amend. XIV, §1)

Burns v. Tondreau, 139 So. 3d 481 (Fla. 3d DCA 2014) (constitutional eligibility for office under municipal charter)

Estes v. Rodin, 259 So. 3d 183 (Fla. 3d DCA 2018) (personal jurisdiction & due process)

Francis v. State, 208 So. 3d 105 (Fla. 3d DCA 2015) (U.S. Const. amend. VIII; *Graham v. Florida*, 560 U.S. 48 (2010))

Aguilar v. State, 239 So. 3d 108 (Fla. 3d DCA 2018) (U.S. Const. amend. IV; Art. I, §9, Fla. Const.)

Neely v. State, 126 So. 3d 342 (Fla. 3d DCA 2013) (U.S. Const. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966); U.S. Const. amend VIII; *Miller v. Alabama*, 567 U.S. 460 (2012))

Rodriguez v. State, 982 So. 2d 1272 (Fla. 3d DCA 2008) (U.S. Const., amend. VI; *Faretta v. California*, 422 U.S. 806 (1975))

Harris v. State, 238 So. 3d 396 (Fla. 3d DCA 2018) (U.S. Const. amend. IV)

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have never sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have

come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

Both the Third District Court of Appeal and the Supreme Court of Florida maintain an automatic recusal process. At each court, I provided the Clerk of Court with a "recusal list" identifying my husband (who is an attorney), attorneys with whom I am close friends, and significant individual stock holdings (if any). The Clerk is responsible for ensuring that I am not assigned to any case involving entities or individuals on the list. At the Third District Court of Appeal, I had no way of knowing what cases the Clerk did not assign to me based on my recusal list. At the Supreme Court of Florida, however, the Clerk maintains a record of the automatic recusal of a Justice, and those cases are included in the list below.

In addition to this automatic recusal process, I also review each case assigned to me in order to determine whether the matter requires recusal. In some infrequent instances, a case has been assigned to me that involves my husband's firm despite the automatic recusal process described above. When that occurs, I recuse myself sua sponte. Additionally, at the Supreme Court of Florida, I recuse myself sua sponte from any case where I sat on the oral argument panel of, or was otherwise involved in the decision rendered by, the Third District Court of Appeal.

Pursuant to the policies described above, I have recused myself sua sponte in the following matters:

Canta v. Philip Morris, Case No. 18-1104 (Spousal Policy)
Pollari v. Philip Morris, Case No. 17-2164 (Spousal Policy)
Irimi v. RJ Reynolds, Case No. 18-251 (Spousal Policy)
Torres v. Deutsche Bank, Case No. 18-890 (Third DCA)
Alfonso v State, Case No. 18-1110 (Third DCA)
Lane v. Lane, Case No. 18-1563 (Third DCA)
Nails v. Walmart, Case No. 18-1626 (Third DCA)
Chestnut v. Nationstar Mortgage, Case No. 18-1748 (Third DCA)
Valiente v. R.J. Behar & Company, Inc., Case No. 18-1756 (Third DCA)

Garcia v. Bank of New York Company, Inc., Case No. 18-1764 (Third DCA)
McCarthur v. State, Case No. 18-1826 (Third DCA)
Amaya v. U.S. Bank National Association, Case No. 18-1857 (Third DCA)
Gonzalez v. Pacheco, Case No. 18-1940 (Third DCA)
Viera v. Mark Inch, Case No. 18-1956 (Third DCA)
Gonzalez v. Federal Mortgage Association, Case No. 18-2064 (Third DCA)
Matheson v. Miami-Dade County, Case No. 18-2088 (Third DCA)
Bacchus v. Mark Inch, Case No. 18-2155 (Third DCA)
Estes v. Rodin, Case No. 18-2156 (Third DCA)
Gyden v. State, Case No. 19-2 (Third DCA)
Philpot v. State, Case No. 19-132 (Third DCA)
Johnson v. State, Case No. 19-334 (Third DCA)
Thompson v. State, Case No. 19-339 (Third DCA)
Faison v. State, Case No. 19-346 (Third DCA)
Hernandez-Morel v. State, Case No. 19-351 (Third DCA)
State v. Mendez, Case No. 19-367 (Third DCA)
Atlantic Civil v. Swift, Case No. 19-409 (Third DCA)
Brown v. State, Case No. 19-529 (Third DCA)
Flowers v. State, Case No. 19-1006 (Third DCA)

In addition to the recusal process described above, based on my recollection and a review of the court's files, I recused myself sua sponte from the following cases while a judge on the Third District Court of Appeal: *Brugmann v. State*, Case No. 3D9-2540; *Murphy v. Murphy*, Case No. 3D11-1604; *City of Key West v. Key West Golf Club Homeowners' Ass'n*, Case No. 3D13-57; *Fuste v. Morales*, Case Nos. Nos. 3D16-1642, 3D16-933 & 3D16-1781; *Bedoyan v. Samra*, Case No. 3D17-1382; and *RDS v. Dep't of Children & Families*, Case Nos. 3D18-0988, 3D18-0839, 3D18-0984). In *Brugmann*, I recused myself from a motion for rehearing/rehearing en banc because my husband joined the law firm representing the petitioner. In *Murphy*, I recused myself from a pending motion for rehearing en banc because I determined that a matter arose requiring recusal. In *City of Key West*, I recused myself during a pending motion for rehearing en banc because I determined that a matter arose that required recusal. In *Fuste*, I recused myself from a pending motion for rehearing en banc because, upon reviewing the record, I determined that the case involved a family friend. In *Bedoyan*, I recused myself because I mistakenly believed that the case involved a family friend. In *RDS*, I recused myself from a pending motion for rehearing/rehearing en banc because, upon reviewing the record, I determined that the expert in the case was a family friend.

Similarly, in addition to the recusal process described above, based on my recollection and a review of the court's files, I recused myself sua sponte while a Justice on the Supreme Court of Florida from *RDS v. Dep't of Children & Families*, Case No. 19-161, one of the cases discussed above where I had recused myself from the case when it was before the Third District Court of Appeal.

Finally, based on my recollection and a review of the courts' files, the only motion seeking my disqualification was filed before the Supreme Court of Florida in *Tabraue v. Doctors Hospital*, Case No. 19-685. Petitioner filed a motion to disqualify me and the other Justice who had served on the Third District Court of Appeal. The basis for the motion was that both of us initially were members of the oral argument panel for this case when it was at the Third District Court of Appeal. The motion noted that neither of us participated in the opinion issued by the Third District Court of Appeal, as it issued after we had joined the Supreme Court of Florida, and further noted that Petitioner was not alleging that either of us "would be partial in deciding this case." Although I denied the motion for recusal because it did not state a legally sufficient basis for disqualification, I sua sponte entered a separate order of recusal pursuant to Florida Rule of Judicial Administration 2.330(i).

In answering this question, I have not included any cases that were transferred to another judge on the Third District Court of Appeal after I was appointed to the Florida Supreme Court, as those cases were reassigned because of my appointment to another court, not because of a recusal.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held any public office other than my judicial offices. From 2002 to 2003, I was a member of the Federal Judicial Nominating Commission for the United States District Court for the Southern District of Florida. I was appointed to the commission by Florida Governor Jeb Bush.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge,

the court and the dates of the period you were a clerk;

I have never served as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1992 – 1993
Morgan Lewis & Bockius LLP
200 South Biscayne Boulevard, Suite 5300
Miami, Florida 33131
Associate

1993 – 1994
Schulte Blum McMahon Joblove & Haft
[firm no longer exists]
200 South Biscayne Boulevard, Suite 3150
Miami, Florida 33131
Associate

1994 – 1998
Cohen Berke Bernstein Brodie & Kondell, P.A.
[firm no longer exists]
2601 South Bayshore Boulevard, 19th Floor
Miami, Florida 33133
Associate

1998 – 2002
Greenberg Traurig
333 South East 2nd Avenue, Suite 4400
Miami, Florida 33131
Associate

2003 – 2006
United States Attorney's Office for the Southern District of Florida
99 North East 4th Street
Miami, Florida 33132
Assistant United States Attorney

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant

matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I served as an Assistant United States Attorney in the Southern District of Florida from 2003 until my appointment to the bench in 2006. Upon joining the U.S. Attorney's Office in 2003, I was assigned to the Civil Division where my practice focused primarily on the defense of employment discrimination and federal tort claims brought against the United States and its agencies. In December 2003, I was transferred to the Criminal Division where my practice focused exclusively on criminal trial and appellate work.

Prior to joining the U.S. Attorney's Office, my practice generally consisted of complex commercial litigation. While in private practice, I handled a variety of matters ranging from employment discrimination claims, construction litigation, contract disputes, business torts, franchise disputes, securities litigation, claims seeking injunctive relief, class actions, arbitrations, and shareholder derivative actions.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

As an Assistant United States Attorney, I represented the United States of America and its agencies and officials. In private practice, my typical clients were insurance companies in coverage disputes, financial institutions, public and closely held corporations, partnerships, and individuals.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

1992 – 2003: While in private practice, 100% of my practice was in litigation. For cases pending in state court, I appeared in court frequently. For cases pending in federal court, I appeared in court occasionally.

2003 – 2006: While an Assistant United States Attorney, 100% of my practice was in litigation. All of my cases were in federal court, and I appeared in court frequently.

i. Indicate the percentage of your practice in:
   1. federal courts: 75%
   2. state courts of record: 25%
   3. other courts: 0%
   4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 50%
   2. criminal proceedings: 50%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried seven cases to verdict. I was chief counsel in three of those trials and associate counsel in the remaining four.

i. What percentage of these trials were:
   1. jury: 100%
   2. non-jury: 0%

In addition to these jury trials, I arbitrated three commercial arbitrations to final decision. I served as associate counsel in those arbitrations.

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Aguilar*, 188 F. App'x. 897 (11th Cir. 2006)

Defendant appealed his conviction and sentence for conspiracy to smuggle aliens into the United States. After the close of evidence, the jury returned a verdict of guilty on thirteen counts against the defendant. The trial judge subsequently sentenced the defendant to the statutory mandatory minimum of 60 months' imprisonment. The defendant raised a number of issues on appeal: (1) insufficiency of the evidence to establish that he smuggled aliens into the United States for commercial gain; (2) the district court abused its discretion in denying his motion for a new trial on a variety of grounds; and (3) the statutory mandatory minimum was unreasonable because the Sentencing Guidelines range fell below the mandatory minimum. I did not handle this case at trial, but had primary responsibility for representing the United States on appeal.

Date of Representation: 2006

Presiding Judges: Hon. Gerald Tjoflat, Hon. Lanier Anderson, and Hon. Joel Dubina.

Counsel for Defendant:
Sheryl J. Lowenthal
9130 South Dadeland Boulevard, Suite 1511
Miami, Florida 33156
(305) 670-3360

2. *United States v. Ostroff*, Case No. 05-CR-20738-Martinez (S.D. Fla.)

This case involved a single-defendant indictment charging the defendant with possession of child pornography. While an Assistant United States Attorney, I was part of a task force focused on prosecuting child pornography in the Southern District. In connection with this initiative, I attended a training seminar at the U.S. Department of Justice's National Advocacy Center, where law enforcement agents and federal prosecutors provided instruction on the most effective ways to prosecute crimes involving the possession and distribution of child pornography. In this case, the grand jury indicted the defendant on a single count of possession of child pornography stored on his computers. I conducted the proceedings before the grand jury, filed the indictment, and handled the initial pretrial proceedings. The defendant pleaded guilty.

Date of Representation: 2005

Presiding Judge: Hon. Jose Martinez

Counsel for Defendant:
Hector Dopico
Federal Public Defender's Office, Southern District of Florida
150 West Flagler Street, Suite 1700
Miami, Florida 33130

(305) 530-7000

3. *United States v. Junior Rafael Corrales, et al.*, Case No. 03-20155-CR-Cooke (S.D. Fla.)

This case involved a four-defendant, four-count indictment charging the defendants with conspiracy to possess with intent to distribute cocaine, attempted possession of cocaine with the intent to distribute, Hobbs Act robbery, and conspiracy to commit Hobbs Act robbery. This case proceeded against Defendant Corrales, as two defendants pleaded guilty and the fourth defendant's trial was separately set. Three weeks before trial was set to begin, the prosecutor assigned to the case was transferred out of the Major Crimes Section and the case was reassigned to me as lead counsel. The jury found the defendant guilty.

Date of Representation: 2004

Presiding Judge: Hon. Marcia Cooke

Co-counsel:
Kenneth A. Blanco
Director, Financial Crimes Enforcement Network
FinCEN
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Washington, D.C. 20036
(202) 354-6393

Counsel for Defendant:
Paul D. Lazarus
1 Financial Plaza, Suite 2210
Fort Lauderdale, Florida 33394
(954) 712-1000

4. *United States v. Jaborie Brown, et al.*, Case No. 03-20678-CR-Altonaga (S.D. Fla.)

This was a HIDTA ("High Intensity Drug Trafficking Task Force") cold case historical investigation into a home invasion, carjacking, and Rolex watch robbery ring operating in southern Miami-Dade County. The investigation resulted in a twenty-two count indictment charging the five defendants with three separate conspiracies (conspiracy with intent to distribute cocaine; conspiracy to commit Hobbes Act robberies; conspiracy to use and carry firearms during and in relation to crimes of violence and drug trafficking), as well as numerous substantive counts, including four separate home invasion robberies. Co-counsel and I split the duties in this matter evenly. I handled the majority of the written pretrial and trial motions, as well as interviewing, preparing, and examining at trial the numerous victims in this case. I also handled the majority of the law enforcement witnesses while co-counsel handled other experts and government

witnesses, some of whom were convicted murderers serving long prison terms. The trial lasted almost a month, and the jury found all five defendants guilty.

Date of Representation: 2004

Presiding Judge: Hon. Cecilia Altonaga

Co-counsel:
Cristina Maxwell
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(305) 576-1011
(Counsel for Anthony Williams)

5. *United States v. Mehrzad Arbane*, Case No. 03-20765-CR-Ungaro-Benages (S.D. Fla.)

This case involved an Iranian national charged with conspiracy to import cocaine into the United States. One of the defendant's co-conspirators, who was significantly involved in the operations of the Cali drug cartel, participated with the defendant in several alien smuggling and narcotics operations. During his relationship with the defendant, this co-conspirator became a government informant. In addition, because the cocaine was seized in Ecuador on its way to the United States, the prosecution of this case involved the testimony of Ecuadorian law enforcement officers, as well as an Ecuadorian prosecutor and expert. Co-counsel and I split the duties in this case evenly, and I was responsible at trial for the examination of the Ecuadorian witnesses. The jury found the defendant guilty.

Date of Representation: 2004

Presiding Judge: Hon. Ursula Ungaro

Co-counsel:
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Counsel for Defendant:
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6. *Omar R. Osahar v. John Potter, Postmaster General of the United States Postal Agency*, Case No. 02-22227-CR-Martinez (S.D. Fla.)

This case was a Title VII employment discrimination claim that I handled while in the Civil Division of the United States Attorney's Office. In this case, a Postal Service employee alleged eleven separate incidents of alleged discrimination, ranging from work assignments to seniority to vacation requests, and sought to apply three different theories of liability (race discrimination, retaliation, hostile work environment) to each incident. I received this case after the prosecutor assigned to the case was transferred to another division, and after the discovery and summary judgment deadlines had passed. After reviewing the file, I moved to extend the discovery and summary judgment deadlines, propounded written discovery, set the plaintiff's deposition, and interviewed plaintiff's

supervisors and co-workers. I then moved for summary judgment, which the trial court granted.

Date of Representation: 2003

Judge: Hon. Jose Martinez

Counsel for Defendant:
Stewart Lee Karlin
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7. *Elian Gonzalez v. Janet Reno*, Case No. 00-206-CV-Moore (S.D. Fla.), *Gonzalez v. Reno*, 86 F. Supp.2d 1167 (S.D. Fla. 2000), *Gonzalez v. Reno*, 2000 U.S. App. LEXIS 7025 (11th Cir. 2000), *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000)

This case sought to obtain an asylum hearing under the Immigration and Naturalization Act for a minor alien. Elian Gonzalez had been rescued in the open waters of the Atlantic Ocean after the boat or raft carrying his mother and others from Cuba capsized. There were no other survivors. Elian's family in the United States sought to obtain an asylum hearing for him, while his father in Cuba sought to have him returned to that country. The case presented a relatively narrow question of law: does the provision of the Immigration and Naturalization Act permitting "any alien" to apply for asylum include a minor in the absence of a statute or agency rule to the contrary. As the case developed, of particular importance was the degree of deference to be given by the courts to an agency's informal rulemaking undertaken during pending litigation. I, along with two other lawyers at Greenberg Traurig, provided this representation on a pro bono basis. I was the lead attorney at Greenberg Traurig, and we had primary responsibility for the written work at both the trial and appellate levels. In addition, I argued before the district court a substantial portion of our opposition to the Immigration and Naturalization Service's motion to dismiss.

Dates of Representation: 1999 – 2000

Presiding Judge: Hon. K. Michael Moore

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Dexter A. Lee
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8. *David Huff v. Sammy Hagar*, Case No. 99-cv-02213-GTV (D. Kans.)

Plaintiff sued defendant for breach of contract, alleging that defendant backed out of an

agreement to co-write an authorized biography of defendant's life. Plaintiff went ahead with the project and produced an unauthorized biography. Concerned that plaintiff planned to market the unauthorized biography at upcoming concerts, defendant sought an injunction to block the sale and distribution of the unauthorized biography, claiming ownership of interview tapes and other materials plaintiff used for the book. We represented the defendant. I was second chair on this case, prepared the injunction papers, and also prepared our client for his testimony at the evidentiary hearing. We successfully obtained a temporary restraining order. Subsequently, I handled the discovery in the case. The case settled.

Date of Representation: 1999

Presiding Judge: Hon. G. Thomas Van Bebber

Co-counsel:
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Attorney for Plaintiff:
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9. *Sullivan v. Amer. Casualty Co. of Reading, Penn. and Leor Dimant*, Case No. 97-3675-CIV-Middlebrooks (S.D. Fla.)

In a separate state court action, plaintiff obtained a jury verdict of $974,238 against Leor Dimant, a member of the musical group House of Pain, for injuries sustained during an altercation with Dimant at a club on Miami Beach. American Casualty, which had issued a general liability insurance policy for House of Pain, denied coverage and refused to satisfy the judgment. Plaintiff then sued American Casualty and Dimant in an effort to satisfy the judgment. After removal of the case to federal court, we were engaged to represent Dimant. We cross-claimed against American Casualty, engaged in significant discovery, and filed a motion for summary judgment. I had primary responsibility for this case, under the supervision of a partner, including taking the depositions and arguing the motion for summary judgment before the district court. The case settled.

Dates of Representation: 1997 – 1999

Presiding Judge: Hon. Donald Middlebrooks

Co-counsel:
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Counsel for Plaintiff:
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Counsel for American Casualty:
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10. *Brooks, et al. v. Blue Cross & Blue Shield, et al.*, Case No. 95-405-CV-Marcus (S.D. Fla.), *Brooks v. Blue Cross & Blue Shield*, 116 F.3d 1364 (11th Cir. 1997)

This case was a putative class action brought on behalf of individuals and their employers alleging violation of the Medicare Secondary Payer ("MSP") statute, 42 U.S.C. § 1395y(b), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962. The MSP statute provided that where employees participate in both an employer's group health care insurance plan and Medicare, the insurance plan always provides primary coverage for health care expenses, regardless of any policy language that purports to make its coverage secondary to Medicare. In this case, the plaintiffs alleged that the individual plaintiffs were over the age of sixty-five, had opted out of their employers' health care plans in favor of coverage by Medicare, and had purchased individual Medigap supplemental health insurance policies from the defendants. Under the terms of those Medigap policies, Medicare provided primary coverage for the individuals' health care expenses. The employer plaintiffs had received demands from Medicare for reimbursement of health care costs paid by Medicare to the individual plaintiffs' providers, with Medicare taking the position that the Medigap insurance policies should have provided primary coverage for those expenses. Plaintiffs alleged that the defendants improperly sold the Medigap insurance supplemental health insurance policies when they knew that the Medicare Secondary Payer laws required the insurers to

instead provide primary insurance coverage. Plaintiffs sought substantial damages from the defendants, including our client New York Life Insurance Company, and the primary issue in the case—what constitutes a "group health policy" under the MSP statue—had not been construed in any reported decision. The team representing New York Life in this matter consisted of a partner and myself. This case involved extensive briefing of a variety of legal issues, which I took a primary role in. The district court granted summary judgment to the defendants, and the Eleventh Circuit affirmed in the reported decision cited above.

Dates of Representation: 1995 – 1997

Presiding Judge: Hon. Stanley Marcus

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18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have not served as a lobbyist for any clients. However, I have provided legal advice to clients who have lobbied government entities.

As for other legal matters, while in private practice, the majority of my practice involved commercial disputes that progressed to litigation in state and federal courts in Florida and around the country. However, I also handled, as associate counsel/second chair, three arbitration matters that proceeded to final decisions. While an Assistant United States Attorney, all of my practice involved civil and criminal matters that progressed to litigation in federal court.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught any courses.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all

anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

When I turn 65, I will be eligible for a pension from the State of Florida based on my 13 years of state employment. The amount of the pension is indeterminable at this point. In addition, I still retain my 401(k) account from the United States Government, but no contributions are being made to that account. Other than those, I do not expect to receive any deferred income or future benefits from previous business relationships, professional services, firm memberships, former employers, clients, or customers.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I do not have any plans, commitments, or agreements to pursue outside employment.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

Please refer to the attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

Please refer to the attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

My husband is a lawyer in Miami, Florida. Should I be confirmed, I would recuse myself from any case in which he or his firm appeared.

My father-in-law is a Senior United States District Court Judge for the Southern District of Florida. In addition to his cases at the district court, he occasionally sits by designation on the U.S. Court of Appeals for the Eleventh Circuit. Should I be confirmed, I would recuse myself from any case in which my father-in-law

was the district court judge, and I would not sit on any panel of the Eleventh Circuit on which he was sitting by designation.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If I am confirmed, I will review any real, potential, or perceived conflicts of interest by referring to the Code of Conduct for United States Judges, 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and other relevant recusal guidelines, laws, rules, or practices governing such circumstances. Although unlikely to occur, I would recuse myself from any case in which I participated as a justice on the Supreme Court of Florida.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

While in practice, I provided pro bono legal work to the Junior League of Miami. In addition, in 1999 and 2000, I provided pro bono representation in the case *Elian Gonzalez v. Janet Reno*. As a judge, I cannot provide pro bono legal services, although I volunteer my time to promote and enhance the legal system by speaking to students and legal groups.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On August 1, 2019, I spoke with an official at the White House Counsel's Office who asked me whether I would be interested in interviewing for a potential vacancy on the U.S. Court of Appeals for the Eleventh Circuit. I said that I would be interested. On August 12, 2019, attorneys from the White House Counsel's Office and the Department of Justice's Office of Legal Policy interviewed me in Washington, D.C. On August 26, 2019, the White House Counsel's office advised me that the President was considering nominating me to a vacancy on the Eleventh Circuit, and officials from the Department of Justice later contacted me about completing the relevant paperwork for submission. Since then, I have been

in contact with officials from the White House Counsel's Office and the Office of Legal Policy. On September 12, 2019, the President announced his intent to nominate me to serve as a Circuit Judge on the Eleventh Circuit.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

EXHIBIT C

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

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2018, you joined a unanimous opinion upholding a mandatory arbitration clause in a cellphone contract. The customer in that case purchased his phone online and completed the transaction without ever viewing the terms of purchase, which were only available on a separate webpage. The opinion you joined nevertheless concluded that the customer had been put on "inquiry notice" of the mandatory arbitration provision. (*MetroPCS v. Porter* (2018))

   Given the increase in e-commerce and online purchases, what standard should be used to determine whether customers are given adequate notice of mandatory arbitration provisions?

   In *MetroPCS Communications, Inc. v. Porter*, 273 So. 3d 1025 (Fla. 3d DCA 2018), Florida's Third District Court of Appeal explained that under Florida law "both courts and legal commentators have concluded that well-settled legal principles of contract formation suffice to decide cases, such as this one, involving contracts entered into and evidenced by electronic means. Hence, we look to those well-settled principles to determine whether the parties here agreed to arbitrate disputes arising from their electronic contract." *Id.* at 1028 (citations omitted). One of those well-settled principles is that a "person has no right to shut his eyes or ears to avoid information, and then say that he has no notice." *Id.* at 1029 (quoting *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932) and citing *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74-75 (2d Cir. 2017) ("Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms.")).

2. **In your time on either the Florida Supreme Court or the Third District Court of Appeals, have you ever written or joined an opinion granting a new trial to a plaintiff in a civil suit? If so, which case or cases and what were the issues involved?**

   I have written an opinion reversing a trial court's improper denial of a plaintiff's new trial motion in a civil suit. *See, e.g.*, *DePrince v. Starboard Cruise Servs., Inc.*, 43 Fla. L. Weekly D171b (Fla. 3d DCA 2018) ("Because the trial court did not follow the holdings from the first appeal, *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586 (Fla. 3d DCA 2015) (*DePrince I*), in instructing the jury on the elements of unilateral mistake, we reverse and remand for a new trial.").

3. In January 2019, the Florida Supreme Court issued an opinion in the case *Glass v. Nationstar Mortgage*, where it held that a borrower who was the prevailing party in a foreclosure action was entitled to attorney's fees. Four months later, after you joined the Florida Supreme Court, the Supreme Court withdrew this opinion without explanation. The withdrawal left in place a lower court ruling holding that a borrower who was the prevailing party in a foreclosure action was not entitled attorney's fees.

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

No.

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

No.

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

Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in *U.S. Bank National Ass'n v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in *Villasol Community Development District v. TC 12, LLC*, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001). After careful review, we determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

4. In 2017, you authored an opinion on tribal sovereign immunity. In your opinion, you wrote that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity." (*Miccosukee Tribe of Indians v. Lewis Tein*)

a. What are the "reasons" for "doubt[ing] the wisdom of perpetuating the doctrine of tribal immunity"?

Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998). There, the Court explained that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*

b. What is your understanding of the nature and scope of the United States' treaty obligations with Indian tribes?

"[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

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

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

Florida follows the Missouri Plan for selecting appellate judges. A judicial nominating commission made up of nine members solicits applications for eligible attorneys, investigates and interviews the applicants, and selects three to six applicants as finalists for each open position. The finalists are forwarded to the Governor, who selects among the finalists. Governor-Elect DeSantis then had an advisory committee – made up of former general counsels to the governor, a former United States Senator, prominent litigators, a transactional attorney, and Mr. Leo – interview the finalists. Finally, Governor-Elect DeSantis interviewed the finalists himself. With ten months having gone by, and there having been three interviews, one each for the judicial nominating commission, the advisory committee, and the Governor-Elect, I don't recall what questions were asked by which interviewer (although the judicial nominating commission interview is recorded at https://thefloridachannel.org/videos/11-4-18-florida-supreme-court-judicial-nominating-commission-part-1/).

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

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

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

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

A lower court judge must always faithfully apply Supreme Court precedents, though there may be infrequent occasions in which a lower court judge may respectfully point out inconsistencies or confusion among Supreme Court precedents, or identify issues that may warrant further review.

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

In the Eleventh Circuit Court of Appeals, a panel is "bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of this Court sitting en banc." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

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

The Supreme Court has the authority to overrule its own decisions. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). As a lower court nominee it is not my place to comment on how the Supreme Court should decide its cases or apply the principle of stare decisis. I am aware that the Supreme Court generally is reluctant to overrule its prior decisions absent "special justification." *See Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *see also Rodriguez de Quijas*, 490 U.S. at 484.

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

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

Roe v. Wade is binding Supreme Court precedent that all lower courts are bound to faithfully apply. Lower courts are bound to apply all Supreme Court precedent regardless of whether it is referred to as "super-stare decisis" or "superprecedent."

b. Is it settled law?

Roe v. Wade has been affirmed by the Supreme Court numerous times. It is binding precedent that I will faithfully apply if confirmed.

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

   Obergefell is binding Supreme Court precedent that I will faithfully apply if confirmed.

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

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

   As a judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Eleventh Circuit decisions.

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

   The Supreme Court's decision in *Heller* explained that "nothing in this 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." 554 U.S. 570, 626-27 (2008).

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

   As a judicial nominee, it would not be appropriate for me to express a personal view on the relationship between *Heller* and prior case law. If confirmed, I would faithfully apply the Supreme Court's decision in *Heller* and all other Supreme Court and Eleventh Circuit decisions.

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

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

    The Supreme Court held that "the First Amendment protection extends to corporations." *Citizen United v. Fed. Elections Comm'n*, 558 U.S. 310, 342 (2010). It is inappropriate

for me to express an opinion about the case. *Citizen United* is binding precedent that I will apply, if confirmed.

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

See response to Question 8(a).

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

The Supreme Court has held that the Religious Freedom Restoration Act applies to closely-held corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014). *Hobby Lobby* is binding precedent that I will apply, if confirmed. It is inappropriate for me comment further on this issue because it could come before the court in pending or impending litigation.

11. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2014. 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 this statement, and I do not know what the Federalist Society meant by it.

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

I am not familiar with this 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?

I am not familiar with this 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.

e. Why did you decided to join the Federalist Society in 2014, ten years after you graduated from law school?

I went to Federalist Society programs while I was in law school, although I did not become a dues paying members until 2014. I started paying dues in 2014 because I could afford it and there was a discount for programs for dues paying members.

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

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

No.

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

No.

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

The Supreme Court and the Eleventh Circuit have issued many opinions regarding administrative law. If confirmed, I would faithfully apply those precedents.

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

As a sitting justice and a judicial nominee, it is inappropriate for me to comment on this political issue that is likely to come before the court in pending or impending litigation.

14. 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 the statutory text itself is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See 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 Eleventh Circuit precedent on the use of legislative history.

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

No.

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

After receiving the questions on October 24, 2019, I reviewed the questions, performed research, and drafted responses. After completing my draft answers, I shared my draft with the Office of Legal Policy at the Department of Justice, and, after receiving feedback, made edits that I deemed appropriate. After finalizing my responses, I approved submission of my responses.

Written Questions for Robert J. Luck
Submitted by Senator Patrick Leahy
October 23, 2019

1. Earlier this year, the Florida Supreme Court issued an opinion in *Glass v. Nationstar Mortgage*, holding that a borrower who was the prevailing party in a foreclosure action was entitled to attorney's fees. But four months later, after you had joined the court, the Florida Supreme Court withdrew this opinion without explanation. As a result, a borrower who prevailed in a foreclosure action was not entitled to attorney's fees. You did not participate in the original January 2019 opinion, but you did participate in the decision to withdraw.

(a) Why did the Florida Supreme Court withdraw this opinion?

Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in *U.S. Bank National Ass'n v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in *Villasol Community Development District v. TC 12, LLC*, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001). After careful review, we determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

(b) Some people have questioned whether the decision to withdraw the original opinion was politically motivated or biased toward lenders. **Should judges be required to provide explanations when withdrawing opinions in order to avoid the appearance of bias?**

All judges should carefully consider whether a given action will create an appearance of bias.

2. In 2017, in *Miccosukee Tribe of Indians v. Lewis Tein,* you wrote that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity." Tribal immunity remains a functioning legal doctrine.

   (a) How can you assure us that you will fairly adjudicate cases in which tribal rights or immunity is implicated?

   Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

3. In January of 2019, when accepting your appointment to the Florida Supreme Court, you praised Governor DeSantis for his pro-Israel policies, including moving the United States embassy in Israel and supporting recognition of Israel's claim to the Golan heights.

   (a) If confirmed, given your recently stated political opinions on these issues, would you consider recusing yourself from any cases involving U.S. policy toward Israel?

   During my January 2019 remarks, I said, "As a congressman, Governor DeSantis led a one-man congressional delegation to Israel to help the President select the site for the United States's embassy in Yerusheliam, in Jerusalem. On the opening day of the embassy, Governor DeSantis traveled back to Israel so he could be there for the historic day." I also said, "As a congressman, Governor DeSantis sponsored legislation and held committee hearings to support the United States's recognition of the Golan as a integral and inseparable part of the state of Israel." If confirmed and faced with a recusal issue, I will carefully review and address it by reference to section 455 of Title 28 of the United States Code and all applicable canons of the Code of Conduct for United States Judges, as well as any and all other laws, rules, practices, and procedures governing such circumstances, and consult with other judges.

4. In 2018, in *Diocese of Palm Beach, Inc. v. Gallagher*, you reversed a trial court ruling that allowed a defamation suit filed by a Catholic priest against the Diocese of Palm Beach to proceed. The plaintiff priest had received a text message from the diocese's music minister stating that another priest had shown photographs containing child pornography to a 14-year-old boy. He then notified the police. When the diocese refused to promote him and reassigned him to a different parish, the plaintiff felt he was being

retaliated against. In response to his complaints, the diocese called him a liar and unfit to be a priest. The plaintiff then brought a defamation suit. In your opinion, you held that the case could not go forward because the case arose out of "an employment dispute between him and the diocese." As a result, you said the case could not "be resolved without the courts excessively entangling themselves in what is essentially a religious dispute."

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

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), a case involving a claim of improper termination of a school minister, the United States Supreme Court held that:

> [The minister] no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. [The minister] continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. Such relief would depend on a determination that [the Church] was wrong to have relieved [the minister] of her position, and it is precisely such a ruling that is barred by the ministerial exception.

Id. at 194 (citation omitted). The priest in *Diocese of Palm Beach, Inc. v. Gallagher*, 249 So. 3d 657 (Fla. 4th DCA 2018), sought the same prohibited relief. Based on *Hosanna-Tabor*, the Fourth District Court of Appeal was compelled to reverse on First Amendment grounds. But the court was careful to note that "not every church-priest dispute is shielded by the ecclesiastic abstention doctrine. Where the 'dispute can be resolved by applying neutral principles of law without inquiry into religious doctrine and without resolving a religious controversy, the civil courts may adjudicate the dispute.'" *Id.* at 665 (citation omitted).

5. 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?

The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I would faithfully follow applicable precedent concerning the methods for interpreting statutes.

6. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch previously called them "disheartening" and "demoralizing."

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

The independence of the federal judiciary is a central feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in the public arena that may follow.

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

Please see my response to Question 6(a).

7. 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?

Article III of the Constitution confers the judicial power upon the courts to resolve specified cases or controversies. If a court were presented with a case or controversy involving a national security decision, the court would be obliged to consider the applicable law and facts in reaching a decision.

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

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

As a general matter, courts have discretion in determining how to respond to a litigant's failure to comply with its orders. It is inappropriate for me to comment on this issue further because it could come before the courts in pending or impending litigation.

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

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

The Constitution expressly divides war-related powers between Congress and the President. *See* U.S. Const. art. I, §§ 8(1), (11)-(14), art II, § 2. In *Hamdi v. Rumsfeld*, the Supreme Court stated: "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." 542 U.S. 07, 536 (2004); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forced has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.").

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

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

Please see my response to Question 9(a).

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

In this and every other area of constitutional law, lower courts should faithfully apply the text and principles established in the Constitution, as interpreted by the Supreme Court. If confirmed, I will apply the Supreme Court's separate of powers precedent, including the precedent referenced in response to Question 9(a). Otherwise, it is inappropriate for me to comment on this issue as it could come before the courts in pending and impending litigation.

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

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

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

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

    I am not familiar with this statement, and it is not binding precedent. If confirmed, I will faithfully apply the Voting Rights Act and any binding Supreme Court and Eleventh Circuit precedent interpreting this Act.

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

    The Emoluments Clause in the Constitution states that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. The application of this clause is the subject of pending litigation and it is inappropriate for me to comment on this case.

14. 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?

    Appellate courts are not factfinders. They must decide cases based on the factual record developed below.

15. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

    The Reconstruction Amendments give Congress the power to counteract racial discrimination "by appropriate legislation." U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

16. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and

certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

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

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

17. 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 Supreme Court has stated that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. S.C. Public Ry. Comm'n*, 502 U.S. 197, 202 (1991). It is never appropriate for lower courts to depart from Supreme Court precedent. With respect to circuit precedent, a panel of the Eleventh Circuit is "bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of this Court sitting en banc." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

18. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. If confirmed, I would carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as other applicable rules or guidance. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which

I served as a lawyer, or as a trial or appellate judge. In every case, I will carefully consider whether recusal is necessary.

19. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

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

    In the referenced footnote, the Supreme Court indicated that courts have a role in ensuring that democratic processes are open and work as intended and legislation does not undermine participation by citizens entitled to representation. The Supreme Court also introduced the idea of varied levels of scrutiny in assessing constitutionality depending on the constitutional issue presented. If confirmed, I will faithfully follow Supreme Court precedent on this and any other issue.

20. 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.

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

    I have not researched this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on issues that may require consideration in future cases.

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

The Supreme Court has held that the Commerce Clause gives Congress the power to regulate activity that "substantially affects" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). The Supreme Court has further held that Congress has the power to enforce the Fourteenth Amendment where there is a "congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

23. 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?

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held, among other things, that the President's Proclamation No. 9645 was lawfully issued under 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiff's attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." *Id.* at 2409. The Court also held that "plaintiff's request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.* The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court and Eleventh Circuit. As a judicial nominee, it would not be appropriate for me to opine on abstract legal concepts that may require consideration and application in future cases.

24. **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 held that an "undue burden" exists where "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). In *Whole Woman's Health v. Hellerstadt*, the Court further held that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right." 136 S. Ct. 2292, 2309 (2016). I will apply *Casey* and all other Supreme Court precedent addressing abortion, if confirmed.

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

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

    The doctrine of qualified immunity has repeatedly been applied by the Supreme Court. *See, e.g.*, *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). I will apply this and all other Supreme Court and Eleventh Circuit precedent, if confirmed. It is inappropriate for me to state a personal opinion on the merits of this doctrine as this issue routinely comes before the courts.

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

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

I have not studied this issue previously. In any case concerning a conflict between legislative and executive power, I would apply Supreme Court and Eleventh Circuit precedent regarding the specific powers at issue and the separation of powers.

27. 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?

Yes, the Constitution creates an independent judiciary with protections to insulate judges from political influence. These protections and the obligation that judges act independently and impartially, without favor to any interest beyond fair application of the law, are essential to the rule of law. If confirmed, I will perform my role with fidelity to the judicial oath of office and the fundamental values of independence and impartiality.

Senator Dick Durbin
Written Questions for Luck
October 23, 2019

For questions with subparts, please answer each subpart separately.

Questions for Robert Luck

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

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

   Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in *U.S. Bank National Ass'n v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in *Villasol Community Development District v. TC 12, LLC*, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481 (Fla. 2001). After careful review, we

determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

2. You note in your questionnaire that after you graduated law school in 2004 and clerked in 2005, you "worked as a law clerk/JD at Greenberg Traurig, P.C. in Miami from 2005 to 2006." You also say in your questionnaire that you did not become a member of the Florida bar until 2006.

   a. **Why did you work as a law clerk at the Greenberg Traurig law firm, instead of working as an attorney?**

      I was hired by Greenberg Traurig as a law clerk rather than as an attorney because I was not yet a member of the Florida Bar.

   b. **Did you take the bar exam prior to 2006? If so, in which state?**

      No.

3.

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

      The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). But ultimately, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Lower court judges must follow the Supreme Court's precedents regardless of whether a given precedent is regarded as "originalist" in approach or not.

   b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

      > …no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

      I have not had occasion to study this Clause, its history, or any applicable precedents that may bear on it. In addition, inasmuch as there is active or impending litigation concerning this Clause, as a judicial nominee it would not be appropriate for me to opine on this topic.

4. You say in your questionnaire that you have been a member of the Federalist Society since 2014.

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

      I joined the Federalist Society because it is the most active voluntary bar association in South Florida in terms of inviting speakers from different backgrounds and viewpoints. I enjoyed attending these talks and debates and learning about different sides of an issue.

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

      Florida follows the Missouri Plan for selecting appellate judges. A judicial nominating commission made up of nine members solicits applications for eligible attorneys, investigates and interviews the applicants, and selects three to six applicants as finalists for each open position. The finalists are forwarded to the Governor, who selects among the finalists. Governor-Elect DeSantis then had an advisory committee – made up of former general counsels to the governor, a former United States Senator, prominent litigators, and a transactional attorney – interview the finalists. Mr. Leo was part of the advisory committee. Finally, Governor-Elect DeSantis interviewed the finalists himself. I met with the judicial nominating commission, the advisory committee, and Governor-Elect DeSantis, as part of the Florida Supreme Court application process.

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

      Please see my response to Question 4(b).

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

      Yes.

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

      Because it's been ten months since the interview, and there were three interviews – one each for the judicial nominating commission, the advisory committee, and the Governor-Elect – I don't recall what

questions I was asked by which interviewer. But I know I was never asked by any interviewer about specific cases.

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

Please see my response to Question 4(e)

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

No.

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

No.

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

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

I am not aware of any donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters.

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

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

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

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

      Canon 4B of the Florida Code of Judicial Conduct states that, "A judge is encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government …." The commentary to Canon 4B states that the "canon was clarified in order to encourage judges to engage in activities to improve the law, the legal system, and the administration of justice. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including, but not limited to, the improvement of the role of the judiciary as an independent branch of government, the revision of substantive and procedural law, the improvement of criminal and juvenile justice, and the improvement of justice in the areas of civil, criminal, family, domestic violence, juvenile dependency, probate and motor vehicle law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law." Consistent with Canon 4B, and my role as a justice on the highest court of the state, I attended the two-day Florida Chapters Conference of the Federalist Society, which included in the reception, in late January and early February. Those same months, I also attended events hosted by the Florida Bar, the Dade County Bar Association, the Florida Association of Women Lawyers – Miami-Dade Chapter, the Cuban American Bar Association, the Florida Supreme Court Historical Society, the Florida Court Personnel Institute and the Florida Supreme Court Teachers' Institute.

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

      Not that I am aware of.

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

      Hundreds of lawyers and judges throughout the state attended the Florida Chapters Conference and the other events I mentioned in Question 6(a). As with all legal events that I attend consistent with Canon 4B, there are lawyers in attendance who may be litigating cases in front of the Florida Supreme Court.

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

Please see my response to Question 6(a).

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

I dissented from the Court's decision to discharge jurisdiction. *City of Miami Beach v. Fla. Retail Fed'n, Inc.*, No. SC17-2284, 2019 WL 446549, at *1 (Fla. Feb. 5, 2019). I don't know why other members of the Court voted to discharge jurisdiction, but the exercise of jurisdiction is a highly discretionary decision that involves a number of individual factors.

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

I have not had occasion to study this issue closely, but my understanding is that Federal Rule of Civil Procedure 17(c) allows a general guardian, committee, conservator, or fiduciary to sue or defend on behalf of a minor, and if a minor does not have an appointed representative the minor may sue by a next friend or by a guardian ad litem. The rule requires a court to appoint a guardian ad litem or issue another appropriate order to protect a minor who is unrepresented in an action.

9.

a. **Is waterboarding torture?**

I have not had occasion to study this issue closely, but my understanding is that waterboarding would constitute torture when intentionally used "to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2304(1) (defining "torture")

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

I have not had occasion to study this issue closely, but my understanding is that under 42 U.S.C. § 2000dd-2(a)(2), no person in the custody or under the control of the United States government may be subject to any interrogation technique not authorized in the Army Field Manual. It is also my understanding that the Army Field Manual does not authorize waterboarding.

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

I am aware that, in connection with his recent confirmation proceedings, Attorney General William P. Barr acknowledged that "section 1045 of the National Defense Authorization Act for Fiscal Year 2016 [42 U.S.C. § 2000dd-2] prohibits the use of waterboarding on any person in U.S. custody." He explained that "statute clarifies that no individual in U.S. custody may be subjected to any interrogation technique that is not authorized or listed in the Army Field Manual, and its prohibits the Army Field Manual from including techniques involving the use or threat of force."

10.

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

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters.

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

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

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

Please see my responses to Questions 10(a) and 10(b).

11.

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

I have not researched this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on hypothetical issues that may require consideration in future cases.

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

Please see my response to Question 11(b).

Nomination of Robert J. Luck
to the United States Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

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

        As requested, I read the story and watched the video before responding to this 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?

        Judicial independence and impartiality are fundamental and essential principles underlying the American judicial system. Otherwise, as a judicial nominee, it is inappropriate for me to opine on political matters related to the nomination and confirmation of federal 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? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

        Please see my response to Question 1(b).

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

        I am not aware of any such advocacy.

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

        I believe the federal judiciary has a defined role as one of the three branches of government established by the Constitution. Otherwise, as a judicial nominee, this question poses a political issue on which it is inappropriate for me to comment.

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?

      I agree with the point of the metaphor that a federal judge's role is strictly to apply the law to the facts of the case, without favor or preference to any party.

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

      In general, a judge should not consider the practical consequences when considering how to rule in a case. In limited circumstances, however, Supreme Court and Circuit precedent, and applicable statutory provisions, might require a judge to engage in such consideration, for example, when deciding whether a party would suffer irreparable harm if a stay or preliminary injunction were not issued.

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

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

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

      A judge's decision must be governed exclusively by the law and the facts and cannot be affected by sympathy for one party or another. That obligation is embodied in the judge's oath to "administer justice without respect to persons." 28 U.S.C. § 453. Empathy can play an important role, however, in reminding a judge of the importance of being respectful to litigants; of giving all parties a full and fair hearing; and of working hard to ensure that parties receive a ruling that is based on the law and not on an individual judge's personal preferences.

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

      Different judges may have developed expertise in particular areas of the law over their years of practice, which will asset them in more readily evaluating cases that arise in those areas. Judges should always strive to attain a full understanding of the factual and legal issues that arise in any case that comes before them to ensure that each litigant obtains a decision that is grounded in the law and facts.

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

       Appellate judges must discuss, and even debate, the legal issues presented in a case as part of the decision-making process as they reach agreement on the decision and the reasoning of the decision. These discussions must focus on governing law, including precedent, and not on outside considerations. Through this process, the panel members identify which judge will author the opinion for the court and whether any panel members will write a concurring or dissenting opinion.

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

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

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

       I think it is non-negotiable for a lower court judge to faithfully apply binding precedent of the Supreme Court and the applicable Circuit, regardless of what the judge's personal views might be.

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

   No.

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

       The right to a jury trial is a bedrock principle in the American judicial system. The Declaration of Independence listed denial of the right to jury trial as one of the grievances against England that justified separation, and the Constitution enshrines the right to jury trial in both criminal and civil cases. U.S. Const. amends. V, VI, VII. The role of the jury is to decide the facts of the case and, in so doing, serve as a check on the power of government.

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

       As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation.

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

Please see my response to question 7(b).

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

Generally, federal appellate courts are not fact-finding bodies and are bound by the factual record developed in trial courts or administrative proceedings.

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

Yes.

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

The Supreme Court addressed this issue most recently in *Whole Woman's Health v. Hellerstedt*, and held that courts "must review legislative 'fact finding under a deferential standard'" but not give them "'dispositive weight.'" 136 S. Ct. 2292, 2310 (2016) (citations omitted). I will apply this and all other Supreme Court and Eleventh Circuit precedent addressing this issue, if confirmed.

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

    Yes.

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

    If confirmed, I commit to comply with the Code of Judicial Conduct, including the obligation to avoid impropriety or the appearance of impropriety. I will evaluate my participation in any activity to ensure compliance with my ethical and legal obligations. If I have any question about whether any activity complies with the Code of Judicial

Conduct I will consult with the ethics attorneys at the Administrative Office of the U.S. Courts.

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

Please see my response to Question 11(b).

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

Questions for Justice Robert Luck, nominee to be U.S. Circuit Judge for the Eleventh Circuit

In the 2017 case *Miccosukee Tribe of Indians v. Lewis Tein*, you wrote an opinion in which you expressed skepticism about tribal sovereign immunity, describing the doctrine as "a policy choice" and questioned "the wisdom of perpetuating the doctrine."

- What is your view of the role that the principles of tribal sovereignty, treaty rights, and the federal trust responsibility play in our legal system?

  Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). There, the Court explained that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

As a state court judge, you presided over a number of criminal proceedings. I cosponsored the First Step Act, which provides greater discretion to trial judges in sentencing low-level drug offenders.

- What principles will guide your review of lower court sentencing decisions if you are confirmed?

  The Eleventh Circuit Court of Appeals has developed a two-step process for reviewing sentences from the district courts: "In reviewing the reasonableness of a sentence, we follow a two-step process. We first ensure the sentence was procedurally reasonable by reviewing whether, among other things, the District Court miscalculated the guideline range. We then determine whether the sentence is substantively reasonable in light of the totality of the circumstances and the 18 U.S.C. § 3553(a) factors." *United States v. Fox*, 926 F.3d 1275, 1278 (11th Cir. 2019) (citations omitted). I will follow the precedents from the Supreme Court and the Eleventh Circuit on sentencing, and any changes made by the First Step Act, if confirmed.

Nomination of Robert J. Luck, to be United States Circuit Judge
for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR COONS

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

      Yes, a right expressly stated in the Constitution is protected from federal interference by the clause enumerating the right and may be protected from state interference under the Supreme Court's Fourteenth Amendment incorporation doctrine. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). I would apply all precedent relevant to the right at issue.

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

      Yes. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that fundamental rights are those that are "deeply rooted in this Nation's history and tradition." I would apply this precedent and consider the sources relied on by the Supreme Court.

   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?

      I would apply the binding precedent from the Supreme Court and Eleventh Circuit regarding the right at issue. I would also evaluate decisions from other circuits for their persuasive value. *See Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1328 (11th Cir. 2018) ("Following our precedent and persuasive decisions from other circuits, we conclude that the crime-fraud exception may defeat work product protection in this circumstance.").

   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*).

As an inferior court judge, I would follow all binding Supreme Court and Eleventh Circuit precedent, including *Lawrence* and *Casey*.

f. What other factors would you consider?

I would consider all factors recognized by the Supreme Court and Eleventh Circuit.

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

The Supreme Court has held that the Fourteenth Amendment's Equal Protection clause applies to gender as well as race. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

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

If confirmed, I will apply Supreme Court precedent. Arguments that are contrary to binding precedent will not dictate my decision.

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 understand that *United States v. Virginia* was not the first time that the Supreme Court struck down a gender-based classification relating to educational opportunities. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). I don't know why there was not an earlier challenge to Virginia Military Institute's former male-only admission policy.

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

In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples be afforded the right to marry "on the terms as accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). If confirmed as an inferior court judge, I would follow all binding Supreme Court and Eleventh Circuit precedent regarding the Fourteenth Amendment.

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

The Fourteenth Amendment guarantees that no State may "deny to any person within its jurisdiction the equal protection of the law." That constitutional protection

extends to all persons. As a sitting judge and nominee, it would not be appropriate for me to comment on the merits of a matter pending or impending in any court.

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

   The Supreme Court has recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will faithfully apply this precedent.

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

      The Supreme Court has recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. If confirmed, I will faithfully apply this precedent.

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

      The Supreme Court has recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully apply this precedent.

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

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

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

      If confirmed as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Eleventh Circuit precedent, and when applicable precedent makes it appropriate to consider such evidence, I will do so in accordance with controlling precedent.

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

Under Federal Rule of Evidence 702, as well as precedent in the *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), line of cases, expert opinions from these disciplines may be admissible into evidence.

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

   If confirmed, I would faithfully discharge my duty to apply all Supreme Court and Eleventh Circuit precedents, including *Obergefell*. To the extent that the question relates to issues that may be the subject to pending or impending litigation, it would be inappropriate for me as a sitting state court justice and judicial nominee to make any further comment.

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

   Please see my response to question 5(a).

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

   This is a topic for academic debate among legal scholars. *See, e.g.*, Robert H. Bork, The Tempting of America 76 (1990) ("[T]he result in *Brown* is consistent with, indeed is compelled by, the original understanding of the fourteenth amendment's equal protection clause."). If confirmed as an inferior court judge, I will follow all binding Supreme Court and Eleventh Circuit precedent regarding *Brown* and its progeny.

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

Please see my response to Question 6(a).

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 and the Eleventh Circuit have issued numerous decisions regarding different constitutional provisions. In some of these, the Supreme Court has carefully considered the original public meaning of the constitutional text, and found that to be dispositive. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). If confirmed, I would be obliged to follow all Supreme Court and Eleventh Circuit precedent, regardless of whether they rely on the original public meaning of the constitutional text.

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

Yes, if dictated by Supreme Court precedent. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

If confirmed, I would follow Supreme Court and Eleventh Circuit precedent regarding what sources are properly considered in applying constitutional provisions in cases brought before the court.

7. In *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So.3d 938 (Fla. 3d DCA 2016), the court of appeals reversed the trial court after withdrawing its prior opinion. The dissenting opinion stated that the majority's "two holdings [were] inconsistent with each other," and, "when taken together, these holdings effectively rewrite Florida statute of limitations jurisprudence in foreclosure cases."
   a. Please explain when it is appropriate for a court to withdraw its prior opinion to overrule a trial court and a unanimous panel opinion.

I was not serving on Florida's Third District Court of Appeal when it decided *Beauvais*. The *Beauvais* panel opinion was decided in 2014. The en banc court issued its opinion in 2016. I did not join the Third District Court of Appeal until February 2017. That said, in Florida, a district court of appeal can rehear a case that was decided by a panel where a majority of the en banc court agrees that the "case or

issue is of exceptional importance" or an en banc decision is "necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(a).

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

The Eleventh Circuit has said that "[t]he holdings of a prior decision can reach only as far as the facts and circumstances frame the precise issue presented in that case." *Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1275 (11th Cir. 2006). If confirmed, I will follow Supreme Court and Eleventh Circuit precedent on how broadly to read prior decisions and if and how to reconcile them.

Questions for the Record for Robert J. Luck
From Senator Mazie K. Hirono

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

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

   No.

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

   No.

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

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

   Judges are duty-bound to decide cases without regard to bias, prejudice, or preference. I agree that training to help judges understand and fulfill this obligation is important.

   b. Have you ever taken such training?

   Yes.

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

   If confirmed, I will participate in any training opportunities offered to assist me in learning my role and performing to the best of my ability.

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

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

Under the Florida Constitution, the Florida Supreme Court has only limited jurisdiction to review the decisions of the district courts of appeal, including those decisions "that expressly and directly conflict[] with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3). In *Glass v. Nationstar Mortgage, LLC*, 268 So. 3d 676 (Fla. 2019), the Florida Supreme Court explained that while it "initially accepted review of the decision of the Fourth District Court of Appeal in [*Glass*] based on express and direct conflict with the decision of the First District Court of Appeal in [*Williams*] … [u]pon further consideration," the Court concluded "that jurisdiction was improvidently granted." This is not unusual. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Anthony-Irish*, 256 So. 3d 800, 801 (Fla. 2018) ("U.S. Bank National Association seeks review of the decision of the Fifth District Court of Appeal in U.S. Bank National Ass'n v. Anthony-Irish, 204 So.3d 57 (Fla. 5th DCA 2016), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. We conclude that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this case."); *Villasol Cmty. Dev. Dist. v. TC 12, LLC*, 265 So. 3d 446 (Fla. 2018) ("Villasol Community Development District seeks review of the decision of the Fifth District Court of Appeal in Villasol Community Development District v. TC 12, LLC, 226 So.3d 854 (Fla. 5th DCA 2017) (table), on the ground that it expressly and directly conflicts with Provident Management Corp. v. City of Treasure Island, 796 So.2d 481 (Fla. 2001). After careful review, we determine that review in this case has been improvidently granted. Accordingly, this case is hereby dismissed.").

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

See my response to question 3(a).

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

It is never appropriate for a lower court to depart from Supreme Court precedent. In the Eleventh Circuit Court of Appeals, a panel is "bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of this Court sitting en banc." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

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

Canon 1 of the Florida Code of Judicial Conduct states that "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved."

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

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

   Different judges may have developed expertise in particular areas of the law over their years of practice, which will asset them in more readily evaluating cases that arise in those areas. Judges should always strive to attain a full understanding of the factual and legal issues that arise in any case that comes before them to ensure that each litigant obtains a decision that is grounded in the law and facts.

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

   The work of judging is to analyze and interpret the law enacted by the political branches and faithfully apply binding precedent to specific cases and controversies presented by the litigants. This work requires the exercise of reason and judgment. It is the judge's role to analyze the governing law, come to a reasonable interpretation of that law, and then fairly apply it to the case presented.

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

   Serving as a judge is incredibly humbling and rewarding because, in simple terms, a judge's job is to help litigants solve difficult problems. I believe that the rule of law depends on our system and its foundational principles of fairness, equal treatment under the law, and due process. I have seen the essential role our system and these values have in our society serving the federal judiciary as a law clerk, as a federal prosecutor, and as a state court judge and justice. If confirmed, it would be an incredible privilege to uphold the Constitution and the laws of this nation by serving on the federal bench.

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

   The fundamental role of any judge is to protect the rule of law by ensuring a fair and just application of the law to the specific cases brought before the court.

Nomination of Robert J. Luck
United States Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR BOOKER

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

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

In your remarks earlier this year accepting your appointment to the Supreme Court of Florida, you quoted from Governor DeSantis's inaugural address and then stated: "This morning, Governor, with you standing by my side, I have taken an oath to make the Constitution, and not the judiciary, supreme."[2]

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

I'm not sure what Governor DeSantis meant by that quote in his inaugural address.

b. In the U.S. Supreme Court's landmark decision in *Marbury v. Madison*, Chief Justice Marshall famously declared more than two centuries ago, "It is emphatically the province and duty of the judicial department to say what the law is."[3] How do you understand the meaning of Governor DeSantis's statement that "[t]he Constitution, not the judiciary, is supreme," in light of the judiciary's mandate to interpret the Constitution and "say what the law is"?

I understood Governor DeSantis's statement to mean that we are state and nation of laws, and not of men and women. The law, as reflected in our Constitution, is what is paramount, and not the force or will of any one person. I see this as consistent with Chief Justice Marshall's opinion in *Marbury*.

[1] Ed Whelan, *Transforming the Florida Supreme Court*, NAT'L REV. (Jan. 11, 2019), https://www.nationalreview.com/bench-memos/transforming-the-florida-supreme-court.
[2] Speech Accepting Appointment to the Supreme Court of Florida, Scheck Hillel Cmty. Sch., Miami, Fla. (Jan. 14, 2019), *in* SJQ Attachments to Question 12(a) at 385.
[3] 5 U.S. 137, 177 (1803)

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

Yes. The principle of judicial restrain is related to the separation of powers and the recognition that it is Congress, not the courts, that enact laws. Based on this principle, the Supreme Court has held, for example, that courts should "avoid reaching constitution questions in advance of the necessity of deciding them, *Camreta v. Greene*, 563 U.S. 692, 705 (2011), and should consider non-constitutional arguments challenging a statute before reaching constitutional arguments, *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[4] Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent that I will apply, if confirmed. As a sitting justice and a judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[5] Was that decision guided by the principle of judicial restraint?

The majority opinion and some of the separate opinions in *Citizens United* addressed the issue of judicial restraint. *Citizens United* is binding Supreme Court precedent that I will apply, if confirmed. As a sitting justice and judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[6] Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent that I will apply, if confirmed. As a sitting justice and judicial nominee, it is inappropriate for me to state my agreement or disagreement with Supreme Court precedent.

3. As a Justice on the Supreme Court of Florida, you concurred with a majority opinion that affirmed the lower court's decision to deny the defendant's motion for post-conviction relief. The defendant, who had been sentenced to death and was under an active death warrant, argued that Florida's lethal injection protocol violated his Eighth Amendment rights because a prior health condition made him more susceptible to suffer a seizure. The Court's opinion concluded that the defendant's concerns were "speculative and conclusory allegations" that were "insufficient to warrant an evidentiary hearing, let alone relief."[7]

a. In your assessment, what makes a defendant's concerns about such suffering so "speculative and conclusory" that an evidentiary hearing or other relief must be denied, consistent with the Eighth Amendment's prohibition on cruel and unusual punishments?

Under Florida and federal law,

> [T]o prevail on an Eighth Amendment method of execution challenge, "a condemned prisoner must: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay v. State* (*Asay VI*), 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015); *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) ("(re)confirm[ing] that anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test").

Long v. State, 271 So. 3d 938, 944 (Fla. 2019).

In the case of Robert Joe Long, the trial court held an evidentiary hearing on his method of execution claim. Based on the evidence, the trial court found that Long "failed to make either of the required showings" and competent substantial evidence supported the trial court's findings. *Id.*

> Specifically, in finding that Long failed to establish that the use of etomidate presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, the postconviction court found the testimony of the State's expert, Dr. Yun, "to be more credible" than that of Long's expert, Dr. Lubarsky:
>
> > The Court finds credible Dr. Yun's testimony that the massive dose of 200 milligrams of etomidate would produce such a deep state of burst suppression and unconsciousness that it would eliminate any possible seizure activity, and render a person—even someone with traumatic brain injury and/or temporal lobe epilepsy—unaware of noxious stimuli. Even if Defendant had a seizure, the Court finds credible Dr. Lubarsky's testimony that the seizure itself is not painful, as well as Dr. Yun's testimony that Defendant would be unconscious and insensate. The Court further finds more credible Dr. Yun's testimony that 200 milligrams of etomidate would render a person unconscious for at least 30 minutes, rather than the maximum of 8 minutes asserted by Dr. Lubarsky. The Court further finds the possible risks associated with the "cascade of events" described by Dr. Lubarsky is highly speculative. Defendant has not shown that if he is administered 200 milligrams of etomidate, he is likely to have a seizure, even a partial undetectable seizure as described by Dr. Wood.
>
> *Id.*

b. Did you have any personal hesitations about denying the defendant a further opportunity to determine whether Florida's lethal injection protocol was "sure or very likely to cause serious illness and needless suffering," consistent with the Eighth Amendment's prohibition on cruel and unusual punishments?[8]

The defendant was afforded an evidentiary hearing on his method of execution claim. My concurrence in *Long* was based solely on the facts and the law, and not on my personal sympathies or prejudices.

4. In another case you handled on the state appellate court, you opened your opinion with the line, "There are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity."[9] You then concluded: "Granting immunity to Indian tribes is a policy choice made by our elected representatives to further important federal and state interests. It is a choice to protect the tribes understanding that others may be injured and without a remedy. The immunity juice, our federal lawmakers have declared, is worth the squeeze."[10]

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[4] 554 U.S. 570 (2008).
[5] 558 U.S. 310 (2010).
[6] 570 U.S. 529 (2013).
[7] *Long v. State*, 271 So. 3d 938, 944-45 (Fla. 2019).
[8] *Id.* at 944.
[9] *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 658 (Fla. Dist. Ct. App. 2017) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)).
[10] *Id.* at 668.

a. In your view, what are the grounds for "doubt[ing] the wisdom of perpetuating the doctrine of tribal immunity"?

Tribal immunity is a matter of federal law. The quote, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," is from the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). There, the Court explained that the doctrine "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. If I am confirmed, I will follow all precedents of the United States Supreme Court and the Eleventh Circuit Court of Appeals regarding tribal immunity.

b. If you are confirmed to serve on the Eleventh Circuit, how would your approach to cases involving tribal immunity differ from how you handled such cases as a state court judge?

Please see my response to Question 4(a).

5. For part of your time at the U.S. Attorney's Office for the Southern District of Florida, you worked under the direction of Alex Acosta. As the U.S. Attorney, Mr. Acosta oversaw a lenient and controversial plea deal in 2008 for a sex crimes prosecution of Jeffrey Epstein.

a. While at the U.S. Attorney's Office, were you involved in any way in any legal matter involving Mr. Epstein? If so, please explain.

No. As I explained at the hearing, the U.S. Attorney's Office for the Southern District of Florida is large, spanning from Key West to Fort Pierce along the eastern coastline of Florida. The Epstein case was investigated out of the Office's West Palm Beach branch. I was assigned to the Miami branch, 50 miles south. Also, in my time at the U.S. Attorney's Office, I was assigned to handle mostly gun violence cases and white collar investigations. I did not handle sex trafficking cases in the Office.

b. During your time at the U.S. Attorney's Office or afterward, did you learn any nonpublic information about Mr. Epstein or the Office's handling of his case? If so, please explain the nature of the information you learned.

No. Please see my response to Question 5(a).

6. You became a member of the Federalist Society in 2014.[11] Why did you join the Federalist Society at that time?

I joined the Federalist Society because it is the most active voluntary bar association in South Florida in terms of inviting speakers from different backgrounds and viewpoints. I enjoyed attending these talks and debates and learning about different sides of an issue.

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

As I said at my hearing, I agree with Justice Kagan that "we are all originalists." Although the term "originalism" may have different meanings to different persons, I take it to refer generally to the act of interpreting a text in accordance with its original public meaning, namely, how reasonable persons with knowledge of the law would have interpreting it at the time of its adoption. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, however, lower court judges must follow the precedents of the Supreme Court. That is so regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

   The Supreme Court has held that the starting point for statutory interpretation is the text of the statute. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (quotations and alternations omitted)). The Supreme Court has further explained that if "the statutory text is plain and unambiguous," it must be applied "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). Although the term "textualist" may have different meanings to different persons, I take it to refer generally to the primacy of the text in statutory interpretation. Ultimately, lower court judges must follow the precedents of the Supreme Court. That is so regardless of whether a given precedent is regarded as "textualist" in approach or not.

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

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

      The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See 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 apply Supreme Court and Eleventh Circuit precedent regarding the use of legislative history.

   b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider

legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 9(a).

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

[11] SJQ at 5.

demonstrated, however, that widespread voter fraud is a myth.[12] 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.[13]

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

As a sitting justice and judicial nominee, it would not be appropriate for me to comment on political issues or issues that might come before the court.

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

Please see my response to Question 10(a).

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

Please see my response to Question 10(a).

11. 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.[14] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[15] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[16] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[17]

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

Racial bias does exist in our society, contrary to the fundamental principle of equality under the law embodied in the Constitution. As a justice, I strive to ensure that every person who enters the courtroom is treated with respect and receives fair treatment under the law.

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

Yes.

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

I have taken implicit bias training from Professor Rachel Godsil and former federal district court judge Mark W. Bennett as part of Florida's judicial education programs. I do not recall what materials they used.

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.[18] Why do you think that is the case?

As a sitting justice and judicial nominee, it would not be appropriate for me to comment on matters that are political and could be the subject of litigation.

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[12] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[13] *Id.*
[14] 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.
[15] *Id.*
[16] 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.
[17] *Id.*
[18] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[19] Why do you think that is the case?

Please see my response to question 11(d).

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

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

12. 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.[20] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[21]

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this question sufficiently to have an informed view.

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

Please see my response to Question 12(a).

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

I believe that every institution, including the judiciary, benefits from a diversity of backgrounds and experiences.

14. 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.

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

As I agreed at my hearing, I do believe that *Brown v. Board of Education* was correctly decided and holds a unique place in the history of American jurisprudence. When the Supreme Court held that the separate-but-equal doctrine violated the Equal Protection

clause of the Fourteenth Amendment, and overruled *Plessy v. Ferguson*, it corrected a historic wrong.

16. Do you believe that *Plessy v. Ferguson*[23] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Please see my response to Question 15.

17. 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.

18. 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

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[19] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).
[20] 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.
[21] *Id.*
[22] 347 U.S. 483 (1954).
[23] 163 U.S. 537 (1896).

heritage."[24] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

As a sitting justice and judicial nominee, it would not be appropriate for me to comment on political matters.

19. 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."[25] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that due process protections apply to all "persons" in the United States, including aliens, regardless of their entry status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will apply this Supreme Court precedent, if confirmed.

[24] 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.
[25] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

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

Robert J. Luck, to be United States Circuit Judge for the Eleventh Circuit

1. At your nominations hearing, Senator Grassley and Senator Cruz asked you to describe the role of legislative history when interpreting a statute. You responded that the relevant law is the text of the statute, and that floor statements are not approved by both houses of the legislature.

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

    The Supreme Court has held that legislative history should be considered only if the statutory text itself is ambiguous. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citations omitted)). The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See 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 apply Supreme Court and Eleventh Circuit precedent regarding the use of legislative history.

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

    Please see my response to Question 1(a).

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

    In general, a judge should not consider the practical consequences when considering how to rule in a case. In limited circumstances, however, Supreme Court and Circuit precedent, and applicable statutory provisions, might require a judge to engage in such consideration, for example, when deciding whether a party would suffer irreparable harm if a stay or preliminary injunction were not issued.

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

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

    Judges have a direct responsibility to ensure that litigants are afforded due process and fair and equal treatment under the law.

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

If confirmed, I will perform my role consistent with the requirements imposed by law and the Code of Judicial Conduct. I also believe in the principles of procedural fairness, which seek to ensure fairness within the judicial system and promote public perception that the system is fair. These principles include demonstrating that the parties' positions have been heard and fairly considered, that the decision-makers are neutral and transparent in their decision-making, and that all parties are treated with respect and courtesy.

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

Racial bias does exist in our society, contrary to the fundamental principle of equality under the law embodied in the Constitution. As a judge, I strive to ensure that every person who enters into the courtroom is treated with respect and receives fair treatment under the law.

EXHIBIT D

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Robert Joshua Luck

2. **Position**: State the position for which you have been nominated.

   United States Court of Appeals Judge for the Eleventh Circuit

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Supreme Court of Florida
   500 South Duval Street
   Tallahassee, Florida 32399

4. **Birthplace**: State year and place of birth.

   1979; South Miami, Florida

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   2001 – 2004, University of Florida Levin College of Law; J.D. (*magna cum laude*), 2004

   1999 – 2000, University of Florida; B.A. (highest honors), 2000

   1998, Broward College; no degree received

   1997 – 1998, George Washington University; no degree received

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2019 – Present

Justice
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399

2017 – 2019
Judge
District Court of Appeal of Florida, Third District
2001 Southwest 117th Avenue
Miami, Florida 33175

2013 – 2017
Judge
Eleventh Judicial Circuit Court of Florida
175 Northwest First Avenue
Miami, Florida 33128

2008 – 2013
Assistant United States Attorney and Deputy Chief, Major Crimes Section
United States Attorney's Office, Southern District of Florida
James Lawrence King Federal Justice Building
99 Northeast Fourth Street
Miami, Florida 33132

2006 – 2008
Staff Attorney and Law Clerk
Judge Ed Carnes
United States Court of Appeals for the Eleventh Circuit
Frank M. Johnson Federal Courthouse
One Church Street
Montgomery, Alabama 36104

2007 – 2008
Adjunct Professor
Alabama State University
915 South Jackson Street
Montgomery, Alabama 36104

2005 – 2006
Law Clerk/JD
Greenberg Traurig, P.A.
333 Southeast Second Avenue, Suite 4400
Miami, Florida 33131

2004 – 2005
Law Clerk

Judge Ed Carnes
United States Court of Appeal for the Eleventh Circuit
Frank M. Johnson Federal Courthouse
One Church Street
Montgomery, Alabama 36104

2003
Summer Associate
Boies, Schiller & Flexner, LLP
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, Florida 33301

2002
Summer Associate
Kluger, Peretz, Kaplan & Berlin, LLP
201 South Biscayne Boulevard, Suite 1700
Miami, Florida 33131

2000 – 2001
Legislative Correspondent
Senators Paul Coverdell and Jon Kyl
730 Hart Senate Office Building
Washington, District of Columbia 20510

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I registered for the selective service upon turning 18.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Civility Award, Project Nuremberg, Lynn University and Temple Beth-El of Boca Raton (2019)

2017 – 2018 Justice Award, League of Prosecutors (2018)

President's Outstanding Community Leader Award, Dade County Bar Association (2017)

"Rodef Sholem" Pursuer of Peace Award, Miami Jewish Legal Society (2016)

Justice Harry Lee Anstead Professionalism Award, Miami-Dade Trial Lawyers Association (2016)

Outstanding Young Alumnus, University of Florida Alumni Association (2015)

Award for Truly Exceptional Achievement & Merit (A-TEAM), United States Attorney's Office (2013)

Integrity Award, United States Department of Health and Human Services, Office of Inspector General (2012)

Director's Recognition, Federal Bureau of Investigation (2011)

Order of the Coif, University of Florida Levin College of Law (2004)

Editor-in-Chief, *Florida Law Review* (2004)

Book Award in White Collar Crime, University of Florida Levin College of Law (2004)

Florida Blue Key Honor Society, University of Florida (2003)

Frank J. Maloney Award, *Florida Law Review* (2003)

Book Award in Florida Administrative Law, University of Florida Levin College of Law (2003)

Cypen & Cypen Scholarship, University of Florida Levin College of Law (2002)

Book Award in Constitutional Law, University of Florida Levin College of Law (2002)

Book Award in Criminal Law, University of Florida Levin College of Law (2001)

Florida Bright Futures Scholarship, State of Florida (1997)

Presidential Academic Scholarship, George Washington University (1997)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Ad Hoc Committee on Attorney Admissions, Peer Review, and Attorney Grievance, United States District Court for the Southern District of Florida (2013)

Ad Hoc Committee to Organize the Bench and Bar Conference, United States District Court for the Southern District of Florida (2011 – 2012)

Alabama State Bar (2008 – 2012)

Cuban American Bar Association (2013 – present)

Dade County Bar Association (2013 – present)

Federal Bar Association, Montgomery, Alabama Chapter (2006 – 2008)

Federalist Society for Law & Public Policy Studies (2014 – present)

Florida Association of Women Lawyers, Miami-Dade Chapter (2013 – present)

Florida Bar (2006 – present)

Florida Bar Appellate Court Rules Committee (2015 – present)
Florida Supreme Court Liaison (2019)
Vice Chair, Appellate Court Rules Committee (2018)
Chair, Criminal Rules Subcommittee (2017)
Vice Chair, Criminal Rules Subcommittee (2016)

Florida Children's and Youth Cabinet, Ex Officio Member (2019 – present)

Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases, Florida Supreme Court Liaison (2019 – present)

Florida Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases, Supreme Court Liaison (2019 – present)

Haitian Lawyers Association (2015 – 2017)

Hugh Maddox Inn of Court (2006 – 2008)

Monroe County Bar Association (2017 – present)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Alabama, 2008
Florida, 2006

There has been no lapse in my Florida Bar membership. I allowed my membership in the Alabama State Bar to lapse in 2008 because I moved back home to Miami in 2008 with no intention of going back to, or practicing in, Alabama.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse

in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Eleventh Circuit, 2007

I allowed my membership in the United States Court of Appeals for the Eleventh Circuit to lapse in 2013 because I was appointed as a state trial court judge in 2013 and was no longer practicing before that court.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

I have not belonged to any professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 and 10.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Michael L. Seigel & James L. Kelley, Lawyers Crossing Lines: Ten Stories, xii (Carolina Academic Press, 2d ed. 2010). Copy supplied. Although I was not an editor on this book, I did provide copy-editing and proofreading services, for

which the authors thanked me in their authors' note. I have included this volume out of an abundance of caution.

Robert J. Luck & Michael L. Seigel, *The Facts and Only the Facts*, in Race to Injustice: Lessons Learned from the Duke Lacrosse Rape Case, 3 – 26 (Carolina Academic Press, Michael L. Seigel ed., 2009). Copy supplied.

Robert J. Luck, *The Bad Habits of Legal Writers, and Why Young Lawyers Should Avoid Them*, Young Lawyer, August 2008. Copy supplied.

Robert Luck, *Hospital welcomes full slate of residents*, GW Hatchet, April 23, 1998. Copy supplied.

Robert Luck, *Gelman strives to spruce up services*, GW Hatchet, April 9, 1998. Copy supplied.

Robert Luck, *Few voters turn out for forum*, GW Hatchet, February 26, 1998. Copy supplied.

Robert Luck, *RHA auctions lottery picks*, GW Hatchet, February 9, 1998. Copy supplied.

Robert Luck, *Grad student wins car with a "lucky" shot*, GW Hatchet, January 22, 1998. Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Florida Bar Appellate Court Rules Committee, Criminal Practice Subcommittee, Pre-vote Subcommittee Report, *Proposed Amendment re Rule 9.140(f)(6)(A)*, November 10, 2017. Copy supplied.

Florida Bar Appellate Court Rules Committee, Criminal Practice Subcommittee Pre-vote Subcommittee Report, *Proposed Amendment re Stays Pending Appeal*, August 17, 2017. Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Letter to Sens. Grassley and Feinstein, Committee on the Judiciary, United States

Senate, Nomination of Judge Rodolfo A. Ruiz to Be District Judge, United States District Court for the Southern District of Florida, May 8, 2018. Copy supplied.

Letter to Sens. Grassley and Feinstein, Committee on the Judiciary, United States Senate, Nomination of Roy K. Altman to Be District Judge, United States District Court for the Southern District of Florida, May 8, 2018. Copy supplied.

Oral Argument, *In re Amendments to the Florida Rules of Appellate Procedure - 2017 Regular-Cycle Report*, Florida Supreme Court Case No. SC17-152, June 6, 2017. Available at https://wfsu.org/gavel2gavel/viewcase.php?eid=2444.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

September 13, 2019: Speaker, "Swearing in of U.S. Attorney Ariana Fajardo Orshan," United States Attorney's Office for the Southern District of Florida, Miami, Florida. Remarks supplied.

August 15, 2019: Speaker, "Investiture of Judge Rodolfo Ruiz," United States District Court for the Southern District of Florida, Miami, Florida. Remarks supplied.

July 26, 2019: Panelist, "A Fireside Chat with One of Our Newest Florida Supreme Court Justices, Justice Robert Luck: Reflections on Law, Life, and the Court," State Convention, American Board of Trial Advocates, Orlando, Florida. Outline supplied.

June 28, 2019: Speaker, "Ethical Considerations in the Practice of Law: Alcohol & Substance Abuse," Florida Registered Paralegals, Boca Raton, Florida. I have no notes, transcripts, or recordings. I gave the introductory remarks at the continuing legal education program for registered paralegals at the state bar convention. The address for Florida Registered Paralegals is 651 East Jefferson Street, Tallahassee, Florida 32399.

June 24, 2019: Speaker, SideBar Series, Young Lawyers Division, Palm Beach County Bar Association, West Palm Beach, Florida. Outline supplied.

May 17, 2019: Speaker, Annual Banquet, Vassar B. Carlton Inn of Court, Melbourne, Florida. Remarks supplied.

May 3, 2019: Administered Oath, "Investiture of Judge Hendon," Third District Court of Appeal, Miami, Florida. Oath supplied.

May 3, 2019: Award Recipient, "Civility Award," Tenth Annual Project Nuremberg Lawyers' Luncheon, Temple Beth El, Boca Raton, Florida. Remarks supplied.

April 10, 2019: Speaker, "Welcoming Florida Blue Key to the Florida Supreme Court," Florida Supreme Court, Tallahassee, Florida. I have no notes, transcripts, or recordings. I spoke to student leaders at the University of Florida about the judicial branch and the role of the Florida Supreme Court. The address for the Florida Supreme Court is 500 South Duval Street, Tallahassee, Florida 32399.

April 9, 2019: Speaker, "Welcoming Leadership Ocala to the Florida Supreme Court," Florida Supreme Court, Tallahassee, Florida. I have no notes, transcripts, or recordings. I spoke to community leaders visiting the court about the judicial branch and the role of the Florida Supreme Court. The address for the Florida Supreme Court is 500 South Duval Street, Tallahassee, Florida 32399.

April 5, 2019: Panelist, "Appellate Judges and Practitioners," Bench and Bar Conference, Dade County Bar Association, Miami, Florida. Outline supplied.

March 21, 2019: Guest Lecturer, "Law and Risk Management Seminar," Florida State University School of Law, Tallahassee, Florida. Outline supplied.

March 18, 2019: Speaker, "The First 100 Days on the Florida Supreme Court and Why It Matters to You," Aventura Marketing Council, Aventura, Florida. Outline supplied.

March 13, 2019: Speaker, "Invocation," Women Making History and Scholarship Awards Reception, Florida Association of Women Lawyers, Miami-Dade Chapter, Miami, Florida. Remarks supplied.

March 4, 2019: Speaker, "Welcoming the House Page Program to the Florida Supreme Court," Florida Supreme Court, Tallahassee, Florida. I have no notes, transcripts, or recordings. I spoke to students participating in the state House of Representative's page program about the judicial branch and the role of the Florida Supreme Court. The address for the Florida Supreme Court is 500 South Duval Street, Tallahassee, Florida 32399.

March 1, 2019: Panelist, "Opening Session: Conversation with Chief Judges and Supreme Court Justices" and "What Do Appellate Judges Want Practitioners & Trial Court Judges to Know," Bench and Bar Conference, Spellman-Hoeveler American Inn of Court, Miami, Florida. I have no notes, transcripts, or recordings. I spoke on two panels about how the Florida Supreme Court operates

and about practicing before the court. The address for the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

February 28, 2019: Speaker, "Welcoming Leadership Florida to the Florida Supreme Court," Florida Supreme Court, Miami, Florida. I have no notes, transcripts, or recordings. I spoke to community leaders visiting the court about the judicial branch and the role of the Florida Supreme Court. The address for the Florida Supreme Court is 500 South Duval Street, Tallahassee, Florida 32399.

February 22, 2019: Speaker, "That's Supreme! Rules and Laws," Hillel Day School, North Miami Beach, Florida. Notes supplied.

February 21, 2019: Speaker, "Florida Courts Scavenger Hunt: The Courts and the Constitution of the State of Florida," Florida Supreme Court Teaching Institute, Tallahassee, Florida. Notes supplied.

February 19, 2019: Panelist, "Disposition of Appeal/Remand Instructions," Florida Court Personnel Institute, Orlando, Florida. Notes supplied.

January 26, 2019: Speaker, "Invocation," Annual Gala, Cuban American Bar Association, Miami, Florida. Remarks supplied.

January 14, 2019: Speaker, "Speech Accepting Appointment to the Supreme Court of Florida," Scheck Hillel Community School, Miami, Florida. Remarks supplied.

December 7, 2018: Speaker, "Invocation," Judicial Retirement Ceremony, Eleventh Judicial Circuit of Florida, Miami, Florida. Remarks supplied.

November 29, 2018: Panelist, Continuing Legal Education Luncheon, Monroe County Bar Association, Key West, Florida. Outline supplied.

October 25, 2018: Speaker, Reception, Legal Services of Greater Miami, Coral Gables, Florida. Remarks supplied.

October 11, 2018: Speaker, "What to Expect for the Upcoming Term of the Florida Supreme Court," North Dade Bar Association, Aventura, Florida. Outline supplied.

July 17, 2018: Speaker, "Florida Supreme Court Mid-Year Review," Miami Beach Bar Association, Miami Beach, Florida. Outline supplied.

June 23, 2018: Presenter, "Installation of Young Lawyers Section President and Officers and Directors," Annual Installation Gala, Dade County Bar Association, Miami, Florida. Outline supplied.

June 20, 2018: Presenter, "Appellate Jurisdiction for Trial Lawyers," June Continuing Legal Education Luncheon, Coral Gables Bar Association, Coral Gables, Florida. Outline supplied.

May 31, 2018: Panelist, "Legal Writing: The 'Write' Way to Avoid Reversal: Factual Findings and Standard of Review," Florida Advanced Judicial College, Orlando, Florida. Notes supplied.

March 20 – 22, 2018: Panelist, "Sentencing Departures and Enhancements," "Stand Your Ground & Self-Defense," "Williams Rule Evidence," "Interrogatory Verdict Forms & Jury Instructions," "Case Management," and "Post-Conviction Proceedings," Fundamentals – Criminal Circuit & Criminal County Tracks, Florida Judicial College – Phase II, Orlando, Florida. Notes supplied.

February 27, 2018: Speaker, "Breakfast with the Appellate Court Committee," Dade County Bar Association, Miami, Florida. Outline supplied.

February 24, 2018: Award Recipient, "Justice Awards Dinner," Miami-Dade League of Prosecutors, Miami, Florida. Remarks supplied.

February 2, 2018: Moderator, "Departures from the American Rule on Attorney's Fees," Florida Chapters Conference, The Federalist Society for Law & Public Policy Studies, Orlando, Florida. Notes supplied. Recording available at: https://www.youtube.com/watch?v=JXCcpamvPgY.

November 16, 2018: Panelist, "Ask the Third DCA Judges," Continuing Education Luncheon, Monroe County Bar Association, Key West, Florida. Outline supplied.

November 15, 2017: Speaker, "Swearing in of Mayor Francis Suarez," City of Miami, Miami, Florida. Oath supplied.

November 2, 2017: Panelist, "The Do's and Don'ts of Motions for New Trial Based on Closing Argument in the Trial Court and on Appeal," Third District Court of Appeal Fall Seminar, Dade County Bar Association, Miami, Florida. Outline supplied.

October 25, 2017: Panelist, "What Appellate Judges Want Trial Lawyers (& Judges) to Know," Dade County Bar Association, Miami, Florida. Outline supplied.

August 10, 2017: Speaker, "General Provisions: Article II, Sections 1 through 9 of the Florida Constitution," Constitution Revision Commission, Miami, Florida. Notes supplied.

May 22, 2017: Panelist, "Common Insurance Disputes in Florida, and How to

Handle Them," Advanced Topics in Insurance Law: Everything the Florida Judge Would Want to Know, Florida Advanced Judicial College, Orlando, Florida. Notes supplied.

April 21, 2017: Speaker, "Investiture of Judge Robert J. Luck," Third District Court of Appeal, Miami, Florida. Remarks supplied.

March 14 – 16, 2017: Panelist, "Sentencing Departures," "Williams Rule Evidence," "Interrogatory Verdict Forms & Jury Instructions," "Stand Your Ground & Self Defense," Fundamentals – Criminal Circuit & Criminal County Tracks, Florida Judicial College, Phase II, Orlando, Florida. Notes supplied.

February 10, 2017: Panelist, "Judicial Ethics," Bench and Bar Conference, Dade County Bar Association, Coral Gables, Florida. Outline supplied.

January 6, 2017: Panelist, "Practicing with Professionalism," Young Lawyers Division, Florida Bar, Fort Lauderdale, Florida. Outline supplied.

November 16, 2016: Award Recipient, "Rodef Sholem" Pursuer of Peace Award, Miami Jewish Legal Society, Miami, Florida. Remarks supplied.

October 16, 2016: Panelist, "Table for Eight with Judge Luck," Florida Association for Women Lawyers, Miami-Dade Chapter, Coral Gables, Florida. I have no notes, transcripts, or recordings. I had an informal question-and-answer session over dinner with eight members of the local women lawyers association about my background and the trial court. The address for the Florida Association for Women Lawyers is Post Office Box 731685, Ormond Beach, Florida 32173.

September 23, 2016: Speaker, Career Day, Hillel Day School, North Miami Beach, Florida. Outline supplied.

September 15, 2016: Speaker, "The 50th Anniversary of Miranda," James Otis Lecture, American Board of Trial Advocates, Miami-Dade Chapter, Miami, Florida. Notes supplied.

August 25, 2016: Award Recipient, Justice Harry Lee Anstead Award, Miami-Dade Trial Lawyers Association, Miami, Florida. Remarks supplied.

August 20, 2016: Speaker, "Domestic Violence," Domestic Violence Awareness Day, Pilgrim's Seventh Day Adventist Church, Hialeah, Florida. I have no notes, transcripts, or recordings. I spoke to church members about the problem of domestic violence and the impact it has on families and children. The address for Pilgrim's Seventh Day Adventist Church is 110 Eucalyptus Drive, Hialeah, Florida 33010.

August 1, 2016: Speaker, Judicial Candidates Forum, Gwen S. Cherry Black

Women Lawyers Association, Miami, Florida. I have no notes, transcripts, or recordings. I spoke to community members at a candidates' forum for judicial candidates during the 2016 primary election cycle. The address for the Gwen S. Cherry Black Women Lawyers Association is Post Office Box 12631, Miami, Florida 33101.

May 24, 2016: Panelist, "The One-Sided Conversation: Reinitiation of Interrogation After Invocation" and "The Hamlet Defendant: Equivocal vs. Unequivocal Invocations of the Right to Remain Silent," I'll Never Tell: Fifth Amendment Issues in Criminal Proceedings, Florida Advanced Judicial College, Orlando, Florida. Notes supplied.

May 13, 2016: Speaker, "Introduction of North Miami Beach Mayor George Vallejo and Indian Creek Village Mayor Bernard Klepach," Law Day 2016: Miranda: More Than Words, North Dade Justice Center, Eleventh Judicial Circuit Court of Florida, North Miami Beach, Florida. Outline supplied.

May 6, 2016: Speaker, "Introduction of Public Defender Carlos Martinez," Law Day 2016: Miranda: More Than Words, Hialeah Branch Courthouse, Eleventh Judicial Circuit Court of Florida, Hialeah, Florida. Outline supplied.

March 24, 2016: Speaker, "Practicing with Professionalism," Young Lawyers Division, Florida Bar, Miami, Florida. Outline supplied.

March 16, 2016: Guest Lecturer, "Plea Bargaining," Criminal Prosecution and Defense Lawyering Workshop: Zealous Advocacy and Situational Ethics in the Adversarial System of Justice, University of Miami School of Law, Coral Gables, Florida. Outline supplied.

March 15, 2016: Speaker, "Professionalism in the Civil Practice of Law: Recent Developments and Case Law Update," Miami Beach Bar Association, Miami Beach, Florida. Outline supplied.

February 26, 2016: Panelist, "Dynamic Depositions" and "Pathways to the Bench," Bench & Bar Conference, Dade County Bar Association, Miami, Florida. I have no notes, transcripts, or recordings. As part of the local bar association's bench and bar conference, I spoke to local lawyers and judges about deposition practice and the judicial application process. The address for the Dade County Bar Association is 123 NW First Avenue, Suite 214, Miami, Florida 33128.

February 21, 2016: Panelist, "Legal Issues in Jury Selection," View from the Bench: SuperStars Mock Trial, Spellman-Hoeveler Chapter of the American Inns of Court, Coral Gables, Florida. I have no notes, transcripts, or recordings. I spoke at a continuing legal education seminar hosted by the local Inn of Court about jury selection. The address for the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

November 21, 2015: Speaker, "Introducing Authors Karen Abbot, T.J. Stiles, James Swanson and Martha Hodes," Miami Book Fair International, Miami-Dade College, Miami, Florida. Outline supplied.

November 10, 2015: Panelist, "Partnership for Professionalism," Spellman-Hoeveler Chapter of the American Inns of Court, Miami, Florida. Outline supplied.

September 17, 2015: Panelist, "Sentencing," Criminal Law Boot Camp for the Civil or Newer Criminal Attorney, Pincus Professional Education, Miami, Florida. Outline supplied.

August 19, 2015: Speaker, "Winning the Appeal," Coral Gables Bar Association, Coral Gables, Florida. Outline supplied.

August 3, 2015: Speaker, "*Hurst v. Florida*, and the Latest Challenge to Florida's Capital Punishment Scheme," Florida Circuit Court Judges Conference, Orlando, Florida. Outline supplied.

April 15, 2015: Panelist, "Table for Eight with Judge Luck," Florida Association for Women Lawyers, Miami-Dade Chapter, Miami, Florida. I have no notes, transcripts, or recordings. I had an informal question-and-answer session over dinner with eight members of the local women lawyers association about my background and the trial court. The address for the Florida Association for Women Lawyers is Post Office Box 731685, Ormond Beach, Florida 32173.

April 15, 2015: Panelist, "Motions for Summary Judgment," Fifth Annual Circuit Court Boot Camp, Pincus Professional Education, Fort Lauderdale, Florida. Outline supplied.

February 20, 2015: Panelist, "Perfecting Your Legal Argument," Bench and Bar Conference, Dade County Bar Association, Miami, Florida. I have no notes, transcripts, or recordings. I spoke at the local bar association's conference for lawyers and judges about argument preservation on appeal. The address for the Dade County Bar Association is 123 NW First Avenue, Suite 214, Miami, Florida 33128.

November 14, 2014: Panelist, "Professionalism Roundtable," Wilkie D. Ferguson, Jr. Bar Association, November 2014, Miami, Florida. Outline supplied.

October 29, 2014: Speaker, "Ethical Governance Day 2014," Miami-Dade Commission on Ethics & Public Trust, North Miami Beach, Florida. Outline supplied.

March 21, 2014: Panelist, "Does Your Ethics and Compliance Program Stand Up

to the Test," Corporate Counsel Conference, Hispanic National Bar Association, Orlando, Florida. Outline supplied.

February 28, 2014: Panelist, "Appellate Advocacy," Bench and Bar Conference, Dade County Bar Association, Coral Gables, Florida. I have no notes, transcripts, or recordings. I served on a panel at the local bar association's bench and bar conference discussing effective techniques for appellate advocacy. The address for the Dade County Bar Association is 123 NW First Avenue, Suite 214, Miami, Florida 33128.

February 18, 2014: Panelist, "Sixth Annual Judicial Forum," Wilkie D. Ferguson, Jr. Bar Association, Miami, Florida. Outline supplied.

November 8, 2013: Speaker, "Investiture of Judge Robert J. Luck," Eleventh Judicial Circuit Court of Florida, Miami, Florida. Remarks supplied.

October 12, 2012: Panelist, "Emerging Fraud Trends and Recent Enforcement Actions," Southeast Regional Investor Fraud Summit, United States Attorney's Office for the Southern District of Florida, Miami, Florida. I have no notes, transcripts, or recordings. The summit was attended by regional stakeholders who investigate, prosecute, and are affected by investor fraud. I spoke on a panel discussing issues with the investigation and prosecution of investor fraud cases. The address for the United States Department of Justice is 950 Pennsylvania Avenue NW, Washington, DC 20530.

May 23, 2012: Panelist, "Identity Theft Seminar: The Who, What, Where, Why, and How of Heath Care Identity Theft," National Advocacy Center, United States Department of Justice, Columbia, South Carolina. Notes supplied.

April 27, 2012: Panelist, "Health Care Fraud Issues," Bench and Bar Conference, United States District Court for the Southern District of Florida, West Palm Beach, Florida. I have no notes, transcripts, or recordings. I was on a panel at the federal district court's bench and bar conference discussing with local lawyers and judges recent issues in health care fraud prosecutions. The address for the United States District Court for the Southern District of Florida is 701 Clematis Street, West Palm Beach, Florida 33401.

May 29, 2009: Speaker, Fifth Annual Career Day, Key Largo School, Monroe County Public Schools, Key Largo, Florida. I have no notes, transcripts, or records. I spoke at the elementary school career day about being a lawyer. The address for Key Largo School is 104801 Overseas Hwy, Key Largo, Florida 33037.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where

they are available to you.

Kristin A. Norse, *An Interview with Justice Robert J. Luck*, The Record, August 26, 2019. Copy supplied.

Nathan Molina, *The Leadership of Justice Luck*, Florida Supreme Court Historical Society Magazine, Summer/Fall 2019. Copy supplied.

Press Conference, Announcement of Appointment of Judge Robert J. Luck to the Supreme Court of Florida, Miami, Florida, January 14, 2019. Partial recording available at: https://www.facebook.com/tampabaynews/videos/major-announcement-governor-ron-desantis-has-appointed-judge-robert-luck-to-the-/2019437454806857/.

Thomas S. Ward, *Judicial Profile – Judge Robert J. Luck*, The Record, August 3, 2018. Copy supplied.

Jason Silver, *Judge Robert J. Luck Appointed to the Third District Court of Appeal*, CABA Briefs, Summer/Fall 2017. Copy supplied.

Celia Ampel, *Miami-Dade Circuit Judge Named to Third DCA*, Daily Business Review, February 9, 2017. Copy supplied.

David Ovalle, *Miami Judicial Races Include Some Intrigue and a Lawsuit*, Miami Herald, August 23, 2016. Copy supplied.

The Herald Recommends in Circuit Court Groups 52, 66 & 74, Miami Herald, July 18, 2016. Copy supplied.

Carlos Harrison, *Judicial Profile: For Robert Luck, 'Process' Happened Quickly*, Daily Business Review, August 15, 2014. Copy supplied.

I was interviewed for the Coronel Matias Farias Radio Show, 1080 AM Miami, Miami, Florida, on February 11, 2014 I have been unable to locate a transcript or recording.

Jay Weaver, *Gov. Rick Scott Appoints Miami Federal Prosecutor to Circuit Court Bench*, Miami Herald, June 30, 2013. Copy supplied.

Governor Selects Federal Prosecutor For Miami-Dade Circuit Judge, Daily Business Review, June 27, 2013. Copy supplied.

Television Interview, *The case of Miami CPA Juan Carlos Rodriguez who scammed his clients out of $1.9 million*, "American Greed," CNBC, April 16, 2013. Available at https://www.youtube.com/watch?v=I0rxJ10BGf8.

Alyson M. Palmer, *Smarts and zingers; Lawyers laud Carnes' intelligence, but are wary of his tough questioning and sharp retorts in opinions*, Daily Report, February 12, 2009. Copy supplied.

MaryJo Sylvester et al., *It's Election Time. Do You Know Where Our Young Voters Are?*, St. Louis Post-Dispatch, November 6, 2000. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Circuit Judge, Eleventh Judicial Circuit of Florida, 2013 – 2017. I was appointed by then-Florida Governor Rick Scott to this position in 2013 and, following a retention election, was retained in 2016. The Eleventh Judicial Circuit has jurisdiction over felony cases and civil cases in which the amount in controversy exceeds $15,000. I served in the criminal (2013 – 2015; 2016 – 2017) and civil (2015 – 2016) divisions.

District Judge, District Court of Appeal of Florida, Third District, 2017 – 2019. I was appointed by then-Florida Governor Rick Scott to this position in 2017 and, following a retention election, was retained in 2018. The Third District Court of Appeal is the intermediate appellate court for Miami-Dade and Monroe Counties, Florida, with jurisdiction over appeals of final orders and judgments, some interlocutory appeals, and extraordinary writs.

Justice, Supreme Court of Florida, 2019 – present. I was appointed by Governor Ron DeSantis to this position in 2019. The Supreme Court of Florida has jurisdiction to hear appeals from final judgments of trial courts imposing the death penalty; appeals involving issues of constitutional validity; appeals involving questions, orders, or judgments certified by intermediate appellate courts to be of great public importance; appeals from intermediate appellate court decisions that directly conflict with a decision of another intermediate appellate court or of the Florida Supreme Court; and certain other matters specified in the Florida Constitution.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? 300

i. Of these, approximately what percent were:

jury trials:	25 %
bench trials:	75 % [total 100%]
civil proceedings:	80 %
criminal proceedings:	20 % [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

In re Amends. to Fla. Evid. Code, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019) (Luck, J., dissenting)

Long v. State, 271 So. 3d 938 (Fla. 2019) (Luck, J., concurring in part and concurring in the judgment)

DePrince v. Starboard Cruise Servs., Inc., 271 So. 3d 11 (Fla. 3d DCA 2018) (en banc)

Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp., 261 So. 3d 613 (Fla. 3d DCA 2018)

Dep't of Children & Families v. Feliciano, 259 So. 3d 957 (Fla. 3d DCA 2018) (Luck, J., concurring in result)

Credo LLC v. Speyside Investments Corp., 259 So. 3d 893 (Fla. 3d DCA 2018) (Luck, J., dissenting)

Santos v. HSBC Bank USA, 258 So. 3d 535 (Fla. 3d DCA 2018)

Matheson v. Miami-Dade Cty., 258 So. 3d 516 (Fla. 3d DCA 2018)

P&S & Co., LLC v. SJ Mak, LLC, 254 So. 3d 535 (Fla. 3d DCA 2018)

Dimitri v. Commerical Ctr. of Miami Master Assoc., Inc., 253 So. 3d 715 (Fla. 3d DCA 2018)

Villafane v. Maradona, 253 So. 3d 708 (Fla. 3d DCA 2018)

Jahangiri v. 1830 N. Bayshore, LLC, 253 So. 3d 699 (Fla. 3d DCA 2018)

Bean v. Univ. of Miami, 252 So. 3d 810 (Fla. 3d DCA 2018)

Rahimi v. Global Discoveries, Ltd., 252 So. 3d 804 (Fla. 3d DCA 2018)

Sayao v. Knightsbridge Bus. Network, Inc., 250 So. 3d 842 (Fla. 3d DCA 2018) (Luck, J., dissenting)

State v. Pena, 247 So. 3d 61 (Fla. 3d DCA 2018)

Diocese of Palm Beach, Inc. v. Gallagher, 249 So. 3d 657 (Fla. 4th DCA 2018) (sitting by designation)

Sosataquechel v. State, 246 So. 3d 497 (Fla. 3d DCA 2018) (Luck, J., concurring in part and dissenting in part)

Leon v. Carollo, 246 So. 3d 490 (Fla. 3d DCA 2018)

Muchnick v. Goihman, 245 So. 3d 978 (Fla. 3d DCA 2018)

OneWest Bank, FSB v. Palmero, No. 3D14-3114, 2018 WL 1832326 (Fla. 3d DCA Apr. 18, 2018)

Liork, LLC v. BH 150 Second Ave., LLC, 241 So. 3d 920 (Fla. 3d DCA 2018)

Schlesinger v. Jacob, 240 So. 3d 75 (Fla. 3d DCA 2018) (Luck, J., concurring)

Nationstar Mortg., LLC v. Silva, 239 So. 3d 782 (Fla. 3d DCA 2018)

Siegel v. Cross Senior Care, Inc., 239 So. 3d 738 (Fla. 3d DCA 2018) (Luck, J., dissenting)

Westberry v. State, 239 So. 3d 186 (Fla. 3d DCA 2018)

McGrath v. Martin, 238 So. 3d 361 (Fla. 3d DCA 2017) (Luck, J., concurring in result)

Burton v. State, 237 So. 3d 1138 (Fla. 3d DCA 2018)

DePrince v. Starboard Cruise Servs., Inc., No. 3D16-1149, 2018 WL 443153 (Fla. 3d DCA Jan. 17, 2018)

Garcia v. State, 237 So. 3d 1080 (Fla. 3d DCA 2017)

Lago v. Costco Wholesale Corp., 233 So. 3d 1248 (Fla. 3d DCA 2017)

Moreno v. State, 232 So. 3d 1133 (Fla. 3d DCA 2017)

Martin v. Sowers, 231 So. 3d 559 (Fla. 3d DCA 2017) (Luck, J., dissenting)

Montesino v. State, 231 So. 3d 514 (Fla. 3d DCA 2017)

Arko Plumbing Corp. v. Rudd, 230 So. 3d 520 (Fla. 3d DCA 2017)

Bennett v. Mortg. Elec. Registration Sys., Inc., 230 So. 3d 100 (Fla. 3d DCA 2017)

Ward v. State, 229 So. 3d 860 (Fla. 3d DCA 2017)

Noriega v. State, 228 So. 3d 170 (Fla. 3d DCA 2017)

Ortiz v. Ortiz, 227 So. 3d 730 (Fla. 3d DCA 2017) (Luck, J., concurring in part and dissenting in part)

Adkins v. Sotolongo, 227 So. 3d 717 (Fla. 3d DCA 2017) (Luck, J., concurring)

Ortiz v. State, 227 So. 3d 682 (Fla. 3d DCA 2017)

Miccosukee Tribe of Indians v. Lewis Tein, P.L, 227 So. 3d 656 (Fla. 3d DCA 2017)

Simon v. State, 225 So. 3d 934 (Fla. 3d DCA 2017)

Cardona v. Casas, 225 So. 3d 384 (Fla. 3d DCA 2017)

Williams v. State, 225 So. 3d 349 (Fla. 3d DCA 2017)

Montero v. State, 225 So. 3d 340 (Fla. 3d DCA 2017)

S.C. v. State, 224 So. 3d 249 (Fla. 3d DCA 2017)

Mukamal v. Marcum LLP, 223 So. 3d 422 (Fla. 3d DCA 2017)

Faddis v. Luddy, 221 So. 3d 758 (Fla. 3d DCA 2017)

Ordonez-Medina v. State, 221 So. 3d 744 (Fla. 3d DCA 2017)

Leal v. Rodriguez, 220 So. 3d 543 (Fla. 3d DCA 2017)

Gomez v. S&I Properties, LLC, 220 So. 3d 539 (Fla. 3d DCA 2017)

Castro v. Pullmantur, S.A., 220 So. 3d 531 (Fla. 3d DCA 2017)

Reid v. State, No. 3D16-1051, 2017 WL 2348615 (Fla. 3d DCA May 31, 2017)

Krieger v. Fla. Fish & Wildlife Conservation Comm'n, 220 So. 3d 511 (Fla. 3d DCA 2017)

J.H. v. State, 220 So. 3d 508 (Fla. 3d DCA 2017)

Deauville Hotel Mgmt., LLC v. Ward, 219 So. 3d 949 (Fla. 3d DCA 2017)

Gilchrease v. State, 219 So. 3d 264 (Fla. 3d DCA 2017)

Knight v. State, 217 So. 3d 1194 (Fla. 3d DCA 2017)

Flanders v. State, 217 So. 3d 160 (Fla. 3d DCA 2017)

Yergin v. Georgopolos, 217 So. 3d 155 (Fla. 3d DCA 2017)

UV Cite III, LLC v. Deutsche Bank Nat'l Tr. Co., 215 So. 3d 1280 (Fla. 3d DCA 2017)

United Auto. Ins. Co. v. Affiliated Heathcare Ctrs., Inc., 21 Fla. L. Weekly Supp. 871a (Fla. 11th Cir. Ct. May 9, 2014)

Sepulveda v. Westport Recovery Corp., 21 Fla. L. Weekly Supp. 391a (Fla. 11th Cir. Ct. Dec. 31, 2013)

Rubio v. State, 21 Fla. L. Weekly Supp. 389a (Fla. 11th Cir. Ct. Dec. 30, 2013) (Luck, J., concurring)

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *State of Florida v. Ricardo Garganelly*, Eleventh Judicial Circuit Case No. F14-6023

   Mr. Garganelly had been charged with battering a person over the age of sixty-five. Mr. Garganelly had been found incompetent to proceed to trial, and on February 12, 2015, I held a hearing to decide where Mr. Garganelly should be placed until he was restored to competence. During the hearing, as I was making my findings, Mr. Garganelly rushed up from his seat and jumped at me. He and I tumbled down the steps of the bench, and as I was lying on the floor, Mr. Garganelly was on top of me, punching my head. My bailiff eventually lifted Mr. Garganelly off of me. I got up, dusted off my robe, fixed my chair (which had been knocked down), took my place on the bench, and dictated what had happened into the record. I then entered an order recusing myself from the case. Despite the bleeding and bruising, I declined medical attention and refused to file a worker's compensation claim. Having heard about the incident in Tallahassee, Chief Justice Jorge Labarga wrote in a letter to me: "I want to commend you for the professionalism you displayed in handling what must have been a very disturbing situation. Your coolness and understanding was exemplary." A copy of the judgment is attached.

   Counsel for the State:

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Counsel for the Defendant:

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2. *State of Florida v. Steven C. Bateman*, Eleventh Judicial Circuit Case No. F13-20190

Mr. Bateman, the former mayor of Homestead, was charged in 2013 with unlawful compensation, self-dealing, and illegal lobbying. The case went to trial within a year (September 2014), and lasted one week. There were a number of high-profile witnesses and community leaders who testified, including Miami-Dade County Mayor Carlos Gimenez, and the media recorded every moment of the trial. The jury convicted Mr. Bateman on three counts, and after post-trial motions, I granted a judgment of acquittal on one count and issued a judgment of conviction on the two others. After he was found guilty, Mr. Bateman wrote in a letter to the probation office: "The court process was extremely professional. I cannot say enough about the professionalism of Judge Luck. He was extremely kind and honorable to everyone. He is an outstanding judge." A copy of the judgment is attached. The conviction and sentence were affirmed on appeal, *Bateman v. State*, 240 So. 3d 36 (Fla. 3d DCA 2017), and the Supreme Court of Florida denied review, No. SC18-229, 2018 WL 1273063 (Fla. Mar. 9, 2018).

Counsel for the State:

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3. *State of Florida v. Yan Arana Castillo*, Eleventh Judicial Circuit Case No. F10-5619D

Mr. Arana Castillo, a seventeen-year-old gang member, stabbed to death a student associated with a rival gang outside of Miami Beach Senior High School. Mr. Arana Castillo pleaded guilty on the eve of trial. In Miami, this was one of the first sentencing hearings of a juvenile following the United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Following the *Miller* decision, the Florida Legislature had enacted a new sentencing law for those who committed murder before the age of eighteen. There was an open question, however, about whether the new law applied retroactively to those juveniles, like Mr. Arana Castillo, who had committed their crimes before the effective date of the new law. I held a two-day sentencing hearing, and in an order, I applied the new law to sentence Mr. Arana Castillo. A copy of the order is attached. The Florida Supreme Court ultimately agreed that the new law applied retroactively, and Mr. Arana Castillo's sentence was affirmed by the Third District Court of Appeal, *Castillo v. State*, 173 So. 3d 979 (Fla. 3d DCA 2015).

Counsel for the State:

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4. *7213 Fisher LLC v. American Leisure Resorts, Inc.*, Eleventh Judicial Circuit Case No. 2010-43000-CA-32

This was a complicated foreclosure case involving a multi-million dollar condominium on Fisher Island. Billionaire investor Manny Medina bought the note and mortgage to the condo and sought to foreclose on it after the owners, who were imprisoned in federal court for tax fraud, stopped paying.

A French company, CDR Creances, had been awarded a constructive trust on the property, and responded with a counterclaim based on fraud and invalid title. The case had been pending since 2010. I ruled on summary judgment motions, held hearings on motions in limine, and presided over the three-day bench trial in October 2015. After the trial, I wrote findings of fact and conclusions of law finding that Fisher had established by a preponderance of the evidence that it was entitled to foreclose on the property, and CDR Creances had not proven by a preponderance of the evidence its fraud and invalid title claims. I then held a two-day hearing on Fisher's attorneys' fees motion, and wrote an order ruling on the objections to the fee request. The orders are attached. The Third District Court of Appeal affirmed, *CDR Creances S.A.S. v. 7213 Fisher, LLC*, 224 So. 3d 227 (Fla. 3d DCA 2017).

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5. *Cristina Lancella v. Citizens Property Insurance Company*, Eleventh Judicial Circuit Case No. 2012-13705-CA-32

This was a first-party property insurance case. Ms. Lancella dropped a salad bowl and chipped a porcelain tile in her kitchen. Citizens Property proposed to repair the tile pursuant to the homeowners' insurance policy, but Ms. Lancella claimed that the repair was not of like kind and quality to her tile, and sued for declaratory relief. By September 2015, the case had been pending for more than three years. On my first day in the civil division, the parties reported ready for trial on the issue of whether the proposed repair was of like kind and quality. I ordered a venire panel brought to the courtroom,

ruled on the pending motions in limine, and started the trial. This was the first of fourteen jury trial trials over which I presided during my year-long stint in the civil division. The jury found that the proposed repair was not of like kind and quality; I entered judgment consistent with the jury's verdict. A copy of the judgment is attached. The defendant dismissed its appeal.

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6. *State of Florida v. Felix Antonio Silva Martinez*, Eleventh Judicial Circuit Case No. F12-20826

Mr. Silva Martinez was charged with lewd and lascivious molestation for sexually assaulting his niece. Prior to trial, the state moved to admit the victim's statements to her mother and her interview with members of the state's child protection team about the molestation. The state also moved to allow the victim to testify through a closed-circuit television feed. I held evidentiary hearings on the motions, and ultimately granted in part and denied in part the motion to admit the victim's out-of-court statements and granted the motion to allow the victim to testify via CCTV. Following trial, the jury found the defendant guilty. My orders and the judgment are attached. The Third District Court of Appeal affirmed the judgment and sentence, *Martinez v. State*, 197 So. 3d 52 (Fla. 3d DCA 2016).

Counsel for the State:

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7. *State of Florida v. Michael Hester*, Eleventh Judicial Circuit Case No. F13-20145

Mr. Hester was charged with attempted second-degree murder for shooting an acquaintance while the two were arguing on the streets of Miami. Mr. Hester claimed that that he shot the victim in self-defense and relied on Florida's Stand Your Ground law, which does not require retreat if faced with an imminent threat of deadly force. Based on the testimony during the trial, I instructed the jury on Florida's self-defense law. The jury rejected the defense and convicted Mr. Hester as charged. A copy of the judgment is attached. The Third District Court of Appeal affirmed Mr. Hester's conviction and sentence, *Hester v. State*, 190 So. 3d 199 (Fla. 3d DCA 2016).

Counsel for the State:

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Counsel for the Defendant:

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8. *Victor Herrera-Zenil et al. v. Carlos Luis Vasallo Tome et al.*, Eleventh Judicial Circuit Court Case No. 2014-1021-CA-32

Mr. Herrera-Zenil and Mr. Vasallo Tome were business partners in

distributing classic Mexican movies. Mr. Vasallo Tome owned the distribution rights to the movies and Mr. Herrera-Zenil had connections to the satellite and cable companies in the United States. Mr. Herrera-Zenil alleged that Mr. Vasallo Tome reneged on their business arrangement and breached his fiduciary duties to Mr. Herrera-Zenil, and that other defendants interfered with the business relationship between the two partners. The defendants moved to dismiss the complaint based on Florida's forum non conveniens doctrine. After an evidentiary hearing, I analyzed the forum non conveniens factors and granted the motion to dismiss. A copy of my order is attached. The Third District Court of Appeal affirmed my order, *Herrera-Zenil v. Tome*, 232 So. 3d 1124 (Fla. 3d DCA 2017).

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9. *Francisco E. Rodriguez v. Kendall 1 Plaza, Ltd.*, Eleventh Judicial Circuit Court Case No. 2011-43450-CA-32

Ms. Rodriguez was leaving a shopping plaza and walking towards her parked car when a car driving around the plaza ran her over. She died a few hours later from head injuries. Ms. Rodriguez's family brought a wrongful death lawsuit against the shopping plaza for premises liability based on the faulty design and maintenance of the parking lot. The family's theory was that if the parking lot had been properly designed and maintained, the driver would not have killed the victim. I tried the five-year-old case in 2016. After an extensive jury selection process and a five-day trial, the jury found no negligence on the part of the shopping plaza. A copy of the judgment is attached. The Third District Court of Appeal affirmed the judgment, *Rodriguez v. Kendall 1 Plaza, Ltd.*, 225 So. 3d 821 (Fla. 3d DCA 2017).

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10. *Signature Group, LLC v. Young Money Entertainment, LLC et al.*, Eleventh Judicial Circuit Court Case No. 2014-19871-CA-32

Signature Group obtained a $1.8 million judgment against Young Money Entertainment and Dwayne Michael Carter, Jr. (also known by the stage name, Lil Wayne). Signature Group sought to collect on the judgment by moving for a break order authorizing the company to enter Mr. Carter's home and take any of his non-protected assets in satisfaction of the judgment. Florida law authorized Signature Group to seek the break order in an ex parte hearing, but imposed certain requirements for the issuance of such an order. After two days of hearings, I denied the ex parte motion without prejudice because Signature Group had not met its burden under Florida law. The company filed an amended motion addressing the deficiencies identified in the first order. The second motion was granted. Copies of both orders are attached.

Counsel for the Plaintiff:

David M. Goldstein
Marcos Rothman Valdes & Goldstein, P.L.
15951 Southwest 41st Street, Suite 800
Davie, Florida 33331-1521
(954) 334-2002

Counsel for the Defendants:

The defendants did not appear at the ex parte hearing.

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *DePrince v. Starboard Cruise Services, Inc.*, 271 So. 3d 11 (Fla. 3d DCA 2018)

Counsel for Appellant:

Mario M. Ruiz
McDonald Hopkins LLC
200 South Biscayne Boulevard, Suite 2600
Miami, Florida 33131-5340
(305) 704-3990

Counsel for Appellee:

Eric D. Isicoff
Isicoff Ragatz
601 Brickell Key Drive, Suite 750
Miami, Florida 33131-4030
(305) 373-3232

2. *Arko Plumbing Corp. v. Rudd*, 230 So. 3d 520 (Fla. 3d DCA 2017)

Counsel for Appellant:

John Quaranta
Quaranta P.A.
255 Alhambra Circle, Suite 1150
Coral Gables, Florida 33134-7415
(305) 930-6077

Counsel for Appellee:

M. Stephen Smith
Rumberger Kirk & Caldwell
Brickell City Tower, Suite 3000
80 Southwest Eighth Street
Miami, Florida 33130-3037
(305) 358-5577

Michael R. Holt
Rumberger Kirk & Caldwell

Brickell City Tower, Suite 3000
80 Southwest Eighth Street
Miami, Florida 33130-3037
(305) 358-5577

3. *Lago v. Costco Wholesale Corp.*, 233 So. 3d 1248 (Fla. 3d DCA 2017)

Counsel for Appellant:

Elliot B. Kula
Kula & Associates, P.A.
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Counsel for Appellee:

Harold S. Stevens
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Wellington, Florida 33414-3402
(954) 290-1835

James R. Hardin, Jr.
JRHJ Law
2588 58th Terrace South
St Petersburg, Florida 33712-5212
(727) 232-1891

4. *Department of Children & Families v. Feliciano*, 259 So. 3d 957 (Fla. 3d DCA 2018) (Luck, J., concurring in the result)

Counsel for Appellant:

Oscar E. Marrero
Marrero & Wydler
2600 South Douglas Road, Penthouse-4
Coral Gables, FL 33134-6127
(305) 446-5528

Counsel for Appellee:

Alan D. Sackrin
Law Office of Alan D. Sackrin
2100 East Hallandale Beach Boulevard, Suite 200
Hallandale Beach, Florida 33009-3770
(954) 455-0800

5. *Leon v. Carollo*, 246 So. 3d 490 (Fla. 3d DCA 2018)

Counsel for Appellant:

Juan-Carlos Planas
Law Firm of Juan-Carlos Planas, P.A.
8500 West Flagler Street, Suite 204B
Miami, Florida 33144-2044
(305) 207-0877

Counsel for Appellee:

Benedict P. Kuehne
Kuehne Davis Law, P.A.
100 Southeast Second Street, Suite 3550
Miami, Florida 33131-2112
(305) 789-5989

6. *Villafane v. Maradona*, 253 So. 3d 708 (Fla. 3d DCA 2018)

Counsel for the Appellant:

Brian J. Barakat
Barakat Law, P.A.
2701 Ponce de Leon Boulevard, Suite 202
Coral Gables, Florida 33134-6020
(305) 444-3114

Counsel for the Appellee:

Eduardo F. Rodriguez
EFR Law Firm
7825 Southwest 179th Terrace
Palmetto Bay, Florida 33157
(305) 978-9340

7. *Adkins v. Sotolongo*, 227 So. 3d 717 (Fla. 3d DCA 2017) (Luck, J., concurring)

Counsel for Appellant:

Appellant was pro se and not represented by counsel.

Counsel for Appellee:

Evan L. Abramowitz
3211 Ponce De Leon Boulevard, Suite 202
Coral Gables, Florida 33134-7274
(305) 254-4500

Counsel for the Guardian Ad Litem:

Emily J. Phillips
Phillips Lanier
2 South Biscayne Boulevard, Suite 2300
Miami, Florida 33131-1803
(305) 350-5299

8. *State v. Pena*, 247 So. 3d 61 (Fla. 3d DCA 2018)

Counsel for Appellant:

Christina L. Dominguez
Assistant Attorney General
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Suntrust International Center
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(305) 377-5441

Counsel for Appellee:

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Gonzalez & Herrera, P.A.
Post Office Box 830217
Ocala, Florida 34483-0217
(305) 506-8001

Dennis Gonzalez Jr.
11401 Southwest 40th Street, Suite 204
Miami, Florida 33165-3338
(305) 209-0384

9. *Montero v. State*, 225 So. 3d 340 (Fla. 3d DCA 2017)

Counsel for Appellant:

Jonathan Greenberg
Assistant Public Defender
Miami Public Defender's Office
1320 Northwest Fourteenth Street

Miami, Florida 33125-1609
(305) 545-1960

Bradley Horenstein
The Horenstein Firm, P.A.
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Miami, Florida 33128-1838
(786) 444-2723

Counsel for Appellee:

Joanne Diez
Assistant Attorney General
Office of the Attorney General
1 Southeast Third Avenue, Suite 900
Miami, Florida 33131-1706
(786) 792-6207

10. *Leal v. Rodriguez*, 220 So. 3d 543 (Fla. 3d DCA 2017)

Counsel for Appellant:

Cristobal D. Padron
Cristobal D. Padron & Associates, P.A.
357 Almeria Avenue, Suite 103
Miami, Florida 33134-5801
(786) 332-6340

Counsel for Appellee:

Appellee appeared pro se and was not represented by counsel.

e. Provide a list of all cases in which certiorari was requested or granted.

Diocese of Palm Beach, Inc. v. Gallagher, 249 So. 3d 657 (Fla. 4th DCA 2018), *cert. denied*, 139 S. Ct. 1601 (2019)

Miccosukee Tribe of Indians v. Lewis Tein, P.L., 227 So. 3d 656 (Fla. 3d DCA 2017), *cert. denied*, 138 S. Ct. 741 (2018)

State v. Reid, No. 3D16-1051, 2017 WL 2348615 (Fla. 3d DCA May 31, 2017), *cert. pending*, No. 18-9152 (U.S. May 1, 2019)

Long v. State, 271 So. 3d 938 (Fla.) (Luck, J., concurring in part and concurring in the judgment), *cert. denied sub nom.*, *Long v. Florida*, 139 S. Ct. 2635 (2019)

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

Cases Reversed/Vacated as a District Judge:

OneWest Bank, FSB v. Palmero, No. 3D14-3114, 2018 WL 1832326 (Fla. 3d DCA Apr. 18, 2018), rev'd 2019 WL 1783727 (Fla. 3d DCA Apr. 24, 2019) (en banc). Writing for a majority of the Third District Court of Appeal, I applied the well-established rule of construction that all contemporaneously executed agreements should be read together where the court is asked to interpret the meaning of the agreement. In a divided opinion, the en banc court vacated the earlier opinion and concluded that where a mortgage is unambiguous, as the en banc court found this mortgage to be, the court could not look at other contemporaneously executed agreements, including the note and loan agreement, to interpret the meaning of language in the mortgage.

DePrince v. Starboard Cruise Services, No. 3D16-1149, 2018 WL 443153 (Fla. 3d DCA Jan. 17, 2018), *rev'd* 271 So. 3d 11 (Fla. 3d DCA 2018) (en banc). Writing for the majority of a three-judge panel of the Third District Court of Appeal, I applied the court's precedent establishing a four-part test for the affirmative defense of unilateral mistake. While I was bound by the court's precedent, I was careful to note that our case law was confusing and inconsistent and hinted that the court should do something about it. This is how I concluded the panel opinion: "We end on this note. The principle of unilateral mistake, as the *DePrince I* court explained, 'appears to be a confusing area of the law with inconsistent application among Florida's district courts of appeal.' 'The existence of three different tests has caused a great deal of confusion in the case law and to litigants and trial courts.' The record shows the trial court struggling to address this confusion. Despite its good faith efforts to reconcile the cases, we, ultimately, conclude that the trial court strayed too far from *DePrince I*. We look forward to one day having less confusion and inconsistency in the application of unilateral mistake, but until then, *DePrince I* controls our decision in this case." The defendant successfully moved for rehearing en banc. I wrote the unanimous opinion for the en banc court receding from *DePrince I* because it was inconsistent with decisions from the Florida Supreme Court, earlier cases from the Third District Court of Appeal, and cases from the other four district courts.

Reid v. State, No. 3D16-1051, 2017 WL 2348615 (Fla. 3d DCA May 31, 2017), *rev'd State v. Reid*, No. SC17-1377, 2019 WL 102322 (Fla. 2019). The defendant was sentenced to life in prison with parole eligibility after twenty-five years after pleading guilty to first-degree murder, attempted armed robbery, and possession of a firearm while engaged in a criminal offense. The defendant was seventeen when he murdered his victim. Following the United States Supreme Court's

decisions in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), the defendant moved for a new sentencing hearing that would give him the opportunity for release after considering the individual circumstances of his crime and background. The trial court denied the motion because the defendant was eligible for parole, and parole was an opportunity for release contemplated by the United States Supreme Court in *Graham* and *Miller*. In *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), the Florida Supreme Court held that "Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of [the defendant's] juvenile status at the time of the murder, as required by *Miller*." Following *Atwell*, I wrote for a unanimous Third District Court of Appeal reversing the trial court's order and remanding for a new sentencing hearing. The state sought review in the Florida Supreme Court. While the case was pending in the Florida Supreme Court, that court receded from its decision in *Atwell*, and held in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), that "sentences with the possibility of parole do not violate *Graham*" and do not require a resentencing. After *Franklin*, the Florida Supreme Court granted review of *Reid*, quashed the Third District's opinion, and remanded for reconsidering in light of *Franklin*.

Decisions Reversed/Quashed as a Circuit Judge:

Deutsche Bank National Trust Co. v. SFL Property Holding LLC, Eleventh Judicial Circuit Case No. 15-8326, *rev'd* 237 So. 3d 1125 (Fla. 3d DCA 2018). In *Deutsche Bank Trust Co. Americas v. Beauvais*, 40 Fla. L. Weekly D1c (Fla. 3d DCA Dec. 17, 2014), the Third District Court of Appeal answered the question, "Where a lender files a foreclosure action upon a borrower's default, and expressly exercises its contractual right to accelerate all payments, does an involuntary dismissal of that action without prejudice in and of itself negate, invalidate or otherwise 'decelerate' the lender's acceleration of the payments, thereby permitting a new cause of action to be filed based upon a new and subsequent default?" The court answered: "We answer that question in the negative, and hold that the involuntary dismissal without prejudice of the foreclosure action did not by itself negate, invalidate or otherwise decelerate the lender's acceleration of the debt in the initial action. The lender's acceleration of the debt triggered the commencement of the statute of limitations, and because the installment nature of the loan payments was never reinstated following the acceleration, there were no 'new' payments due and thus there could be no 'new' default following the dismissal without prejudice of the initial action. The filing of the subsequent action, after expiration of the statute of limitations, was therefore barred." Following *Beauvais*, and with the same facts, I granted the defendant's motion for summary judgment based on the expiration of the statute of limitations. While the case was on appeal, the en banc Third District Court of Appeal reversed itself in *Beauvais* and concluded that "after the 2010 dismissal without prejudice of the predecessor mortgagee's foreclosure action, the parties returned to the status quo that existed prior to the filing of the dismissed complaint. As a matter of law, the bank's 2012 foreclosure action, based on

breaches that occurred after the breach that triggered the first complaint, was not barred by the statute of limitations." *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016) (en banc) (*Beauvais II*). Based on *Beauvais II*, the Third District Court of Appeal reversed my summary judgment for the defendant. In reversing, the court noted "that the trial court did not have the benefit of *Bartram* or this Court's en banc opinion, *Beauvais II*, when it entered final judgment in favor of SFL Property."

Wells Fargo Bank, N.A. v. BH-NV Investments 1, LLC, Eleventh Judicial Circuit Case No. 15-15951, *rev'd* 230 So. 3d 60 (Fla. 3d DCA 2017). In *Deutsche Bank Trust Co. Americas v. Beauvais*, 40 Fla. L. Weekly D1c (Fla. 3d DCA Dec. 17, 2014), the Third District Court of Appeal answered the question, "Where a lender files a foreclosure action upon a borrower's default, and expressly exercises its contractual right to accelerate all payments, does an involuntary dismissal of that action without prejudice in and of itself negate, invalidate or otherwise 'decelerate' the lender's acceleration of the payments, thereby permitting a new cause of action to be filed based upon a new and subsequent default?" The court answered: "We answer that question in the negative, and hold that the involuntary dismissal without prejudice of the foreclosure action did not by itself negate, invalidate or otherwise decelerate the lender's acceleration of the debt in the initial action. The lender's acceleration of the debt triggered the commencement of the statute of limitations, and because the installment nature of the loan payments was never reinstated following the acceleration, there were no 'new' payments due and thus there could be no 'new' default following the dismissal without prejudice of the initial action. The filing of the subsequent action, after expiration of the statute of limitations, was therefore barred." Following *Beauvais*, and with the same facts, I granted the defendant's motion for summary judgment based on the expiration of the statute of limitations. While the case was on appeal, the en banc Third District Court of Appeal reversed itself in *Beauvais* and concluded that "after the 2010 dismissal without prejudice of the predecessor mortgagee's foreclosure action, the parties returned to the status quo that existed prior to the filing of the dismissed complaint. As a matter of law, the bank's 2012 foreclosure action, based on breaches that occurred after the breach that triggered the first complaint, was not barred by the statute of limitations." *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016) (en banc) (*Beauvais II*). Based on *Beauvais II*, the Third District Court of Appeal reversed my summary judgment for the defendant. The court noted that "the trial court did not have the benefit of [*Beauvais II*] when it rendered the final judgment in favor of BH–NV."

Rivero v. Howard, Eleventh Judicial Circuit Case No. 09-42627, *rev'd* 218 So. 3d 992 (Fla. 3d DCA 2017). The plaintiff sued defendant for two counts of legal malpractice. I granted summary judgment for the defendant, finding that there was no genuine of material fact that the attorney did not cause the plaintiff to lose his false arrest and malicious prosecution claims against the Miami-Dade Police Department. Those claims would have been unsuccessful even without his

attorney's negligence. The Third District Court of Appeal reversed as to one count, concluding that I erred in finding no genuine issue of material fact. The court affirmed summary judgment as to the other legal malpractice claim.

Brugal v. State, Eleventh Judicial Circuit Case No. 12-28472, *rev'd* 217 So. 3d 134 (Fla. 3d DCA 2017). The defendant was convicted of four counts of lewd and lascivious molestation and four counts of lewd and lascivious battery. Based on binding precedent from the Third District Court of Appeal, I granted the defendant's motion for judgment of acquittal on three of the molestation counts and three of the battery counts because they violated the defendant's double jeopardy rights. The Third District reversed as to five of the six dismissed counts, distinguishing its precedent and concluding that the convictions did not violate the defendant's double jeopardy rights. The court affirmed my judgment of acquittal as to the sixth dismissed count, but on other grounds. A year later, after the Third District's *Brugal* opinion was final, the Florida Supreme Court unanimously agreed with my analysis of the double jeopardy issue and rejected the Third District's approach in *Lee v. State*, 258 So. 3d 1297 (Fla. 2018) ("We hold that, . . . to determine whether multiple convictions of solicitation of a minor, unlawful use of a two-way communications device, and traveling after solicitation of a minor are based upon the same conduct for purposes of double jeopardy, the reviewing court should consider only the charging document.").

Calixte v. Federal National Mortgage Association, Eleventh Judicial Circuit Case No. 14-28843, *rev'd* 211 So. 3d 1084 (Fla. 3d DCA 2017). After a bench trial, I entered judgment for the plaintiff on its foreclosure complaint and found that the plaintiff had reestablished the lost note under Florida law. On appeal, the Third District Court of Appeal "uph[e]ld the judgment in all respects except for one point." The court found that I "failed to determine whether Appellants were 'adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument,' as required by section 673.3091(2), Florida Statutes (2015)." The court reversed and remanded "for further proceedings, 'at which the court must address the means by which the Bank must satisfy this post-proof condition.'"

Sepulveda v. Westport Recovery Corp., Eleventh Judicial Circuit Case No. 13-152 AP, *rev'd* 145 So. 3d 162 (Fla. 3d DCA 2014). Writing for a unanimous panel of the circuit court appellate division, I concluded that under the unique facts of the case, and based on long-standing Florida Supreme Court precedent, the county court had jurisdiction to determine Mr. Sepulveda's homestead exemption claim. The Third District Court of Appeal disagreed and concluded that only the circuit court had jurisdiction to determine homestead exemption claims.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

As a judge on the circuit court appellate division, a judge on the Third District Court of Appeal, and a justice on the Supreme Court of Florida, all of my decisions have been published.

As a trial court judge, I have issued in excess of one hundred written decisions. None of them have been published because the state trial court does not publish trial court orders. All of my trial court orders are stored as part of the court files maintained by the Miami-Dade Clerk of Courts.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

Bean v. University of Miami, 252 So. 3d 810 (Fla. 3d DCA 2018), *rev. denied*, SC18-1476, 2019 WL 1498810 (Fla. Apr. 5, 2019)

State v. Pena, 247 So. 3d 61 (Fla. 3d DCA 2018)

Diocese of Palm Beach, Inc. v. Gallagher, 249 So. 3d 657 (Fla. 4th DCA), *rev. denied*, SC18-865, 2018 WL 4050485 (Fla. Aug. 23, 2018), *cert. denied*, 139 S. Ct. 1601 (2019)

In re Amendments to the Florida Evidence Code, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019) (Luck, J., dissenting)

State of Florida v. Shericka Williams, Eleventh Judicial Circuit Case No. F14-1793 (October 2, 2014) (copy supplied), *aff'd*, 208 So. 3d 196 (Fla. 3d DCA 2016), *rev. denied*, SC17-125, 2017 WL 1366132 (Fla. Apr. 13, 2017)

State of Florida v. Felix Antonio Silva Martinez, Eleventh Circuit Case No. F12-20826 (December 27, 2013) (copy supplied), *affirmed*, 197 So. 3d 52 (Fla. 3d DCA 2016)

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

In determining the necessity or propriety of recusal, I thoroughly review each case assigned to me in order to determine whether the matter presents potential recusal-related issues. In doing so, I have been consistently guided by: (i) Florida Rule of Judicial Administration 2.330; (ii) the Florida Code of Judicial Conduct; and (iii) Opinions of the Florida Judicial Ethics Advisory Committee ("JEAC").

The Third District Court of Appeal had, and the Florida Supreme Court has, an automatic recusal policy whereby I am automatically recused without my knowledge from any cases in which I served as a trial or appellate judge in the same case. *See* Fla. Code of Jud. Conduct, Canon 3(E)(1)(b).

In addition, the Florida Code of Judicial Conduct requires that a judge disqualify himself or herself where "a person within the third degree of relationship to" the judge "is acting as a lawyer in the proceeding." Fla. Code. Jud. Conduct, Canon 3(E)(1)(d)(ii). My first cousin (the son of my father's sister) is a criminal defense lawyer in Miami-Dade County and represents felony defendants in the Eleventh Judicial Circuit. Pursuant to this rule, I sua sponte recused in the following cases:

State of Florida v. Clarence McPherson, Eleventh Judicial Circuit Case No. F16-22272

State of Florida v. Mark Edward Penaredondo, Eleventh Judicial Circuit Case No. F17-472

State of Florida v. Rashad Xavier Raye, Eleventh Judicial Circuit Case Nos. F12-21130, F12-21187, and F13-10968

State of Florida v. Rafael Jean-Baptiste, Eleventh Judicial Circuit Case Nos. F16-13846A and F16-22257

State of Florida v. Marlene Castillo, Eleventh Judicial Circuit Case No. F16-18788

State of Florida v. Rashaad Andrew Welcome and Kelsey Freitus, F15-2868A-B

State of Florida v. Christian Josue Vasquez, Eleventh Judicial Circuit Case No. F15-2664

State of Florida v. Antione Gabriel Curington, Adrian Bridges, and Thadis Lumar Milbry, Eleventh Judicial Circuit Case Nos. F14-27779A-C

State of Florida v. Robert Butler, Eleventh Judicial Circuit Case No. F13-14066

State of Florida v. Kevin Neance, Eleventh Judicial Circuit Case Nos. F12-6781 and F13-17610

State of Florida v. Evelyne Gedeusma, Eleventh Judicial Circuit Case Nos. F12-11003B

In addition, "where a judge selects an attorney to serve in [a] special role . . . in an election campaign, and the campaign is not remote in time from the date the relationship is revealed to the opposing party, disqualification is warranted." *Neiman-Marcus Grp., Inc. v. Robinson*, 829 So. 2d 967, 968 (Fla. 4th DCA 2002). Five attorneys served in a special role in my retention campaign. I sua sponte recused myself in the following cases where one of the five attorneys appeared as counsel:

Moishe Mana v. Tony Cho, Eleventh Judicial Circuit Case No. 2014-5040-CA-32.

R.K./FL Management, Inc. v. Irina Chevaldina, Eleventh Judicial Circuit Case No. 2011-17842-CA-32

I also have recused in the following additional cases:

The Rama Fund, LLC v. Medley Plaza, Inc., Eleventh Judicial Circuit Case No. 2012-41663-CA-32. The former receiver moved to disqualify the former trial judge assigned to the case because the former trial judge and the new receiver were friends. I found the motion to be legally insufficient. However, I exercised my discretion to sua sponte recuse and have the case reassigned to another judge. *See* Fla. R. Jud. Admin. 2.330(i); *State v. Oliu*, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016).

Bayshore Yacht & Tennis Club Condominium Association, Inc. v. City of North Bay Village, Eleventh Judicial Circuit Case No. 2015-28965-CA-32. I recused myself on my own motion because I received a threatening ex parte communication from one of the parties. *See* Fla. R. Jud. Admin. 2.330(i); *State v.*

Oliu, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016).

Anthony Diaz v. BP Products North America, Inc., Eleventh Judicial Circuit Case No. 2009-59029-CA-32. In his motion, the defendant alleged that statements I purportedly made in open court had given him cause to believe he would be treated unfairly. Taking the allegations as true, as I was required to do, *see* Fla. R. Jud. Admin. 2.330(f), I granted the motion, given that it satisfied the procedural requirements of Rule 2.330.

State of Florida v. Ricardo Garganelly, Eleventh Judicial Circuit Case No. F14-6023. I sua sponte recused myself after the defendant physically attacked me on the bench during an evidentiary hearing. *See* Fla. R. Jud. Admin. 2.330(i); *State v. Oliu*, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016).

State of Florida v. Oscar Vega, Eleventh Judicial Circuit Case Nos. F11-9016 and F13-18576. The defendant moved to recuse me because I questioned his counsel's credibility, admonished counsel for the length of her cross examination and for asking improper questions, did not allow counsel to approach witnesses, seemed disinterested in counsel's closing argument, credited the testimony of a police officer, and relied on a statute in rendering my decision that had not been cited by the parties. I found the motion to be legally insufficient. However, I exercised my discretion to sua sponte recuse and have the case reassigned to another judge. *See* Fla. R. Jud. Admin. 2.330(i); *State v. Oliu*, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016).

State of Florida v. Erica Tapia, Eleventh Judicial Circuit Case No. F14-7963. The defendant moved to recuse me because I was a material witness in her probation violation case and I ordered a transcript of a hearing. I found the motion to be legally insufficient. However, I exercised my discretion to sua sponte recuse and have the case reassigned to another judge. *See* Fla. R. Jud. Admin. 2.330(i); *State v. Oliu*, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016).

State of Florida v. Rafael DeJesus Guzman, Eleventh Judicial Circuit Case No. F13-26686. I sua sponte recused myself after receiving an inappropriate ex parte communication from defense counsel. *See* Fla. R. Jud. Admin. 2.330(i); *State v. Oliu*, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016).

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held public office other than judicial office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have not rendered any services to any political party or election commission.

In the November 2012 general election, my childhood friend, John Couriel, ran to represent district 35 in the Florida state senate. I spent the last two weeks before election day as an unpaid campaign volunteer. I helped as a runner, picking up and dropping off campaign materials and supplies, and food and drinks for other volunteers.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a law clerk and staff attorney to Judge Ed Carnes on the United States Court of Appeals for the Eleventh Circuit from 2004 to 2005, and then again from 2006 to 2008.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

2005 – 2006
Law Clerk/JD
Greenberg Traurig, P.A.
333 Southeast 2nd Avenue, Suite 4400
Miami, Florida 33131

2008 – 2013
Assistant United States Attorney and Deputy Chief, Major Crimes Section
United States Attorney's Office, Southern District of Florida
James Lawrence King Federal Justice Building
99 Northeast Fourth Street

Miami, Florida 33132

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Following my first clerkship with Judge Carnes in 2005, I worked as a Law Clerk/JD at Greenberg Traurig, P.A. in Miami from 2005 to 2006. I worked in the appellate and litigation support division of the firm, helping with federal and state appeals and helping the litigators with potential appellate issues.

Following my second clerkship with Judge Carnes, I worked at the United States Attorney's Office for the Southern District of Florida in Miami from 2008 to 2013. In 2008, I started in the Office's appellate section. From 2008 to 2010, I was assigned to the major crimes section. From 2010 to 2012, I was assigned to the economic crimes section. From 2012 to 2013, when I left the Office to join the state trial court, I was appointed as a deputy chief in the major crimes section.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

At Greenberg Traurig, the firm's appellate clients typically were developers and landowners appealing local government zoning decisions, and businesses that were defending a judgment or appealing a judgment following complex civil litigation. I only worked on appellate and litigation support matters while I was at the firm.

At the United States Attorney's Office, I represented the government in federal criminal prosecutions before the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit. From 2008 to 2010, in the major crimes section, I typically handled cases involving gun violence, arson, drug trafficking, and immigration fraud. From 2010 to 2012, in the economic crimes section, I typically handled cases involving health care, investor, and tax fraud. From 2012 to 2013, as a deputy chief of the major crimes section, I helped supervise and train new attorneys in the Office in their gun violence, drug trafficking, and immigration fraud prosecutions.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

At Greenberg Traurig, from 2005 to 2006, one hundred percent of my work was in litigation, but because I was not yet a member of the Florida Bar, and most of our work was appellate and litigation support, I was in court infrequently.

At the United States Attorney's Office, from 2008 to 2013, one hundred percent of my work was in appellate and trial litigation, and I was in court on average at least once a week, and often more than that.

i. Indicate the percentage of your practice in:
   1. federal courts: 95%
   2. state courts of record: 5%
   3. other courts: 0%
   4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 5%
   2. criminal proceedings: 95%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Excluding appeals and cases that concluded with a plea of guilty to the court, I have tried nineteen cases to verdict as an Assistant United States Attorney. Half were as chief counsel and half were as associate counsel.

i. What percentage of these trials were:
   1. jury: 100%
   2. non-jury: 0%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of

the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Crecencio Hernandez*, Southern District of Florida Case No. 08-21054 CR-Zloch

Mr. Hernandez, as the captain of an old, rickety fishing boat, attempted to smuggle dozens of foreign nationals into the United States. As the boat approached Miami, Mr. Hernandez ran it aground on a sand bar and the boat tipped over. Six of the passengers couldn't swim and drowned as a result. At the time, this was one of the worst human smuggling tragedies in the Southern District. There was no trial; Mr. Hernandez pleaded guilty.

Dates of Representation: 2008 – 2009

Judges/Courts: Judge William J. Zloch, United States District Court for the Southern District of Florida

Counsel for the Defendant:

Judge Patrick M. Hunt (former Assistant Federal Public Defender)
United States Federal Building and Courthouse
299 East Broward Boulevard, Room 205E
Fort Lauderdale, Florida 33301
(954) 769-5470

2. *United States v. Lydia Menocal and Ofelia Macia*, Southern District of Florida Case No. 10-20116-CR-Ungaro

Ms. Menocal and Ms. Macia owned and operated Florida Language Institute, a language school in Miami authorized to approve student visas for foreign nationals studying in the United States. Ms. Menocal signed off on hundreds of forms approving student visas for foreign nationals without requiring that they attend class, subverting post-September 11 rules that were put in place to prevent manipulation of the student visa program by terrorists. At the time of the indictment, this was the largest student visa fraud case ever prosecuted, and was mentioned by the Assistant Secretary for Homeland Security in testimony before a congressional subcommittee. There was no trial; Ms. Menocal and

Ms. Macia pleaded guilty.

Dates of Representation: 2010

Judge/Court: Judge Ursula Ungaro, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was co-chief counsel with:

Judge Roy K. Altman (former Assistant United States Attorney)
United States Federal Building and Courthouse
299 East Broward Boulevard
Courtroom 207A, Chambers 207B
Fort Lauderdale, Florida 33301
(954) 769-5680

Counsel for the Defendants:

Manuel Gonzalez
2000 Ponce De Leon Boulevard, Suite 618
Coral Gables, Florida 33134-4422
(305) 444-1400

Juan M. Carrera
Carrera & Amador, P.A.
221 Southwest 42nd Avenue, Floor 3
Miami, Florida 33134-1751
(305) 441-1544

3. *United States v. Junior Sylvin, Emmanuel Othello, Niko Thompson, Ziv Bythol, Tarvus Daniels, Frantz Sterlin, Chris Victor, Eric Taylor, and Gordon Louis*, Southern District of Florida Case No. 09-20264-CR-King, *aff'd*, *United States v. Sterlin*, 466 F. App'x 792 (11th Cir. 2012), *and United States v. Niko Thopson*, 466 F. App'x 838 (11th Cir. 2012)

Junior Sylvin was the head of a gang that terrorized the Little Haiti neighborhood for years. Mr. Sylvin and three of his gang members were convicted at trial in May 2010 for running a drug trafficking organization, and sentenced to decades in federal prison. Another three pleaded guilty before trial. One was acquitted and another remains a fugitive.

Dates of Representation: 2009 – 2010

Judge/Court: Judge James Lawrence King, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was associate counsel with:

Russell Koonin (former Assistant United States Attorney)
United States Securities and Exchange Commission
801 Brickell Avenue, Suite 1800
Miami, Florida 33131-4901
(305) 982-6385

Counsel for the Defendants:

Robyn Blake
The Law Office of Robyn M. Blake, P.A.
20295 Northwest Second Avenue, Suite 215
Miami, Florida 33169-2511
(305) 651-5505

Michael Smith
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Fort Lauderdale, Florida 33301-2858
(954) 761-7201

Gregory A. Samms
The Law Office of Gregory A. Samms, PA
113 Almeria Avenue
Coral Gables, Florida 33134-6008
(786) 953-5802

David Donet
Donet, McMillan & Trontz, P.A.
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Coconut Grove, Florida 33133-5232
(305) 444-0030

Jeffrey D. Weinkle
Florida Criminal Defense, PA
1481 Northwest North River Dr
Miami, Florida 33125-2601
(305) 373-4445

Scott W. Sakin
Scott W. Sakin, P.A.
2883 Executive Park Drive, Suite 200
Weston, Florida 33331-3662

(954) 779-7879

Jan C. Smith II
Federal Public Defender's Office
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1842
(954) 356-7436

Barry S. Greff
Law Office of Barry S. Greff, P.A.
1870 North Corporate Lakes Boulevard, No. 266735
Weston, Florida 33326-3280
(305) 576-8400

4. *United States v. Rene De Los Rios*, Southern District of Florida Case No. 10-20527-CR-Lenard, *aff'd*, *United States v. De Los Rios*, 489 F. App'x 320 (11th Cir. 2012)

Dr. De Los Rios was the medical director at two HIV infusion clinics that billed Medicare. Dr. De Los Rios prescribed expensive medications that he knew his patients did not need and were not receiving. As a result, Medicare was fraudulently billed approximately $50 million. Dr. De Los Rios was convicted at trial in April 2011. He was sentenced to twenty years in prison—at the time, the second-longest sentence for a doctor committing Medicare fraud in Miami.

Dates of Representation: 2011

Judge/Court: Judge Joan A. Lenard, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was associate counsel with:

Joe Beemsterboer
Senior Deputy Chief, Fraud Section
United States Department of Justice
950 Constitution Avenue, Northwest
Washington, DC 20530

Counsel for the Defendant:

Jose M. Quinon
2333 Brickell Avenue, Suite A1
Miami, Florida 33129-2497
(305) 858-5700

Kristina G. Maranges
Envision Physician Services
7700 West Sunrise Boulevard, Suite PL-6
Plantation, Florida 33322-4113
(954) 939-7751

5. *United States v. Raul Diaz-Perera and Yenky Sanchez*, Southern District of Florida Case No. 11-20049-CR-Altonaga, *aff'd*, *United States v. Sanchez*, Eleventh Circuit Case No. 11-15707 (11th Cir. December 17, 2012)

Mr. Diaz-Perera was a former manager at the Department of Children and Families, and supervised Mr. Sanchez. The two of them stole and sold the Medicare numbers of hundreds of DCF clients in order to facilitate a Medicare fraud scheme. Mr. Diaz-Perera pleaded guilty. Mr. Sanchez was convicted at trial in September 2011.

Date of Representation: 2011

Judge/Court: Judge Cecilia M. Altonaga, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was chief counsel with:

Adam L. Schwartz (former Assistant United States Attorney)
Homer Bonner Jacobs
1441 Brickell Avenue, Suite 1200
Miami, Florida 33131-3445
(305) 350-5116

Counsel for the Defendants:

Roberto E. Abreu
Abreu Law, PLLC
201 Alhambra Circle, Suite 504
Coral Gables, Florida 33134-5105
(786) 558-9646

Martin A. Feigenbaum
Law Office of Martin A. Feigenbaum, Esq.
Post Office Box 545960
Surfside, Florida 33154-5960
(305) 323-4595

6. *United States v. Juan Carlos Rodriguez*, Southern District of Florida Case No. 12-20148-CR-Dimitrouleas, *aff'd*, *United States v. Rodriguez*, 537 F. App'x 840 (11th Cir.

2013)

Mr. Rodriguez was an accountant who set up an investment company, MDN Financial. Mr. Rodriguez solicited his accounting clients, and their friends and family members, to give him money to invest in stocks and bonds. Instead of investing the money, Mr. Rodriguez operated MDN Financial as a Ponzi scheme, using the money from new clients to pay back older clients, and pocketing the rest for himself. More than forty of his clients lost money—many, their life savings—and were devastated when the scheme fell apart. Mr. Rodriguez pleaded guilty and was sentenced above the sentencing guidelines to 84 months imprisonment. The case was profiled by the CNBC television program, "American Greed."

Date of Representation: 2012

Judge/Court: Judge William P. Dimitrouleas, United States District Court for the Southern District of Florida

Counsel for the Defendant:

Lane S. Abraham
999 Ponce de Leon Boulevard, Suite 750
Coral Gables, Florida 33134-3057
(305) 285-8822

7. *United States v. Odalys Fernandez and Kelvin Soto*, Southern District of Florida Case No. 12-20230-CR-Ungaro, *aff'd*, *United States v. Fernandez*, 553 F. App'x 927 (11th Cir. 2014)

A federal grand jury returned an indictment that charged Odalys Fernandez and Kelvin Soto with one count each of conspiracy to defraud Medicare from August 17, 2007, to March 19, 2009, 18 U.S.C. § 1349, and with five counts of healthcare fraud for Fernandez and four counts for Soto, § 1347. Ms. Fernandez was charged with submitting false records that recorded purported visits to Klebe de la Cruz, Eulalia Garcia, Rolando Arece, and Caridad Pizzorno. And Mr. Soto was charged with submitting false records that recorded purported visits to Epifano Diaz, Leonida Barrios, Franklin Barnes, and Rosa Diaz.

The evidence at trial established that from 2007 to 2009, Ms. Fernandez and Mr. Soto, nurses in the home-health field, signed nursing notes and records that falsely stated that they provided nursing services to diabetic patients who were homebound and insulin-dependent. Ms. Fernandez and Ms. Soto submitted the records to a home health care agency, Ideal Home Health, which in turn sought reimbursement from the Medicare program and then paid the nurses a portion of that reimbursement as a kickback. Ideal paid its nurses $25 for each nursing note that recorded a visit to a patient and an additional $25 if the nurse had recruited the patient. Many of the patients of Ideal were not diabetic and did not require insulin injections in their home, and Ideal did not require

its nurses to visit the patients or provide nursing services to them.

A jury convicted Ms. Fernandez and Mr. Soto on all counts. The district court sentenced Ms. Fernandez to concurrent terms of 41 months of imprisonment, followed by concurrent periods of three years of supervised release, and ordered restitution in the amount of $240,369. The district court sentenced Mr. Soto to concurrent terms of 72 months of imprisonment, followed by concurrent periods of three years of supervised release, and ordered restitution in the amount of $727,418.

Date of Representation: 2012

Judge/Court: Judge Ursula Ungaro, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was associate counsel with:

Daniel J. Bernstein
United States Attorney's Office
99 Northeast Fourth Street
Miami, Florida 33132-2131
(305) 961-9169

Counsel for the Defendants:

Clayton R. Kaeiser
330 Alhambra Circle, Suite 200
Coral Gables, Florida 33134-5004
(305) 548-4888

Silvia T. Burgoa
330 Alhambra Circle, Suite 200
Coral Gables, Florida 33134-5004
(305) 858-3221

Charles T. White
1031 Ives Dairy Road, Suite 228
Miami, Florida 33179-2538
(305) 914-0160

8. *United States v. Isachi Gil*, Southern District of Florida Case No. 10-20766-CR-Cooke, *aff'd*, *United States v. Gil*, 497 F. App'x 940 (11th Cir. 2012)

Ms. Gil, a nurse, was charged with falsely representing in nursing notes, patient records, or other documents that she was visiting home-bound patients and administering insulin

injections to those home-bound, diabetic patients, when in actuality, the patients either were not diabetic or did not receive those services because they either did not require them or the visits never occurred. Ms. Gil was charged with health care fraud and making false statements in connection with health care matters, in violation of 18 U.S.C. §§ 1347, 1035(a)(2). A jury convicted Ms. Gil following a two-week trial, and the trial court sentenced her to 43 months of imprisonment.

Date of Representation: 2010 – 2011

Judge/Court: Judge Marcia G. Cooke, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was associate counsel with:

Daniel J. Bernstein
United States Attorney's Office
99 Northeast Fourth Street
Miami, Florida 33132-2131
(305) 961-9169

I also briefed and argued the appeal before the United States Court of Appeals for the Eleventh Circuit.

Counsel for the Defendant:

Frank Quintero Jr.
Quintero Broche P.A.
75 Valencia Avenue, Suite 800
Coral Gables, Florida 33134-6135
(305) 446-0303

Juan Pablo Broche
Quintero Broche P.A.
75 Valencia Avenue, Suite 800
Coral Gables, FL 33134-6135
(305) 446-0303

9. *United States v. Juan Gonzalez and Wilmer Quesada-Ramos*, Southern District of Florida Case No. 09-20492-CR-Gold, *aff'd*, *United States v. Quesada-Ramos*, 429 F. App'x 909 (11th Cir. 2011)

Officers arrived around 11:00 p.m. on February 4, 2009, to investigate an alarm activated in a carpet warehouse located in downtown Hialeah, Florida, and discovered a fire that had been started by pouring gasoline through a window onto rolls of carpet. The first two

officers on the scene saw Mr. Ramos in his red truck with its dim headlights drive out of a nearby alley. Mr. Ramos fled and led one officer on a high-speed chase through four traffic lights before the officer stopped the truck at a crowded intersection. Inside the truck, the officer discovered Mr. Ramos's cellular telephone and a wallet containing Mr. Gonzalez's driver's license and receipts from two gas stations where Mr. Gonzalez had purchased $60 in gasoline within three hours of the fire. Although Mr. Ramos denied that he knew Mr. Gonzalez, investigators later discovered that Mr. Gonzalez was Mr. Ramos's uncle, Mr. Gonzalez had worked for years as a subcontractor for the owner of the warehouse, Mr. Gonzalez had fought with the owner about salary deductions in the two months preceding the fire, and Mr. Ramos had helped Mr. Gonzalez install storage racks inside the warehouse. Mr. Gonzalez, who lived many miles away, also was seen by police officers near the warehouse at the time of the fire, fled when officers at two different locations attempted to question him, and, when apprehended, was "really dusty," coughed incessantly, had soot on his face and singed hair in his nose, and spit up "blackish mucus." Mr. Gonzalez gave vague explanations for his symptoms and for his presence near the warehouse, and a fragment of DNA on a t-shirt found at the scene shared 20 characteristics with Mr. Gonzalez's DNA. A police officer seized from Mr. Gonzalez a cigarette lighter and a cell phone, which Mr. Gonzalez had used "pretty close" to the warehouse at 10:22 p.m. and at 11:19 p.m. Records for Mr. Ramos's cellular telephone established that he had driven to Hialeah the night of the fire, where he had made calls between 10:30 p.m. and 11:20 p.m. Although investigators did not discover any accelerant on Ramos's clothing or on any objects in his truck, a trained dog alerted to the presence of an accelerant in the bed of his truck. Mr. Gonzalez and Mr. Ramos were charged with conspiring to destroy, 18 U.S.C. § 844(n), and destroying by fire a building used in interstate commerce, §§ 2, 844(i). After a two-week trial, the jury convicted Mr. Gonzalez and Mr. Ramos of all charges.

Dates of Representation: 2009 – 2010

Judge/Court: Judge Alan S. Gold, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

I was chief counsel with:

Jared E. Dwyer (former Assistant United States Attorney)
Greenberg Traurig, P.A.
333 Southeast Second Avenue
Miami, Florida 33131-2176
(305) 579-0564

Counsel for the Defendants:

Vincent P. Farina (former Assistant Federal Public Defender)
8218 Southwest 193rd Street

Miami, Florida 33157-8006
(305) 772-7120

Kashyap P. Patel (former Assistant Federal Public Defender)
White House
1650 Pennsylvania Avenue, Northwest
Washington, DC 20502-0001
(202) 227-4000

John A. Weekes, Jr.
Weekes Law, P.L.
633 Southeast Third Avenue, Suite 203
Fort Lauderdale, Florida 33301-3263
(954) 463-1211

10. *United States v. Douglas Newton*, Southern District of Florida Case No. 11-60150-CR-Cooke, *aff'd*, *United States v. Newton*, 559 F. App'x 902 (11th Cir. 2014)

Mr. Newton was the President, Secretary, and sole Director of Real American Brands, Inc. ("RLAB"). He agreed to pay kickbacks to induce a pension fund to buy restricted shares of RLAB's penny stock. When informed that the pension fund would no longer purchase any more of RLAB stock, Mr. Newton conspired with a friend, Yan Skwara, to pay the same kickbacks for the purchase of stock in Skwara's company. Mr. Newton was charged with mail fraud, securities fraud, and conspiracy to commit securities fraud. The jury convicted Mr. Newton of all counts and he was sentenced to 30 months' imprisonment followed by one year of supervised release.

Dates of Representation: 2011 – 2012

Judge/Court: Judge Marcia G. Cooke, United States District Court for the Southern District of Florida

Co-Counsel for the Government:

H. Ron Davidson
United States Attorney's Office
99 Northeast Fourth Street
Miami, Florida 33132
(305) 961-9001

Counsel for the Defendant:

Miguel Caridad (former Assistant Federal Public Defender)
1012 Castile Avenue
Coral Gables, Florida 33134-4740
(305) 530-7000

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

    Florida Judicial Education, 2014 – Present: I have served as faculty at Florida Judicial College (for new judges), the Florida Conference of Circuit Judges, Advanced Judicial College, and the Florida Court Personnel Institute. I have taught classes to my judicial colleagues regarding numerous criminal and civil topics, including sentencing, case management, insurance law, and legal writing.

    Florida Bar Appellate Court Rules Committee, 2015 – Present: Appointed to consecutive terms on the committee by Presidents of the Florida Bar, I have served as chair and vice-chair of the criminal rules subcommittee, and vice chair of the entire committee, helping the chair oversee all committee activities. The committee is responsible for analyzing proposals concerning new rules of appellate procedure, as well as existing rules. On behalf of the committee, I orally argued in the front of the Florida Supreme Court in favor of a rule requiring that all appeals throughout the state be heard by three-judge panels instead of by a single judge. *See In re Amendments to Fla. Rules of Appellate Procedure-2017 Regular-Cycle Report*, 256 So. 3d 1218 (Fla. 2018).

    I have never acted or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    In 2007 and 2008, I taught a Business Law course at Alabama State University in Montgomery, Alabama. This was an introductory but required course for all business majors at the university. The course covered the American court system and Constitution, and basic torts, contracts, and criminal law. The syllabuses are supplied.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    The only future benefits I expect to receive are from my federal and state retirement plans and from investments in individual retirement accounts.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    I do not have any plans, commitments, or agreements to pursue outside employment.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    When my nomination is formally submitted to the Senate, I will file my mandated Financial Disclosure Report and will supply a copy to this Committee.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       If confirmed, I will recuse myself from any case where I have ever played any role. Otherwise, I will evaluate any other real or potential conflict of interest, or relationship that could give rise to the appearance of a conflict of interest, on a case-by-case basis and determine appropriate action, including recusal, with the input of parties and after consulting the applicable canons of judicial ethics.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

       If confirmed, I will carefully review and address any real or potential conflicts of interest by reference to section 455 of Title 28 of the United States Code and all applicable canons of the Code of Conduct for United States Judges, as well as any and all other laws, rules, practices, and procedures governing such circumstances.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities,

listing specific instances and the amount of time devoted to each.

Because I have worked for the courts and federal government for most of my career, I've been limited in the pro bono legal work that I could do. But in 2006 I, along with many others, helped research for and edit the Cuban American Bar Association's amicus curiae brief submitted to the en banc Eleventh Circuit Court of Appeals in *United States v. Campa*.

In 2011 and 2012, I was appointed by the Chief Judge of the Southern District of Florida to serve on the committee to organize the bench and bar conference, and the ad hoc committee on attorney admissions, peer review, and attorney grievances.

In 2013, as part of Dade Legal Aid's Put Something Back program, I represented a victim of domestic violence seeking an injunction against an ex-boyfriend.

Since being appointed to the bench in 2013, I have served on the Florida Bar's Appellate Court Rules Committee and as a volunteer judge for local high schools and law schools.

Every year since 2013, I have judged the mock oral argument for the University of Miami Law School's appellate advocacy class.

Every year since 2013, I have judged the mock trial for the University of Miami Law School and Florida International University Law School's trial advocacy class.

Every year since 2013, I have judged practice rounds for the University of Miami Law School's moot court team.

In 2016, I reviewed and graded briefs for the Hispanic National Bar Association's annual moot court competition.

In 2017, 2018, and 2019, I judged the Florida Law Related Education Association's high school moot court competition.

And from 2013 to 2016, I was a Big Brother in the Big Brothers/Big Sisters program. I saw my Little Brother, Wadney, graduate from Booker T. Washington High School in Miami's Overtown neighborhood, and start Miami-Dade College.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department

regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is no selection commission in my jurisdiction for circuit court appointments. I was contacted by the White House Counsel's Office about an interview on July 31, 2019. I interviewed with attorneys from the White House and the Department of Justice's Office of Legal Policy on August 5, 2019, in Washington, DC. On August 26, 2019, I was informed that I was a potential nominee for a vacancy on the United States Court of Appeals for the Eleventh Circuit, and on September 12, 2019, the President announced his intent to nominate me. Since then I have been in contact with officials from the White House Counsel's Office and the Office of Legal Policy.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

EXHIBIT E

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

Andrew Lynn Brasher

2. **Position**: State the position for which you have been nominated.

United States Circuit Judge for the Eleventh Circuit Court of Appeals

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

One Church Street, Suite E300
Montgomery, Alabama 36104

4. **Birthplace**: State year and place of birth.

1981; Milan, Tennessee

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

2003 – 2006, Harvard Law School; J.D. (*cum laude*), 2006

2001, Université Stendhal (now Université Grenoble Alpes); no degree

1999 – 2002, Samford University; B.A. (*summa cum laude* with honors), 2002

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2019 – present
United States District Judge for the Middle District of Alabama
One Church Street, Suite E300
Montgomery, Alabama 36104

2011 – 2019
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Solicitor General (2014 – 2019)
Deputy Solicitor General (2011 – 2014)

2007 – 2011
Bradley Arant Boult Cummings LLP
819 5th Avenue North
Birmingham, Alabama 35203
Associate

2006 – 2007
Honorable William H. Pryor Jr.
United States Court of Appeals for the Eleventh Circuit
Hugo Black Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203
Law Clerk

Summer 2006
Gibson Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Summer Associate

Summer 2005
Ropes & Gray LLP
800 Boylston Street
Boston, Massachusetts 02199
Summer Associate

Spring 2005
Visiting Professor Ronald Mann
Harvard Law School
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
Research Assistant

Fall 2004
Professor Charles Ogletree
Harvard Law School
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138

Research Assistant

Summer 2004
Maynard Cooper & Gale
1901 Sixth Avenue North
Regions Harbert Plaza, Suite 2400
Birmingham, Alabama 35203
Summer Associate

Summer 2004
Bradley Arant Rose & White
[Now Bradley Arant Boult Cummings]
1819 5th Avenue North
Birmingham, Alabama 35203
Summer Associate

Fall 2003
Professor Charles Donahue
Harvard Law School
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
Research Assistant

Spring 2003
Baptist Joint Committee for Religious Liberty
200 Maryland Avenue, N.E.
Washington, D.C. 20002
Intern

Other Affiliations (uncompensated):

2015 – present
Samford University
800 Lakeshore Drive
Birmingham, Alabama 35229
Board of Overseers

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have never served in the military. I registered for selective service upon turning 18.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

National Association of Attorneys General, Best Brief Award (2011–2012, 2013–2014, and 2014–2015 Terms)

Alabama Leadership Initiative (2013)

Alabama Super Lawyers Rising Star (2011)

Degree from Harvard Law School conferred *cum laude* (2006)

Victor Brudney Prize (2006)

Member, *Harvard Law Review* (2004 – 2006)

Degree from Samford University conferred *summa cum laude* with honors (2002)

Samford University Academic, History, and Foreign Language Scholarships (1999 – 2002)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Inns of Court, Hugh Maddox Chapter (September 2018—present)

Alabama State Bar Association Character & Fitness Committee (2013 – 2017)

Alabama Supreme Court
Standing Committee on Alabama Rules of Appellate Procedure (2014 – May 2019)

American Bar Association (2008 – 2014)

Birmingham Bar Association (2008 – 2011)

Defense Research Institute (2007 – 2011)
Young Lawyer Liaison, Government Enforcement and Corporate Compliance Committee (2009 – 2010)
Young Lawyer Liaison, Appellate Practice Committee (2010 – 2011)

Federalist Society for Law and Public Policy Studies (2003 – 2006, 2008 – present)
Montgomery Chapter Vice President (2013 – 2019)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Alabama, 2007

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2011
United States Court of Appeals for the Fourth Circuit, 2010
United States Court of Appeals for the Fifth Circuit, 2010
United States Court of Appeals for the Sixth Circuit, 2011
United States Court of Appeals for the Ninth Circuit, 2011
United States Court of Appeals for the Eleventh Circuit, 2007
United States District Court for the Northern District of Alabama, 2007
United States District Court for the Middle District of Alabama, 2012
United States District Court for the Southern District of Alabama, 2013

To my knowledge, there have been no lapses in membership, but I do not plan to renew memberships going forward.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Alabama Legislature's Code of Ethics Reform and Clarification Commission, Ex Officio Member (2018 – 2019)

Alabama Legislature's Interim Study Committee on Campaign Finance Reform, Attorney General's Delegate (2012 – 2013)

Samford University Board of Overseers (2015 – present)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I am a member of the Board of Overseers for Samford University. Samford University was founded in 1841 as a Baptist college for men. In 1913, the school became fully and permanently coeducational. The school did not admit African American students until the 1960's. At present, and at no time during my service on the Board of Overseers, does Samford discriminate in admissions or in the hiring of employees on the basis of race, sex, religion or national origin, either through formal admission or hiring requirements or the practical implementation of admission or hiring policies.

Except as set forth above, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Assistant Attorney General Ed Carnes 1980-1985, 69 Ala. L. Rev. 651 (2018). Copy supplied.

Alabama Law Institute, Alabama Election Law Handbook (18th ed. 2017). Contributor and editor. Copy supplied.

Symposium: A Recipe for Continued Confusion and More Judicial Involvement in Redistricting, ScotusBlog (May 23, 2017). Copy supplied.

Alabama Law Institute, Alabama Election Law Handbook (17th ed. 2015). Contributor and editor. Copy supplied.

Symposium: The Death Penalty Lives To Fight Another Day, ScotusBlog (June 29, 2015). Copy supplied.

Symposium: Good Faith and Caution, Not Irrationality or Malice, ScotusBlog (Jan. 16, 2015). Copy supplied.

Advice on Motions in Limine, For the Defense, Jan. 2012. Copy supplied.

Circuit Reports: Eleventh Circuit, Certworthy, Vol. 13, Issue 2 (Oct. 20, 2011). Copy supplied.

Class Action Lessons from Wal-Mart v. Dukes, Corporate Counselor, Aug. 2011. Copy supplied.

Circuit Reports: Eleventh Circuit, Certworthy, Vol. 13, Issue 1 (April 1, 2011). Copy supplied.

If You Wouldn't Say It, Why Write It? Tips for More Conversational and Effective Writing, For the Defense, Jan. 2011. Copy supplied.

Circuit Reports: Eleventh Circuit, Certworthy, Vol. 12, Issue 2 (Oct.15, 2010). Copy supplied.

Basics of Certiorari Practice in the Alabama Supreme Court, Ala. Law. (May 2009). Copy supplied.

Amendments Rejected in Encyclopedia of the Supreme Court of the United States (5th ed. 2008). Copy supplied.

Substantive Consolidation: A Critical Examination, Harvard Law School Program on Corporate Governance (2006). Copy supplied.

Discriminatory Limitations on Direct Wine Shipment, 119 Harv. L. Rev. 307 (2006). Copy supplied.

Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright, 118 Harv. L. Rev. 1355 (2005). Copy supplied.

Letter to the Editor, Harv. L. Rec., Apr. 22, 2004. Copy supplied.

Book Review of *One Nation Under God* by Eugene Hemrick, *Report from the Capitol* (March 5, 2003). Copy supplied.

Commencement Speaker Embarrasses and Offends Graduates and Attendees, Samford Crimson, Feb. 12, 2003. Copy supplied.

Birmingham Pledge Means Well, but Empty, Without Firm Commitment, Samford Crimson, Sept. 25, 2002. Copy supplied.

International Theme Unrelated to Events, Samford Crimson, Mar. 21, 2001. Copy supplied.

ROTC Provides Military Experience, Samford Crimson, May 10, 2000. Copy supplied.

Spring Fling Promises Fun for All, Samford Crimson, Apr. 26, 2000. Copy supplied.

Theatre Offers Creative Childcare, Samford Crimson, Mar. 22, 2000. Copy supplied.

Beeson Bridge Falls to Science Center, Samford Crimson, Mar. 15, 2000. Copy supplied.

Stages Gears up for New Semester, Samford Crimson, Mar. 1, 2000. Copy supplied.

In addition to the above, as a research assistant, I edited drafts of Professor Ronald Mann's book *Charging Ahead: The Growth and Regulation of Payment Card Markets* and the 2005 edition of Professor Charles Ogletree's book *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education.* As a member of the Harvard Law Review, I had some role in editing most articles published from the fall of 2004 to the spring of 2006.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Report of the Standing Committee on the Alabama Rules of Appellate Procedure (Feb. 9, 2018). Copy supplied.

Report of the Standing Committee on the Alabama Rules of Appellate Procedure (July 27, 2017). Copy supplied.

Report of the Standing Committee on the Alabama Rules of Appellate Procedure (March 11, 2016). Copy supplied.

Report of the Standing Committee on the Alabama Rules of Appellate Procedure (Sept. 25, 2015). Copy supplied.

Report of the Study Committee on Campaign Finance Reform to the Alabama Legislature (2013). Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Testimony before U.S. Senate Judiciary Committee, Nomination of Andrew L. Brasher, June 5, 2018. Video available at https://www.judiciary.senate.gov/meetings/06/06/2018/nominations.

Letter to Sens. Charles E. Grassley and Dianne Feinstein, Nomination of Brett J. Talley, Oct. 17, 2017. Copy supplied.

Letter to Sens. Charles E. Grassley and Dianne Feinstein, Nomination of Kevin C. Newsom, June 7, 2017. Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

November 2, 2019: Speaker, "Welcoming Remarks," YMCA Youth Judicial Competition, Embassy Suites Hotel, Montgomery, Alabama. I made brief opening remarks at this youth mock trial competition. I have no notes, transcript, or recording. The address for Montgomery YMCA is 880 South Lawrence Street, Montgomery, Alabama 36104

October 3, 2019: Speaker, "Welcoming Remarks," Leadership Alabama Opening Program, Frank M. Johnson Jr. Courthouse, Montgomery, Alabama. I welcomed the participants to this leadership program and told stories about arguing in the Supreme Court. I have no notes, transcript, or recording. The address for Leadership Alabama is Post Office Box 631, Montgomery, Alabama 36101.

September 11, 2019: Speaker, "Thoughts on statutory interpretation," Legislative Services Bill Drafting Seminar, Alabama State House, Montgomery, Alabama. Notes supplied.

August 9, 2019: Speaker, "Investiture Remarks," Investiture of Andrew L. Brasher to be a United States District Judge, Frank M. Johnson Jr. Courthouse, Montgomery, Alabama. Transcript supplied.

July 2, 2019: Speaker, "Remarks on the genius of the United States government and the duties of citizenship," Naturalization Ceremony, Frank M. Johnson Jr. Courthouse, Montgomery, Alabama. Transcript supplied.

Feb. 1, 2019: Panelist, "Technology and Appellate Advocacy," Cumberland Law Review Symposium, Cumberland School of Law. I have no notes, transcript, or recording. The address for Cumberland School of Law is 305 Riley Road, Birmingham, Alabama 35229.

August 16, 2018: Speaker, "Oral Argument," 2018 Alabama Supreme Court Appellate Advocacy Program CLE, Alabama Judicial Center, Montgomery, Alabama. Notes supplied.

July 23, 2018: Speaker, "The Supreme Court's Decision in *Florida v. Georgia*," Annual Meeting of the Conference of Western Attorneys General, Santa Ana Pueblo, New Mexico. PowerPoint supplied.

March 22, 2018: Judge/Panelist, Donworth Moot Court Competition, Cumberland School

of Law. I was a judge for the final round of this moot court competition. I have no notes, transcript, or recording. The address for Cumberland School of Law is 305 Riley Road, Birmingham, Alabama 35229.

March 19, 2018: Panelist, "Solicitors General Supreme Court Review and Preview," Rule of Law Defense Fund, New Orleans, Louisiana. I have no notes, transcript, or recording. The address for the Rule of Law Defense Fund is 1747 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.

December 14, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," State Government Lawyers' CLE, Montgomery, Alabama. Notes supplied.

November 2, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Southeastern Business Law Institute, Birmingham, Alabama. Notes supplied.

October 19, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Yale Law School Student Chapter, New Haven, Connecticut. Notes supplied as notes from December 14, 2017 event.

October 3, 2017: Panelist, "The Limits of Executive Orders," 2017 Faulkner Law Review Symposium, Montgomery, Alabama. I have no notes, transcript, or recording. The address for the Faulkner Law Review is 5345 Atlanta Highway, Montgomery, Alabama 36109.

September 21, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Federalist Society for Law & Public Policy Studies, University of Alabama Law School Student Chapter, Tuscaloosa, Alabama. Notes supplied as notes from November 3, 2017 event.

August 25, 2017: Speaker, "When Laws Are Challenged in Litigation," Legislative Services Bill Drafting Seminar, Alabama Legislature, Montgomery, Alabama. Notes supplied.

July 14, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Alabama State Bar Association Annual Meeting, Point Clear, Alabama. Notes supplied as notes from November 3, 2017 event.

June 30, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Federalist Society for Law & Public Policy Studies, Nashville Lawyers Chapter, Nashville, Tennessee. Notes supplied as notes from November 3, 2017 event.

May 31, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. Notes

supplied as notes from December 14, 2017 event.

May 5, 2017: Panelist, "The Gorsuch Effect," Rule of Law Defense Fund, Charleston, South Carolina. The panel discussed Justice Gorsuch's first few weeks on the Supreme Court. I have no notes, transcript, or recording. The address for the Rule of Law Defense Fund is 1747 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.

April 10, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Student Chapter, Oxford, Mississippi. Notes supplied as notes from December 14, 2017, event.

March 25, 2017: Panelist, "State Solicitors General," Harvard Law Federalist Society Alumni Symposium, Cambridge, Massachusetts. I spoke regarding my work as Alabama Solicitor General. I have no notes, transcript, or recording. The address for the Harvard Student Chapter of the Federalist Society is 103 Pound Hall, 1563 Mass Avenue, Cambridge, Massachusetts 02138. Press coverage supplied.

February 28, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, University of Georgia School of Law Student Chapter, Athens, Georgia. Notes supplied as notes from December 14, 2017, event.

February 17, 2017: Speaker, "The Law of Firearms in Public Places," Alabama League of Municipalities, Montgomery, Alabama. Notes supplied.

February 4, 2017: Panelist, "Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Florida Lawyers Chapter, Annual Meeting, Orlando, Florida. Recording supplied.

January 10, 2017: Speaker, "Attorney General's Office Update," Alabama Probate Judges' Winter Meeting, Point Clear, Alabama. PowerPoint supplied.

December 8, 2016: Speaker, "The Law of Firearms in Public Places," Alabama Association of County Commissions, Montgomery, Alabama. Notes supplied as notes from February 17, 2017 event.

October 28, 2016: Panelist, "Amicus Practice in the Eleventh Circuit," Eleventh Circuit Practice Institute, Atlanta, Georgia. I have no notes, transcript, or recording. The address for the Institute of Continuing Legal Education, which sponsored the Eleventh Circuit Practice Institute, is Post Office Box 117210, Atlanta, Georgia 30368.

October 27, 2016: Panelist, "Conversation with Solicitors General," Eleventh Circuit Practice Institute, Atlanta, Georgia. I spoke regarding my work as Alabama Solicitor General. I have no notes, transcript, or recording. The address for the Institute of Continuing Legal Education, which sponsored the Eleventh Circuit Practice Institute, is

Post Office Box 117210, Atlanta, Georgia 30368.

October 19, 2016: Speaker, "Supreme Court Review," Bradley Arant Boult Cummings LLP, Birmingham, Alabama. PowerPoint supplied.

October 19, 2016: Speaker, "Jobs in Law and Government," Samford University, Birmingham, Alabama. I spoke regarding my work as Alabama Solicitor General. I have no notes, transcript, or recording. The address for Samford University is 800 Lakeshore Drive, Homewood, Alabama 35209.

October 11, 2016: Speaker, "Supreme Court 2015 Wrap Up: A Terrible Horrible No Good Very Bad Term," Federalist Society for Law & Public Policy Studies, University of Alabama Law School Student Chapter, Tuscaloosa, Alabama. Notes supplied.

September 20, 2016: Speaker, "Justice Scalia's Legacy," Montgomery Kiwanis Club, Montgomery, Alabama. I spoke about some of Justice Scalia's important opinions and arguing before Justice Scalia. I have no notes, transcript, or recording. The address for the Montgomery Kiwanis Club is 201 Dexter Avenue, Montgomery, Alabama 36104.

September 15, 2016: Speaker, "Supreme Court 2015 Wrap Up: A Terrible Horrible No Good Very Bad Term," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. Notes supplied as notes from October 11, 2016, event.

July 27, 2016: Speaker, "Review of Supreme Court Term 2015-16," Houston County Bar Association, Dothan, Alabama. Notes supplied as notes from October 11, 2016, event.

April 19, 2016: Panelist, "Future of the Voting Rights Act after *Shelby County v. Holder*," National Association of Attorneys General Southern Meeting, Emory Law School, Atlanta, Georgia. Notes supplied.

March 24, 2016: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Harvard Law School Student Chapter, Cambridge, Massachusetts. Notes supplied.

February 24, 2016: Panelist, "Antonin Scalia's Life & Death," Faulkner Law School, Montgomery, Alabama. I spoke about arguing before Justice Scalia. I have no notes, transcript, or recording. The address for Faulkner Law School is 5345 Atlanta Highway, Montgomery, Alabama 36109.

February 1, 2016: Speaker, "What I Learned From Losing *ADC v. Alabama*," Federalist Society for Law & Public Policy Studies, University of Chicago Law School Student Chapter, Chicago, Illinois. The presentation was substantively similar to my April 19, 2016 speech at the National Association of Attorneys General Southern Meeting, for which I have provided notes.

October 30, 2015: Speaker, "Supreme Court Round-Up," Southeastern Business Law Institute, Birmingham, Alabama. I discussed the previous Supreme Court term's business cases. I have no notes, transcript, or recording. The address of the Southeastern Business Law Institute is Cumberland School of Law, 305 Riley Road, Birmingham, Alabama 35229.

September 29, 2015: Panelist, "Supreme Court Round-Up," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. I discussed the previous Supreme Court term. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

July 29, 2015: Speaker, "Understanding the Supreme Court's Same-Sex Marriage Decision," Alabama Probate Judges Conference, Tuscaloosa, Alabama. PowerPoint supplied.

July 21, 2015: Moderator, "Fat Cats and Philanthropists: How the IRS Governs Your Charitable Giving," Alabama Policy Institute, Birmingham, Alabama. Recording supplied.

July 12, 2015: Panelist, "Update on United States Supreme Court Cases and Decisions," Alabama State Bar Association Annual Meeting, Point Clear, Alabama. I spoke about the Supreme Court term that had recently ended. I have no notes, transcript, or recording. The address of the Alabama State Bar Association is 415 Dexter Avenue, Montgomery, Alabama 36104.

June 22, 2015: Panelist, "Supreme Court Tax Cases," State and Local Legal Center, Washington, District of Columbia. PowerPoint supplied.

May 21, 2015: Panelist, "Solicitors General Review the Supreme Court," Rule of Law Defense Fund, Atlanta, Georgia. The panelists discussed pending and recently-decided Supreme Court cases. I have no notes, transcript, or recording. The address of the Rule of Law Defense Fund is 1747 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.

April 22, 2015: Speaker, "Weighing the Legal Arguments for Same-Sex Marriage from a Federalism Perspective," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. The substance of my presentation was similar to the talk given on July 29, 2015, for which I have provided a PowerPoint.

February 12, 2015: Panelist, "Controversial Cases in the U.S. Supreme Court and 11th Circuit," Hugh Maddox Inn of Court, Montgomery, Alabama. I recounted the facts and holdings of cases that had been decided by the Supreme Court and Eleventh Circuit. I have no notes, transcript, or recording. The address for the Hugh Maddox Inn of Court is

150 South Perry Street, Montgomery, Alabama 36104.

August 22, 2014: Speaker, "Supreme Court Roundup: Review of 2013-2014 Term," Eleventh Circuit Practice Institute, Montgomery, Alabama. Notes supplied.

July 8, 2014: Speaker, "Supreme Court Roundup: Review of 2013-2014 Term," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. Notes supplied as notes from August 22, 2014, event.

June 27, 2014: Speaker, "Supreme Court Roundup: Review of 2013-2014 Term," Federalist Society for Law & Public Policy Studies, Montgomery Lawyers Chapter, Montgomery, Alabama. Notes supplied as notes from August 22, 2014, event.

February 26, 2014: Speaker, "Remarks from Attorney General Luther Strange," Alabama Citizens for Life, Montgomery, Alabama. I read brief remarks on behalf of Attorney General Luther Strange who had been an invited speaker but could not attend at the last minute. I have no notes, transcript, or recording. The address of Alabama Citizens for Life is Post Office Box 184, Montgomery, Alabama 36101. Press coverage supplied.

December 4, 2013: Speaker, "Understanding Alabama's Immigration Law and the Litigation About It," Administrative Law Section of the Alabama State Bar, Montgomery, Alabama. PowerPoint supplied.

November 20, 2013: Speaker, "Pre-Trial and Motions Practice in the Federal Courts," Faulkner Law School, Montgomery, Alabama. Notes supplied.

August 21, 2013: Speaker, "Understanding Alabama's Immigration Law and the Litigation About It," Alabama Association of County Commissioners Annual Convention, Orange Beach, Alabama. PowerPoint supplied.

Oct. 18, 2012: Speaker, Review of Supreme Court Term 2011-12, Alabama Government Lawyer's CLE, Montgomery, Alabama. PowerPoint supplied.

Sept. 5, 2012: Panelist, "Back to School Supreme Court Review: What You Need to Know About This Term and Last," Bradley Arant Boult Cummings LLP, Birmingham, Alabama. I spoke about cases that had been decided in the most recent Supreme Court term and cases in the upcoming term. I have no notes, transcript, or recording. The address for Bradley Arant Boult Cummings LLP is One Federal Place 1819 Fifth Avenue North, Birmingham, Alabama 35203.

Sept. 3, 2012: Judge/Panelist, Gordon T. Saad Appellate Advocacy Competition, Cumberland School of Law. I was a judge for the final round of this moot court competition. I have no notes, transcript, or recording. The address for Cumberland School of Law is 305 Riley Road, Birmingham, Alabama 35229.

In private practice, I presented at two teleconference CLEs about mortgage servicer litigation. I do not recall the precise date of those CLEs, nor can I find any records, notes, etc.

In college, I gave presentations at political science research conferences on my unpublished senior thesis, which concerned regional political parties in Spain. I cannot recall with any confidence the dates or locations of those conferences.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Fraimon Roberts III, *Frog Habitat Case Pending at U.S. Supreme Court Draws Interest from St. Tammany to Utah*, New Orleans Advocate, Sept. 10, 2017. Copy supplied.

Pat Duggins, *Justice Reform: When the Jury Says "Life in Prison," and the Judge Says "Death...,"* Ala. Public Radio, May 2, 2017. Transcript supplied.

Josh Moon, *Analysis: The Truth About Alabama's Proposed Gambling Bills*, Montgomery Advertiser, Aug. 17, 2016. Copy supplied.

Marcia Coyle, *Water Wars Likely To Spill into Supreme Court; Foes of EPA Rules Filed Challenges in 21 Courts*, Nat'l L.J., July 11, 2016. Copy supplied.

Kathy Hagood, *Writing for the Judge*, Bus. Ala., Apr. 2016. Copy supplied.

Capitol Journal, Alabama Public Television, August 28, 2015. Recording supplied.

Dori Bernstein, Irv Gornstein, & Steven Goldblatt, *Supreme Court Institute Annual Report*, May 14. 2015. Copy supplied.

Nina Totenberg, *After Botched Executions, Supreme Court Weighs Lethal Drug Cocktail*, NPR Morning Edition, Apr. 29, 2015. Transcript supplied.

Kim Chandler, *Fight Over Legislative Districts Returns to District Court*, Associated Press, Apr. 18, 2015. Copy supplied. Reprinted in multiple outlets.

Patrick L. Gregory, *Alabama Gets Another Chance To Defend Diesel Tax on Rail Carriers*, Bloomberg BNA, Mar. 10, 2015. Copy supplied.

Mary Troyan, *State Revenue Could Take a Hit*, Montgomery Advertiser, Dec. 12, 2014. Copy supplied. Reprinted in multiple outlets.

Mark Sherman & Kim Chandler, *Justices To Consider Alabama Voting Case*, Associated Press, Nov. 12, 2014. Copy supplied.

Nina Totenberg, *Supreme Court Case Seeks Source of Alabama Gerrymandering*, NPR Morning Edition, Nov. 12, 2014. Transcript supplied.

Nina Totenberg, *Should Short Beards Be Allowed Behind Bars?*, NPR All Things Considered, Oct. 6, 2014. Transcript supplied.

Shave and a Haircut, ScotusBlog, Oct. 5, 2014. Recording supplied.

Richard Wolf, *Justices To Rule if Race-Based Districts Legal; Case Seeks To Dilute Black Voting Strength in Some Areas*, USA Today, Sept. 2, 2014. Copy supplied.

Capitol Journal, Alabama Public Television, August 8, 2014. Recording supplied.

Alexander Ripps, *Sales and Use Taxes: Supreme Court Agrees To Hear Alabama Diesel Tax Case*, Bloomberg BNA, July 2, 2014. Copy supplied.

Kevin P. McGowan, *Public Employee's Testimony in Criminal Trial Is Protected Speech, Supreme Court Decides*, Bloomberg BNA, June 25, 2014. Copy supplied.

Sam Hananel, *U.S. Supreme Court Rules for Whistleblower in Alabama Case*, Associated Press, June 20, 2014. Copy supplied. Reprinted in multiple outlets.

Brian Lyman, *AG Wants Decision Ending Gay Sex Ban Reconsidered*, Montgomery Advertiser, June 19, 2014. Copy supplied.

Brian Lyman, *State AG Backs Tea Party in IRS Case*, Montgomery Advertiser, May 8, 2014. Copy supplied. Reprinted in multiple outlets.

Richard Wolf, *Supreme Court Won't Hear Case on Gay Wedding Snub*, USA Today, Apr. 7, 2014. Copy supplied.

Brian Lyman, *Judge Orders Trial in Alabama Abortion Lawsuit*, Montgomery Advertiser, Apr. 1, 2014. Copy supplied. Reprinted in multiple outlets.

Brian Lyman, *Judge Extends Temporary Restraining Order on Alabama Abortion Law*, Montgomery Advertiser, Mar. 25, 2014. Copy supplied.

Richard Wolf, *Justices May Hear Gay Wedding Case: New Mexico Studio's Refusal To Take Photos Creates Legal Tussle*, USA Today, Mar. 21, 2014. Copy supplied.

Brian Lyman, *Impact of Tex. Abortion Ruling on Ala. Law Not Clear*, Montgomery Advertiser, Nov. 27, 2013. Copy supplied.

Brian Lyman, *Experts in Abortion Clinic Case Come at a Price*, Montgomery Advertiser, Aug. 1, 2013. Copy supplied.

Mike Cason, *New Rule for Doctors Delayed Again*, Birmingham News, July 21, 2013. Copy supplied.

Brian Lyman, *Judgment in Abortion Clinic Suit Likely To Come Next Year*, Montgomery Advertiser, July 20, 2013. Copy supplied.

Sebastian Kitchen, *Ala. Attorney General Asks Federal Judge To Close Creek Casinos*, Montgomery Advertiser, Apr. 13, 2013. Copy supplied.

Robert McClendon, *Bingo Battle Heating up: Attorney General Expands Complaint Against Poarch Creek Tribe*, Huntsville Times, Apr. 12, 2013. Copy supplied.

Robert McClendon, *Expert: Indian Bingo Suit 'Novel' But Won't Succeed*, Mobile Register, Feb. 22, 2013. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 2017, I was appointed by the Alabama Board of Pardons and Paroles to be a hearing officer (akin to an administrative law judge) to resolve a personnel matter involving allegations against the Board's former executive director.

Since May 2019, I have been a United States District Judge in the Middle District of Alabama. I was appointed by the President and confirmed by the Senate.

The United States District Court for the Middle District of Alabama has jurisdiction as set forth principally at Chapter 85 of Title 28 of the United States Code.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

Three.

i. Of these, approximately what percent were:

jury trials:	50%
bench trials:	50%
civil proceedings:	100%
criminal proceedings:	0%

b. Provide citations for all opinions you have written, including concurrences and dissents.

Turnham v. United States, 383 F.Supp.3d 1288 (M.D. Ala. May 29, 2019)

CFTC v. Dinar Corp, Inc., 2019 WL 3842069 (M.D. Ala. May 30, 2019)

Piard v. VRP Transps., Inc., Doc. 46, 3:18-cv-847 (M.D. Ala. May 31, 2019)

Ansley v. Spicer, Doc. 27, 2:18-cv-1010 (M.D. Ala. June 11, 2019).

Quinn v. City of Tuskegee, Doc. 73, 3:14-cv-1033 (M.D. Ala. June 19, 2019)

Quattlebaum v. Fed. Express Corp., 2019 WL 2518337 (M.D. Ala. June 18, 2019)

Stallworth v. Hurst, 2019 WL 2606935 (M.D. Ala. June 25, 2019)

Walker v. Trans Union, LLC, 2019 WL 2884339 (M.D. Ala. July 3, 2019)

Carn as Trustee of SpecAlloy Corp. v. Peluso, 2019 WL 4553105 (M.D. Ala. July 9, 2019)

Harper v. Houston Cty. Bd. of Educ., 2019 WL 3072631 (M.D. Ala. July 12, 2019)

Fuller v. Koch Foods, Inc., 2019 WL 3072633 (M.D. Ala. July 12, 2019)

Bowman v. Reliance Standard Life Ins. Co., 2019 WL 3072589 (M.D. Ala. July 12, 2019)

Emanuel v. Ala. State Univ., 2019 WL 3246398 (M.D. Ala. July 18, 2019)

Haas v. Fancher, 2019 WL 3323330 (M.D. Ala. July 24, 2019)

Moore v. Auto. Fin. Corp., 2019 WL 3323328 (M.D. Ala. July 24, 2019)

James v. City of Montgomery, 2019 WL 3346530 (M.D. Ala. July 25, 2019)

Emanuel v. Ala. State Univ., Doc. 50, 2:17-cv-00658 (M.D. Ala. Aug. 1, 2019)

Moulton v. W.W.I., Inc., 2019 WL 3558032 (M.D. Ala. Aug. 21, 2019)

Alegion, Inc. v. Central States, Se. & Sw. Areas Pension Fund, 2019 WL 4145525 (M.D. Ala. August 30, 2019)

Thomas v. STERIS Corp., 2019 WL 4253847 (M.D. Ala. Sept. 6, 2019)

Fuller v. Koch Foods, Inc., 2019 WL 4281912 (M.D. Ala. Sept. 10, 2019)

Knowles v. Inzi Controls Ala., Inc., 2019 WL 4551609 (M.D. Ala. Sept. 19, 2019)

Brown v. United States, 2019 WL 4724797 (M.D. Ala. Sept. 26, 2019)

Forte v. City of Montgomery, 2019 WL 4741672 (M.D. Ala. Sept. 27, 2019)

Prichard v. Hyundai Motor Mfg. of Alabama LLC, 2019 WL 4935704 (M.D. Ala. Oct. 7, 2019)

K.J.C. v. City of Montgomery, 2019 WL 4941105 (M.D. Ala. Oct. 7, 2019)

Claussen v. PowerSecure, Inc., 2019 WL 4941109 (M.D. Ala. Oct. 7, 2019)

In re McIntyre Bldg. Co. Inc., 2019 WL 4984822 (M.D. Ala. Oct. 8, 2019)

Stallworth v. Hurst, 2019 WL 5070196 (M.D. Ala. Oct. 8, 2019)

Hughley v. USAA Gen. Indem. Co., Doc. 10, 3:19-cv-681 (M.D. Ala. Oct. 23, 2019)

Russaw v. Scott & Assocs., 2019 WL 5467903 (M.D. Ala. Oct. 24, 2019)

United States v. Lopez-Morales, Doc. 41, 3:19-cr-00303 (M.D. Ala. Oct. 24, 2019)

Woodruff v. Jackson Hosp. & Clinic, Inc., 2019 WL 5616906 (M.D. Ala. Oct. 30, 2019)

Capps v. Winn-Dixie Stores, Inc., Doc. 19, 3:19-cv-571 (M.D. Ala. Nov. 1, 2019)

b. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *CFTC v. Dinar Corp., Inc.*, 1:15-cv-00538 (M.D. Ala)

The CFTC brought an enforcement action against an individual Husam Tayeh and related companies in which the CFTC alleged that Tayeh illegally sold installment contracts for Iraqi Dinar and Vietnamese Dong. After Tayeh conceded liability, the CFTC requested an approximately $100 million judgment in disgorgement and civil penalties. The Court denied the CFTC's motion for a summary judgment and set the issue for a bench trial. The case was tried to the bench. As of this writing, the Court has not yet ruled but a decision is forthcoming.

Counsel for CFTC

Timothy J. Mulreany
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U S Commodity Futures Trading Commission
1155 21st Street, N.W.

Washington, DC 20581
(202) 418-5306

Counsel for Defendant

Alain Jeff Ifrah
Rachel Hirsch
Jessica A. Feil
Ifrah Law PLLC
1717 Pennslyvania Avenue, N.W., Suite 650
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2. *Holton v. Bama Lanes of Prattville*, LLC, 2:17-cv-00453 (M.D. Ala)

Plaintiff Holton filed suit against her former employer under federal anti-discrimination laws for allowing a co-worker to sexually harass her and for terminating her employment. She also sued her former co-worker and alleged harasser for state law torts. The case was tried over three days. The jury returned a verdict for the employer on the federal anti-discrimination claims but found for the plaintiff on state law tort claims against the employer and the co-worker.

Counsel for Plaintiff

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Counsel for Defendants Bama Lanes and Wainwright

Thomas Kent Garrett
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(334) 318-4213

Counsel for Defendant Williams

Tamika Renee Miller
445 Dexter Avenue Suite 4050
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(334) 625-6959

3. *In re Phil Bryant* (Ala. Bd. of Paroles & Pardons 2017)

I was appointed by the Alabama Board of Pardons and Paroles to be a hearing officer, which is similar to an administrative law judge, to resolve a personnel matter involving allegations that the Board's former executive director had engaged in race- and sex-based discrimination. After an evidentiary hearing, I determined that the executive director had violated federal law and state rules by assigning state vehicles to employees based on their race and sex. Based on my finding, the employee was removed for his position. My decision was affirmed by the Board of State Personnel.

Counsel for Prosecution

Meredith Barnes
Kevin Blackburn
Laura Best
Board of Pardons & Paroles
301 Ripley Street
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(334) 514-5090

Counsel for Defendant

John D. Saxon
2119 Third Avenue North
Birmingham, Alabama 35204
(205) 324-0223

c. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *Turnham v. United States*, 383 F. Supp. 3d 1288 (M.D. Ala. May 29, 2019)

Counsel for Plaintiff

Samuel Robert McCord , Sr.
Samuel Robert McCord , Jr.
2151 Highland Avenue South
Birmingham, Alabama 35205
(205) 252-2100

Counsel for the United States

Allison Cecile Carroll
U.S. Department of Justice
Tax Division
Post Office Box 14198

Ben Franklin Station
Washington, D.C. 20044
(202) 514-2000

2. *CFTC v. Dinar Corp, Inc.*, 2019 WL 3842069 (M.D. Ala. May 30, 2019)

Counsel for CFTC

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U S Commodity Futures Trading Commission
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Counsel for Defendant

Alain Jeff Ifrah
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3. *In re McIntyre Bldg. Co. Inc.*, 2019 WL 4984822 (M.D. Ala. Oct. 8, 2019)

Counsel for Plaintiff

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Counsel for Defendant

Joe Alan Joseph

James P Roberts
Burr & Forman LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Trustee

Leonard Norman Math
Chambless, Math & Carr, PC
Post Office Box 230759
Montgomery, Alabama 36123
(334) 272-2230

4. *Claussen v. PowerSecure, Inc.*, 2019 WL 4941109 (M.D. Ala. Oct. 7, 2019)

Counsel for Plaintiff

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John W. Naramore
John Garland Smith
Balch & Bingham LLP
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5. *Stallworth v. Hurst*, 2019 WL 5070196 (M.D. Ala. Oct. 8, 2019)

Counsel for Plaintiff

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Jeffrey Williams Speegle
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6. *James v. City of Montgomery*, 2019 WL 3346530 (M.D. Ala. July 25, 2019)

Counsel for Plaintiff

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(205) 521-9929

Counsel for Defendant

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City Attorney's Office
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Montgomery, Alabama 36101
(334) 625-2050

7. *Walker v. Trans Union, LLC*, 2019 WL 2884339 (M.D. Ala. July 3, 2019)

Counsel for Plaintiff

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Counsel for Defendant

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McDowell, Knight, Roedder & Sledge, L.L.C.
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8. *Moore v. Auto. Fin. Corp.*, 2019 WL 3323328 (M.D. Ala. July 24, 2019)

Counsel for Appellant

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Counsel for Appellee

Frederick Darrell Clarke , III
Richard Scott Williams
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9. *Alegion, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 2019 WL 4145525 (M.D. Ala. August 30, 2019)

Counsel for Appellant

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(334)546-2009

Counsel for Appellee

Charles H. Lee
Lois J. Yu
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Chicago, Illinois 60631
(847) 939-2481

10. *Brown v. United States*, 2019 WL 4724797 (M.D. Ala. Sept. 26, 2019)

Counsel for Petitioner

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Federal Defenders for the Middle District of Alabama
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099

Counsel for the United States

Sandra Jean Stewart
United States Attorney Office for the Middle District of Alabama
131 Clayton Street
Montgomery, Alabama 36104
(334) 551-1705

d. Provide a list of all cases in which certiorari was requested or granted.

None.

e. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

None.

f. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

At this point, I have not chosen to publish any opinions. However, at least one has been published based on the publisher's criteria for publication. My opinions are available through CM/ECF, on the Middle District of Alabama's website, and Westlaw and LexisNexis.

g. Provide citations for significant opinions on federal or state constitutional issues,

together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

None. Although some of the opinions listed above touch on constitutional issues and although all opinions are significant to the parties involved, I do not believe I have issued an opinion that meets the standard of this question.

h. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

No party has ever requested that I recuse.

As a United States District Judge, assignments and reassignments are automatically generated by the clerk's office based on my recusal list, which includes things like my former employer, stock ownership, and my wife's employer. In *Jones v. Knight*, 2:16-cv-784, an attorney with my former employer, the Alabama Attorney General's Office, appeared as counsel in a case I had been assigned. After ensuring that I had no prior knowledge or involvement in the case, *see* 28 U.S.C. § 455(b)(3), I entered an order disclosing my former employment and directing that, in an abundance of caution, the case would be reassigned upon the request of any party. No party requested reassignment.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If

appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have never been a candidate for or held an elected public office. Since law school, I have held the following appointed positions:

Solicitor General, State of Alabama, 2014 – 2019. Appointed in January 2014 by then-Alabama Attorney General Luther Strange.

Deputy Solicitor General, State of Alabama, 2011 – 2014. Appointed in November 2011 by then-Alabama Attorney General Luther Strange.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Volunteer, Trump Transition Team (Dec. 2016 – Jan. 2017). I consulted on occasion with members of the Department of Justice "beachhead" team about criminal law issues with which they should familiarize themselves before the transition.

Volunteer, Bradley Byrne for Governor (2010). I made phone calls to tell supporters about scheduled events and to remind supporters to vote.

Volunteer, Luther Strange for Attorney General (2010). I made phone calls to remind supporters to vote. I also gave the campaign and transition team occasional advice about legal issues affecting the State.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 2006 to 2007, I served as a law clerk to the Honorable William H. Pryor Jr., Circuit Judge of the United States Court of Appeals for the Eleventh Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of

your affiliation with each.

Summer 2006
Gibson Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Summer Associate

2007 – 2011
Bradley Arant Boult Cummings LLP
819 Fifth Avenue North
Birmingham, Alabama 35203
Associate

2011 – 2019
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Deputy Solicitor General (2011 – 2014)
Solicitor General (2014 – 2019)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My practice has always focused on complex trial and appellate litigation, but I have never specialized in any particular substantive area of the law. When I first graduated from law school, I was a pre-clerkship summer associate at a large law firm where I worked primarily on securities cases. When I returned to private practice after my clerkship, I worked on all aspects of complex commercial and product liability litigation, including pre-trial discovery, class certification, summary judgment, motions in limine, jury instructions, and appeals. As the Deputy Solicitor General from 2011 to 2014, I worked on constitutional cases in federal court—conducting discovery, pre-trial motions practice, filing briefs, and arguing appeals. I also worked on criminal appeals in the state court system and federal habeas matters in federal court. When I was promoted to Solicitor General in 2014, I became a supervisor as well as a litigator. As Solicitor General, I supervised other attorneys in three areas: (1) particularly important or complicated civil litigation in federal district court or state trial court, (2) civil and criminal

appeals in the United States Supreme Court, Eleventh Circuit Court of Appeals, and Alabama Supreme Court, and (3) legal opinions issued by the Attorney General to state and local officers. I also appeared in court and personally handle trial-level cases or appeals at the direction of the Attorney General.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

In private practice, I worked primarily for manufacturers, construction companies, financial services companies, and pharmaceutical companies. I also represented Alabama's then-governor in litigation and in an advisory capacity. During this period of my career, I also had a heavy pro bono practice and was frequently appointed by the federal courts to represent criminal defendants.

In November of 2011, I left private practice to work at the Alabama Attorney General's Office, first as Deputy Solicitor General and then as Solicitor General. My clients at the Attorney General's Office were the State, its agencies, and its officers.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice was always exclusively litigation and litigation-related advice. When I was in private practice, I appeared in court occasionally. At the Attorney General's Office, I appeared in court frequently. I have presented oral argument three times in the United States Supreme Court, four times in the Alabama Supreme Court, approximately seventeen times in the Eleventh Circuit, and approximately five times in other state and federal appellate courts. I have argued dispositive motions and other pre- and post-trial matters in the Middle District of Alabama, Northern District of Alabama, and state trial courts.

i. Indicate the percentage of your practice in:

1.	federal courts:	70%
2.	state courts of record:	30%
3.	other courts:	0%
4.	administrative agencies:	0%

ii. Indicate the percentage of your practice in:

1.	civil proceedings:	70%
2.	criminal proceedings:	30%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than

settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

When I was in private practice, I was associate counsel in two jury trials. I represented the defendant in a federal criminal trial, and the defendant in a complex state court civil trial. At the Attorney General's Office, I have been counsel for three bench trials over constitutional issues: I defended the constitutionality of state laws in two federal bench trials. I also defended the prosecution team and other state employees against constitutional claims during a multi-day evidentiary hearing in a state-court public corruption prosecution. After the court entered judgment on those claims, the case proceeded to a jury trial on the criminal charges in which I did not actively participate.

i. What percentage of these trials were:

1. jury: 30%
2. non-jury: 70%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have practiced extensively before the Supreme Court of the United States both in private practice and at the Alabama Attorney General's Office. I have filed nine merits briefs as counsel of record or co-counsel, and I have argued three cases. I have also filed other kinds of briefs, such as amicus briefs and briefs in opposition to certiorari.

I have argued the following merits cases in the Supreme Court:

McWilliams v. Dunn, 137 S. Ct. 1790 (2017)
Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015)
Ala. Dep't of Revenue v. CSX Transp., Inc., 135 S. Ct. 1136 (2015)

I have filed briefs as counsel of record for either a party or *amicus curiae* in the following additional merits cases:

Weyerhauser Co. v. U.S. Fish & Wildlife Serv., No. 17-71 (Aug 14, 2017) (consolidated with *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, No. 17-74)
Dunn v. Madison, 138 S. Ct. 9 (2017)
Johnson v. Alabama, 137 S. Ct. 2292 (2017)
Russell v. Alabama, 137 S. Ct. 158 (2016)
Barnes v. Alabama, 136 S. Ct. 2447 (2016)
Barnes v. Alabama, 136 S. Ct. 2446 (2016)
Flowers v. Alabama, 136 S. Ct. 2445 (2016)
Slaton v. Alabama, 136 S. Ct. 2445 (2016)
Bonds v. Alabama, 136 S. Ct. 2444 (2016)
Knotts v. Alabama, 136 S. Ct. 2443 (2016)
Wimbley v. Alabama, 136 S. Ct. 2387 (2016)

Johnson v. Lee, 136 S. Ct. 1802 (2016)
Adams v. Alabama, 136 S. Ct. 1796 (2016)
Wittman v. Personhuballah, 136 S. Ct. 1732 (2016)
Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)
Presley v. Alabama, 136 S. Ct. 1399 (2016)
Duke v. Alabama, 136 S. Ct. 1378 (2016)
Baker v. Alabama, 136 S. Ct. 1378 (2016)
McWilliams v. Alabama, 136 S. Ct. 1373 (2016)
Storey v. Alabama, 136 S. Ct. 1373 (2016)
Forman v. Alabama, 136 S. Ct. 1372 (2016)
Ingram v. Alabama, 136 S. Ct. 1372 (2016)
Flynn v. Alabama, 136 S. Ct. 1371 (2016)
Foster v. Alabama, 136 S. Ct. 1371 (2016)
Hogan v. Alabama, 136 S. Ct. 1370 (2016)
Iiams v. Alabama, 136 S. Ct. 1370 (2016)
Gardner v. Alabama, 136 S. Ct. 1369 (2016)
Reeves v. Alabama, 136 S. Ct. 1369 (2016)
Pratt v. Alabama, 136 S. Ct. 1368 (2016)
Stubbs v. Alabama, 136 S. Ct. 1368 (2016)
Black v. Alabama, 136 S. Ct. 1367 (2016)
Dunlap v. Alabama, 136 S. Ct. 1367 (2016)
Matthews v. Alabama, 136 S. Ct. 1366 (2016)
Wilson v. Alabama, 136 S. Ct. 1366 (2016)
Williams v. Alabama, 136 S. Ct. 1365 (2016)
Click v. Alabama, 136 S. Ct. 1363 (2016)
Hurst v. Florida, 136 S. Ct. 616 (2016)
Glossip v. Gross, 135 S. Ct. 2726 (2015)
Obergefell v. Hodges, 135 S. Ct. 2584 (2015)
Knight v. Thompson, 135 S. Ct. 1173 (2015)
Holt v. Hobbs, 135 S. Ct. 853 (2015)
Lane v. Franks, 573 U.S. 228 (2014)
Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014)
Walden v. Fiore, 571 U.S. 277 (2014)
Hinton v. Alabama, 571 U.S. 263 (2014)
Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1 (2013)
McQuiggin v. Perkins, 569 U.S. 383 (2013)
Standard Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013)
Perry v. Perez, 565 U.S. 1090 (2011)

I have also filed briefs as counsel of record for either a party or *amicus curiae* in the following nonmerits matters:

Lee v. Alabama, No. 17-775 (April 2, 2018)
Kirksey v. Alabama, No. 17-6113 (Nov. 6, 2017)
Wimbley v. Alabama, No. 17-5663 (Oct. 30, 2017)
Peruta v. California, No. 16-894 (June 26, 2017)

Culbreth v. Alabama, No. 16-8186 (June 19, 2017)
Alaska v. Zinke, No. 16-596 (May 1, 2017)
Woolf v. Alabama, No. 16-8152 (Apr. 24, 2017)
Ala. Democratic Conference v. Marshall, No. 16-832 (Apr. 24, 2017)
Byrd v. Alabama, No. 16-479 (Mar. 20, 2017)
Bohannon v. Alabama, No. 16-6746 (Jan. 23, 2017)
Shaw v. Alabama, No. 16-5726 (Jan. 23, 2017)
Brohl v. Direct Mktg. Ass'n, No. 16-458 (Dec. 12, 2016)
Bldg. Indus. Ass'n of the Bay Area v. Dept. of Commerce, No. 15-1350 (Oct. 11, 2016)
Knight v. Thompson, No. 15-999 (May 2, 2016)
Samra v. Price, No. 15-8089 (Apr. 18, 2016)
Brooker v. Alabama, No. 15-892 (Apr. 18, 2016)
Luong v. Alabama, No. 15-922 (Mar. 28, 2016)
Shanklin v. Alabama, No. 15-953 (Mar. 21, 2016)
McWane Inc. v. FTC, No. 15-706 (Mar. 21, 2016)
White v. Alabama, No. 15-5730 (Oct. 19, 2015)
Dunn v. DeBruce, No. 14-807 (June 15, 2015)
Lockhart v. Alabama, No. 14-8194 (Apr. 20, 2015)
Scott v. Alabama, No. 14-8189 (Apr. 20, 2015)
Strange v. Searcy, No. 14A840 (Feb. 9, 2015)
Arthur v. Thomas, No. 13-1451 (Oct. 6, 2014)
Lynch v. Alabama, No. 13-1232 (Oct. 6, 2014)
Elane Photography, LLC. v. Willock, No. 13-585 (Apr. 7, 2014)
Patterson v. Adkins, No. 13-85 (Oct. 7, 2013)
Reynolds v. Alabama, No. 12-10278 (Oct. 7, 2013)
Daniel v. Alabama, No. 11-10329 (Oct. 1, 2012)

I have been listed on briefs as supporting counsel for either a party or *amicus curiae* in the following merits cases:

McCoy v. Louisiana, 138 S. Ct. 1500 (2018)
Lee v. United States, 137 S. Ct. 1958 (2017)
NLRB v. SW General, Inc., 137 S. Ct. 929 (2017)
NLRB v. Noel Canning, 134 S. Ct. 2550 (2014)
Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013)
Miller v. Alabama, 567 U.S. 460 (2012)
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)
Riley v. Kennedy, 553 U.S. 406 (2008)

I have been listed on briefs as supporting counsel for either a party or *amicus curiae* in the following nonmerits matters:

Ala. Dep't of Revenue v. CSX Transp., Inc., No. 18-447
CSX Transp., Inc. v. Ala. Dep't of Revenue, No. 18-618
Indiana v. Massachusetts, No. 22O149 (Dec. 11, 2017)
Missouri v. California, No. 22O148 (Dec. 4, 2017)

Arthur v. Dunn, No. 16-1407 (May 25, 2017)
Arthur v. Dunn, No. 16-602, 16A-451 (Feb. 21, 2017)
Arthur v. Alabama, No. 16-595 (Jan. 23, 2017)
Keunzel v. Alabama, No. 16-213 (Oct. 31, 2016)
Lee v. Thomas, No. 13-775 (Mar. 24, 2014)
Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 13-137 (Feb. 24, 2014)
Stroud v. Alabama Bd. of Pardons & Paroles, No. 13-635 (Jan. 13, 2014)
Clemons v. Alabama, No. 12-1478 (Oct. 7, 2013)
Alabama v. United States, No. 12-884 (Apr. 29, 2013)
Thaler v. McGowen, No. 12-82 (Nov. 26, 2012)
Thomas v. Madison, No. 12-308 (Nov. 13, 2012)
Lord Abbett Mun. Income Fund, Inc. v. Strange, No. 11-1332 (Oct. 1, 2012)
Alabama v. Lane, No. 11-627 (Jan. 23, 2012)
Beason v. Bentley, No. 11-157 (Jan. 9, 2012)

Although not listed in the briefs or docket, I also assisted in the preparation of the reply brief in the following case:

Allen v. Siebert, 128 S. Ct. 2 (2007)

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Ala. Legislative Black Caucus v. Alabama*,135 S.Ct. 1257 (2015); *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017).

I defended the constitutionality of Alabama's house and senate legislative districts before a three-judge district court in the Middle District of Alabama and the Supreme Court of the United States. From 2012 to 2014, my principal role was to advise the Attorney General about various legal issues presented by the case. After the State prevailed in the district court, I briefed and argued the appeal in the Supreme Court in 2014. In a 5-4 decision authored by Justice Breyer and joined by Justices Kennedy, Ginsburg, Kagan, and Sotomayor, the Court reversed and remanded for further proceedings.

On remand, I participated in supplemental discovery, briefing, and argument before the three-judge district court. In an opinion authored by Judge William H. Pryor Jr. of the U.S. Court of Appeals for the Eleventh Circuit and joined by Chief Judge Keith Watkins of the Middle District of Alabama, the district court held 12 of Alabama's districts unconstitutional and rejected claims against all other districts. Judge Myron Thompson of the Middle District of Alabama concurred in part and dissented in part.

During the remedial phase of the litigation, I advised the Legislature on how to redraw the challenged house and senate districts. The Legislature redrew all the challenged districts, and the plaintiffs agreed that the new plans solved the legal infirmities in the old plans. The litigation ended in the fall of 2017.

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2. *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

I represented the Commissioner of the Alabama Department of Corrections in this capital case presenting questions about the meaning of "clearly established" law under the Anti-Terrorism and Effective Death Penalty Act. The inmate argued that *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that a State must provide an indigent defendant whose mental health will be a significant factor at trial the assistance of a mental health expert who is a member of the defense team rather than neutral. In an opinion written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, the Supreme Court declined to resolve that question, concluding instead that it was clearly established that in this particular case the neutral expert did not meet the State's obligations under *Ake*. Justice Alito wrote a dissenting opinion, joined by the Chief Justice and Justices Thomas and Gorsuch.

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3. *State v. Hubbard*, 43-CC-2014-000565.00 (Lee Cnty. Cir. Ct.). Decisions supplied, with the exception of court orders that remain under seal.

During the State's public corruption prosecution of former Alabama Speaker of the House Mike Hubbard, I defended the Attorney General's Office, state employees, and the prosecution team in year-long proceedings against various state and federal constitutional claims. In particular, I acted as lead counsel in a multi-day evidentiary hearing with related depositions and discovery matters. Judge Jacob Walker of the Lee County Circuit Court granted judgment in favor of the State on all constitutional challenges. After a jury trial in which I did not actively participate, Speaker Hubbard was found guilty of 12 felony violations of state ethics laws. That conviction is presently on appeal.

Other attorneys for the State

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[deceased]

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4. *Ala. Democratic Conference v. Attorney Gen.*, 838 F.3d 1057 (11th Cir. 2016); *Ala. Democratic Conference v. Broussard*, 541 Fed. Appx. 931 (11th Cir. 2013); *Ala. Democratic Conference v. Strange*, Case No. 5:11-cv-02449-JEO (N.D. Ala.).

From 2012 to 2017, I defended a state campaign contribution restriction – the "PAC-to-PAC transfer ban" – from a constitutional challenge based on *Citizens United*. The Alabama Legislature had unanimously enacted the law to ban certain transfers between political action committees after such transfers had been implicated in a federal bribery prosecution. After Magistrate Judge John Ott of the Northern District of Alabama held the law unconstitutional, I appealed the decision to the Eleventh Circuit, drafting all relevant briefs and delivering oral argument. A panel of the Eleventh Circuit—Judge Rosemary Barkett, Judge Adalberto Jordan, and Visiting Judge Harvey Schlesinger—reversed and remanded for additional proceedings. Following those proceedings, Judge Ott upheld the law, and I successfully defended that ruling in a second appeal. A new panel of the Eleventh Circuit –Judge Charles Wilson, Judge Beverly Martin, and Visiting Judge Patrick Higginbotham – agreed that the law is constitutional.

Co-Counsel

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5. *Ala. Dept. of Revenue v. CSX Transp., Inc*, 135 S. Ct. 1136 (2015).

I defended the legality of Alabama's sales and use tax on railroad diesel fuel against a challenge under the federal 4-R Act in this case before Supreme Court of the United States. The Supreme Court granted review to consider two questions: whether a State violates federal law when it taxes diesel fuel purchases made by a rail carrier while exempting similar purchases made by the rail carrier's competitors and, if so, whether that violation is eliminated when other tax provisions offset that treatment. The Supreme Court ruled unanimously for the Alabama Department of Revenue on the second question and 7-2 against the Department on question one. Justice Scalia wrote the Court's majority opinion, which was joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Kagan, and Sotomayor. Justice Thomas and Justice Ginsburg dissented.

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6. *Planned Parenthood Se. v. Strange*, 2:13cv405-MHT (M.D. Ala.).

From 2013 until 2016, I defended the constitutionality of a state law that imposed an "admitting privileges" requirement on abortion clinics. I took and defended depositions, handled written discovery, and briefed and argued temporary restraining order and summary judgment motions. During the multi-week bench trial that followed, I also handled various evidentiary issues, directed the trial team's strategy, and gave the closing argument. Judge Myron Thompson of the Middle District of Alabama ultimately held the law at issue to be unconstitutional: *Planned Parenthood v. Bentley*, 951 F.Supp.2d 1280 (M.D. Ala. 2013) (preliminary injunction); *Planned Parenthood v. Strange*, 9 F.Supp.3d 1272 (M.D. Ala. 2014) (summary judgment); *Planned Parenthood v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala. 2014) (post-trial judgment). After the Supreme Court held a similar Texas law unconstitutional in *Whole Woman's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292 (2016), I withdrew the State's appeal of Judge Thompson's permanent injunction, ending the litigation.

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7. *Lane v. Franks*, 134 S. Ct. 2369 (2014).

I represented the Acting President of Central Alabama Community College in this personnel dispute before the Supreme Court of the United States. The dispute arose after a former state employee alleged that he was fired because he testified against a state legislator during a federal public corruption trial. The Supreme Court granted certiorari to consider whether the First Amendment protects an employee in such circumstances. After I took over representation in this case, the State confessed error and argued that the First Amendment allows a state employee to sue if he or she is terminated because he or she testified about public corruption. The State also argued that the state supervisor who fired the employee could not be held personally liable for damages because of qualified immunity. The Supreme Court unanimously adopted our position.

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8. *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015); *Alabama v. PCI Gaming Auth.*, 15 F. Supp.3d 1161 (M.D. Ala. 2014).

I represented the State of Alabama in this public nuisance suit filed to challenge gambling that the Attorney General had concluded violated the Indian Gaming Regulatory Act. I drafted and filed the complaint and amended complaint, and I briefed various motions, including the

defendants' motion to dismiss. Chief Judge Keith Watkins of the Middle District of Alabama dismissed the amended complaint, and I then briefed and argued the State's appeal. The Eleventh Circuit – Judge Jill Pryor, Judge Stanley Marcus, and Visiting Judge David Ebel – affirmed.

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9. *Riley v. Joint Fiscal Comm. of Ala. Legislature*, 26 So. 3d 1150 (Ala. 2009); *Ex parte Riley*, 11 So. 3d 801 (Ala. 2008); *Joint Fiscal Comm. of Ala. Legislature v. Riley*, No. CV-08-900752 (Montgomery Cty. Cir. Ct.).

From 2008 through 2009, I represented the then-Governor of Alabama, Bob Riley, in litigation challenging the constitutionality of his item veto of a conditional appropriation in the general-fund appropriations bill for fiscal year 2009. I briefed motions to dismiss and summary judgment in state trial court (Hon. Truman Hobbs), which ruled against the Governor. We appealed twice to the Supreme Court of Alabama, and I drafted the briefs in that Court as well. In the first appeal, the Supreme Court of Alabama (Justices, Cobb, See, Lyons, Woodall, Smith,

Stuart, Bolin, Parker, and Murdock) held the dispute was justiciable. In the second appeal, the Supreme Court of Alabama (Justices Cobb, Lyons, Woodall, Smith, Stuart, Bolin, Parker, Murdock, and Shaw) held that the Governor's item veto message did not satisfy state constitutional requirements and that the vetoed section of the general-fund appropriations bill was not itself unconstitutional.

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10. *United States v. McCray*, No. 2:05-cr-00531-KOB-TMP (N.D. Ala.); 280 Fed. Appx. 945 (2008).

From 2007 until 2009, I represented the defendant Richard Orlando McCray in this federal criminal case. The Eleventh Circuit appointed my firm to represent the defendant on appeal from a guilty plea, and we successfully argued that he had pled guilty only because the district judge misled him about his likely sentence during the guilty plea colloquy. Judges Stanley Birch, Joel Dubina, and Stanley Marcus vacated the conviction and remanded for further proceedings. I continued to represent Mr. McCray pro bono during his subsequent trial in front of Judge Karon Bowdre. The jury found Mr. McCray guilty, but we secured the minimum possible sentence.

Co-Counsel for Mr. McCray

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18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As the Solicitor General of Alabama, I had a substantial role in supervising the drafting of Attorney General's Opinions, which resolve questions of state law for the benefit of local and state officials. These opinions can be found at https://www.ago.state.al.us/Opinions.

In private practice, I often represented clients in civil litigation resolved by a settlement before trial. One such case was a multi-million dollar contract and unjust enrichment action filed by a

former employee against my client, Amquip Crane Co. After discovery, summary judgment, and rulings on pre-trial motions, the case settled shortly before trial.

In private practice, I also represented a number of businesses in responding to investigations conducted by state regulators. One such business was required to respond to investigative demands from the Attorneys General of New York, Colorado, Florida, and Alabama.

I have never acted or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have never taught a course.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I may seek to teach a law school course once or twice a year. I have no commitments or agreements to do so, and no other plans for outside activities.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

When my nomination is transmitted to the Senate, I will submit a copy of my Financial Disclosure Report to the Committee.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I will recuse in any litigation where I have ever played a role. I intend to recuse from any current or future case that challenges a government law or policy that I have previously defended. I also intend to recuse from any current or future cases in which I was involved in a previous iteration of the case involving a criminal defendant. This means, for example, that I will recuse from a future federal habeas petition filed by a state or federal prisoner who was prosecuted in a state court case in which I was, or appeared to be, involved. For a reasonable period of time, I anticipate recusing in cases where the Office of the Alabama Attorney General represents a party. If I directly own stock in any business, I will recuse from any litigation involving that business. I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will carefully review and address any real or potential conflicts by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I had a substantial pro bono caseload when I was in private practice. I counseled and represented homeless men through a pro bono legal assistance program at a Birmingham homeless shelter. And I was often appointed to represent criminal defendants in federal court. I tried one appointed federal case to verdict: *United States v. McCray*, No. 2:05-cr-00531-KOB-TMP (N. D. Ala. 2008). I litigated four more on appeal: *United States v. Hamaker*, 303 Fed. Appx. 855 (11th Cir. Dec. 18, 2008); *United States v. Ghertler*, 605 F.3d 1256 (11th Cir. 2010); *Madaio v. Roden*, 375 Fed. Appx. 921 (11th Cir. April 20, 2010); *United States v. Whitworth*, 10-13473-A (May 17, 2011). (To the extent my firm received partial compensation under the Criminal Justice Act, it is my understanding that the firm used it to fund other pro bono activities.)

My position at the Attorney General's Office precluded pro bono work, Ala. Code § 36-15-9, but I volunteered in other ways. For example, I was a member of the state bar committee that determines whether applicants for the bar meet the requisite character and fitness requirements to

practice law.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In September of 2019, Senator Richard Shelby's office invited me to meet with the Senator and his staff about a potential vacancy on the Eleventh Circuit Court of Appeals. Senator Shelby also arranged for me to meet with members of the White House Counsel's Office. Those meetings took place in Washington D.C. on September 23, 2019. Approximately ten days later, Senator Shelby's Office and the White House Counsel's Office informed me that I might be nominated if a vacancy arose. Since that time, I have been in touch with attorneys from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice to complete background checks and similar paperwork. It is my understanding that a vacancy arose sometime during October. On November 6, 2019, the President announced his intent to submit my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

EXHIBIT F

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Andrew Lynn Brasher

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the Middle District of Alabama

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office of the Alabama Attorney General
   501 Washington Avenue
   Montgomery, Alabama 36130

4. **Birthplace**: State year and place of birth.

   1981; Milan, Tennessee

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   2003 – 2006, Harvard Law School; J.D. (*cum laude*), 2006

   2001, Université Stendhal (now Université Grenoble Alpes); no degree

   1999 – 2002, Samford University; B.A. (*summa cum laude* with honors), 2002

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

   2011 – present
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Montgomery, Alabama 36130
Solicitor General (2014 – present)
Deputy Solicitor General (2011 – 2014)

2007 – 2011
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2006 – 2007
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Summer 2005
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Summer Associate

Spring 2005
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Research Assistant

Fall 2004
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Summer 2004
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Other Affiliations (uncompensated):

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7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have never served in the military. I registered for selective service upon turning 18.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

National Association of Attorneys General, Best Brief Award (2011–2012, 2013–2014,

and 2014–2015 Terms)

Alabama Leadership Initiative (2013)

Alabama SuperLawyers Rising Star (2011)

Degree from Harvard Law School conferred *cum laude* (2006)

Victor Brudney Prize (2006)

Member, *Harvard Law Review* (2004 – 2006)

Degree from Samford University conferred *summa cum laude* with honors (2002)

Samford University Academic, History, and Foreign Language Scholarships (1999 – 2002)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Alabama State Bar Association Character & Fitness Committee (2013 – 2017)

Alabama Supreme Court
Standing Committee on Alabama Rules of Appellate Procedure (2014 – present)

American Bar Association (2008 – 2014)

Birmingham Bar Association (2008 – 2011)

Defense Research Institute (2007 – 2011)
Young Lawyer Liaison, Government Enforcement and Corporate Compliance Committee (2009 – 2010)
Young Lawyer Liaison, Appellate Practice Committee (2010 – 2011)

Federalist Society for Law and Public Policy Studies (2003 – 2006, 2008 – present)
Montgomery Chapter Vice President (2013 – present)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Alabama, 2007

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2011
United States Court of Appeals for the Fourth Circuit, 2010
United States Court of Appeals for the Fifth Circuit, 2010
United States Court of Appeals for the Sixth Circuit, 2011
United States Court of Appeals for the Ninth Circuit, 2011
United States Court of Appeals for the Eleventh Circuit, 2007
United States District Court for the Northern District of Alabama, 2007
United States District Court for the Middle District of Alabama, 2012
United States District Court for the Southern District of Alabama, 2013

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Alabama Legislature's Code of Ethics Reform and Clarification Commission, Ex Officio Member (2018 – present)

Alabama Legislature's Interim Study Committee on Campaign Finance Reform, Attorney General's Delegate (2012 – 2013)

Samford University Board of Overseers (2015 – present)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I am a member of the Board of Overseers for Samford University. Samford University was founded in 1841 as a Baptist college for men. In 1913, the school

became fully and permanently coeducational. The school did not admit African American students until the 1960's. At present, and at no time during my service on the Board of Overseers, does Samford discriminate in admissions or in the hiring of employees on the basis of race, sex, religion or national origin, either through formal admission or hiring requirements or the practical implementation of admission or hiring policies.

Except as set forth above, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Assistant Attorney General Ed Carnes 1980-1985, 69 ALA. L. REV. 651 (2018). Copy supplied.

ALABAMA LAW INSTITUTE, ALABAMA ELECTION LAW HANDBOOK (18th ed. 2017). Contributor and editor. Copy supplied.

Symposium: A Recipe for Continued Confusion and More Judicial Involvement in Redistricting, SCOTUSBLOG (May 23, 2017). Copy supplied.

Alabama Law Institute, ALABAMA ELECTION LAW HANDBOOK (17th ed. 2015). Contributor and editor. Copy supplied.

Symposium: The Death Penalty Lives To Fight Another Day, SCOTUSBLOG (June 29, 2015). Copy supplied.

Symposium: Good Faith and Caution, Not Irrationality or Malice, SCOTUSBLOG (Jan. 16, 2015). Copy supplied.

Advice on Motions in Limine, FOR THE DEFENSE, Jan. 2012. Copy supplied.

Circuit Reports: Eleventh Circuit, CERTWORTHY, Vol. 13, Issue 2 (Oct. 20, 2011). Copy supplied.

Class Action Lessons from Wal-Mart v. Dukes, CORPORATE COUNSELOR, Aug. 2011. Copy supplied.

Circuit Reports: Eleventh Circuit, CERTWORTHY, Vol. 13, Issue 1 (April 1, 2011). Copy supplied.

If You Wouldn't Say It, Why Write It? Tips for More Conversational and Effective Writing, FOR THE DEFENSE, Jan. 2011. Copy supplied.

Circuit Reports: Eleventh Circuit, CERTWORTHY, Vol. 12, Issue 2 (Oct.15, 2010). Copy supplied.

Basics of Certiorari Practice in the Alabama Supreme Court, ALA. LAW. (May 2009). Copy supplied.

Amendments Rejected in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (5th ed. 2008). Copy supplied.

Substantive Consolidation: A Critical Examination, Harvard Law School Program on Corporate Governance (2006). Copy supplied.

Discriminatory Limitations on Direct Wine Shipment, 119 HARV. L. REV. 307 (2006). Copy supplied.

Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright, 118 HARV. L. REV. 1355 (2005). Copy supplied.

Letter to the Editor, HARV. L. REC., Apr. 22, 2004. Copy supplied.

Book Review of *One Nation Under God* by Eugene Hemrick, *Report from the Capitol*, Vol. 58, No. 5 (March 5, 2003). Copy supplied.

Commencement Speaker Embarrasses and Offends Graduates and Attendees, SAMFORD CRIMSON, Feb. 12, 2003. Copy supplied.

Birmingham Pledge Means Well, but Empty, Without Firm Commitment, SAMFORD CRIMSON, Sept. 25, 2002. Copy supplied.

International Theme Unrelated to Events, SAMFORD CRIMSON, Mar. 21, 2001. Copy supplied.

ROTC Provides Military Experience, SAMFORD CRIMSON, May 10, 2000. Copy supplied.

Spring Fling Promises Fun for All, SAMFORD CRIMSON, Apr. 26, 2000. Copy supplied.

Theatre Offers Creative Childcare, SAMFORD CRIMSON, Mar. 22, 2000. Copy supplied.

Beeson Bridge Falls to Science Center, SAMFORD CRIMSON, Mar. 15, 2000. Copy supplied.

Stages Gears up for New Semester, SAMFORD CRIMSON, Mar. 1, 2000. Copy supplied.

In addition to the above, as a research assistant, I edited drafts of Professor Ronald Mann's book *Charging Ahead: The Growth and Regulation of Payment Card Markets* and the 2005 edition of Professor Charles Ogletree's book *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education.* As a member of the Harvard Law Review, I had some role in editing most articles published from the fall of 2004 to the spring of 2006.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

REPORT OF THE STANDING COMMITTEE ON THE ALABAMA RULES OF APPELLATE PROCEDURE (Feb. 9, 2018). Copy supplied.

REPORT OF THE STANDING COMMITTEE ON THE ALABAMA RULES OF APPELLATE PROCEDURE (July 27, 2017). Copy supplied.

REPORT OF THE STANDING COMMITTEE ON THE ALABAMA RULES OF APPELLATE PROCEDURE (March 11, 2016). Copy supplied.

REPORT OF THE STANDING COMMITTEE ON THE ALABAMA RULES OF APPELLATE PROCEDURE (Sept. 25, 2015). Copy supplied.

REPORT OF THE STUDY COMMITTEE ON CAMPAIGN FINANCE REFORM TO THE ALABAMA LEGISLATURE (2013). Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Letter to Sens. Charles E. Grassley and Dianne Feinstein, Nomination of Brett J. Talley, Oct. 17, 2017. Copy supplied.

Letter to Sens. Charles E. Grassley and Dianne Feinstein, Nomination of Kevin C. Newsom, June 7, 2017. Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

March 22, 2018: Judge/Panelist, Donworth Moot Court Competition, Cumberland School of Law. I was a judge for the final round of this moot court competition. I have no notes, transcript, or recording. The address for Cumberland School of Law is 305 Riley Road, Birmingham, Alabama 35229.

March 19, 2018: Panelist, "Solicitors General Supreme Court Review and Preview," Rule of Law Defense Fund, New Orleans, Louisiana. I have no notes, transcript, or recording. The address for the Rule of Law Defense Fund is 1747 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.

December 14, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," State Government Lawyers' CLE, Montgomery, Alabama. Notes supplied.

November 2, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Southeastern Business Law Institute, Birmingham, Alabama. Notes supplied.

October 19, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Yale Law School Student Chapter, New Haven, Connecticut. Notes supplied as notes from December 14, 2017 event.

October 3, 2017: Panelist, "The Limits of Executive Orders," 2017 Faulkner Law Review Symposium, Montgomery, Alabama. I have no notes, transcript, or recording. The address for the Faulkner Law Review is 5345 Atlanta Highway, Montgomery, Alabama 36109.

September 21, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Federalist Society for Law & Public Policy Studies, University of Alabama Law School Student Chapter, Tuscaloosa, Alabama. Notes supplied as notes from November 3, 2017 event.

August 25, 2017: Speaker, "When Laws Are Challenged in Litigation," Legislative Services Bill Drafting Seminar, Alabama Legislature, Montgomery, Alabama. Notes supplied.

July 14, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Alabama State Bar Association Annual Meeting, Point Clear, Alabama. Notes supplied as notes from November 3, 2017 event.

June 30, 2017: Speaker, "Review and Preview of Supreme Court Term 2016-17," Federalist Society for Law & Public Policy Studies, Nashville Lawyers Chapter, Nashville, Tennessee. Notes supplied as notes from November 3, 2017 event.

May 31, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. Notes supplied as notes from December 14, 2017 event.

May 5, 2017: Panelist, "The Gorsuch Effect," Rule of Law Defense Fund, Charleston, South Carolina. The panel discussed Justice Gorsuch's first few weeks on the Supreme Court. I have no notes, transcript, or recording. The address for the Rule of Law Defense Fund is 1747 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.

April 10, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, University of Mississippi School of Law Student Chapter, Oxford, Mississippi. Notes supplied as notes from December 14, 2017, event.

March 25, 2017: Panelist, "State Solicitors General," Harvard Law Federalist Society Alumni Symposium, Cambridge, Massachusetts. I spoke regarding my work as Alabama Solicitor General. I have no notes, transcript, or recording. The address for the Harvard Student Chapter of the Federalist Society is 103 Pound Hall, 1563 Mass Avenue, Cambridge, Massachusetts 02138. Press coverage supplied.

February 28, 2017: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, University of Georgia School of Law Student Chapter, Athens, Georgia. Notes supplied as notes from December 14, 2017, event.

February 17, 2017: Speaker, "The Law of Firearms in Public Places," Alabama League of Municipalities, Montgomery, Alabama. Notes supplied.

February 4, 2017: Panelist, "Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Florida Lawyers Chapter, Annual Meeting, Orlando, Florida. Recording supplied.

January 10, 2017: Speaker, "Attorney General's Office Update," Alabama Probate Judges' Winter Meeting, Point Clear, Alabama. PowerPoint supplied.

December 8, 2016: Speaker, "The Law of Firearms in Public Places," Alabama Association of County Commissions, Montgomery, Alabama. Notes supplied as notes from February 17, 2017 event.

October 28, 2016: Panelist, "Amicus Practice in the Eleventh Circuit," Eleventh Circuit Practice Institute, Atlanta, Georgia. I have no notes, transcript, or recording. The address for the Institute of Continuing Legal Education, which sponsored the Eleventh Circuit Practice Institute, is Post Office Box 117210, Atlanta, Georgia 30368.

October 27, 2016: Panelist, "Conversation with Solicitors General," Eleventh Circuit Practice Institute, Atlanta, Georgia. I spoke regarding my work as Alabama Solicitor General. I have no notes, transcript, or recording. The address for the Institute of Continuing Legal Education, which sponsored the Eleventh Circuit Practice Institute, is Post Office Box 117210, Atlanta, Georgia 30368-7210.

October 19, 2016: Speaker, "Supreme Court Review," Bradley Arant Boult Cummings LLP, Birmingham, Alabama. PowerPoint supplied.

October 19, 2016: Speaker, "Jobs in Law and Government," Samford University, Birmingham, Alabama. I spoke regarding my work as Alabama Solicitor General. I have no notes, transcript, or recording. The address for Samford University is 800 Lakeshore Drive, Homewood, Alabama 35209.

October 11, 2016: Speaker, "Supreme Court 2015 Wrap Up: A Terrible Horrible No Good Very Bad Term," Federalist Society for Law & Public Policy Studies, University of Alabama Law School Student Chapter, Tuscaloosa, Alabama. Notes supplied.

September 20, 2016: Speaker, "Justice Scalia's Legacy," Montgomery Kiwanis Club, Montgomery, Alabama. I spoke about some of Justice Scalia's important opinions and arguing before Justice Scalia. I have no notes, transcript, or recording. The address for the Montgomery Kiwanis Club is 201 Dexter Avenue, Montgomery, Alabama 36104.

September 15, 2016: Speaker, "Supreme Court 2015 Wrap Up: A Terrible Horrible No Good Very Bad Term," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. Notes supplied

as notes from October 11, 2016, event.

July 27, 2016: Speaker, "Review of Supreme Court Term 2015-16," Houston County Bar Association, Dothan, Alabama. Notes supplied as notes from October 11, 2016, event.

April 19, 2016: Panelist, "Future of the Voting Rights Act after *Shelby County v. Holder*," National Association of Attorneys General Southern Meeting, Emory Law School, Atlanta, Georgia. Notes supplied.

March 24, 2016: Speaker, "Alabama's Litigation Against The EPA's Waters Of The United States Rule: A Case Study In Combating Federal Overreach," Federalist Society for Law & Public Policy Studies, Harvard Law School Student Chapter, Cambridge, Massachusetts. Notes supplied.

February 24, 2016: Panelist, "Antonin Scalia's Life & Death," Faulkner Law School, Montgomery, Alabama. I spoke about arguing before Justice Scalia. I have no notes, transcript, or recording. The address for Faulkner Law School is 5345 Atlanta Highway, Montgomery, Alabama 36109.

February 1, 2016: Speaker, "What I Learned From Losing *ADC v. Alabama*," Federalist Society for Law & Public Policy Studies, University of Chicago Law School Student Chapter, Chicago, Illinois. The presentation was substantively similar to my April 19, 2016 speech at the National Association of Attorneys General Southern Meeting, for which I have provided notes.

October 30, 2015: Speaker, "Supreme Court Round-Up," Southeastern Business Law Institute, Birmingham, Alabama. I discussed the previous Supreme Court term's business cases. I have no notes, transcript, or recording. The address of the Southeastern Business Law Institute is Cumberland School of Law, 305 Riley Road, Birmingham, Alabama 35229.

September 29, 2015: Panelist, "Supreme Court Round-Up," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. I discussed the previous Supreme Court term. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

July 29, 2015: Speaker, "Understanding the Supreme Court's Same-Sex Marriage Decision," Alabama Probate Judges Conference, Tuscaloosa, Alabama. PowerPoint supplied.

July 21, 2015: Moderator, "Fat Cats and Philanthropists: How the IRS Governs Your Charitable Giving," Alabama Policy Institute, Birmingham, Alabama. Recording supplied.

July 12, 2015: Panelist, "Update on United States Supreme Court Cases and Decisions," Alabama State Bar Association Annual Meeting, Point Clear, Alabama. I spoke about the Supreme Court term that had recently ended. I have no notes, transcript, or recording. The address of the Alabama State Bar Association is 415 Dexter Avenue, Montgomery, Alabama 36104.

June 22, 2015: Panelist, "Supreme Court Tax Cases," State and Local Legal Center, Washington, District of Columbia. PowerPoint supplied.

May 21, 2015: Panelist, "Solicitors General Review the Supreme Court," Rule of Law Defense Fund, Atlanta, Georgia. The panelists discussed pending and recently-decided Supreme Court cases. I have no notes, transcript, or recording. The address of the Rule of Law Defense Fund is 1747 Pennsylvania Avenue, N.W., Suite 800, Washington, D.C. 20006.

April 22, 2015: Speaker, "Weighing the Legal Arguments for Same-Sex Marriage from a Federalism Perspective," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. The substance of my presentation was similar to the talk given on July 29, 2015, for which I have provided a PowerPoint.

February 12, 2015: Panelist, "Controversial Cases in the U.S. Supreme Court and 11th Circuit," Hugh Maddox Inn of Court, Montgomery, Alabama. I recounted the facts and holdings of cases that had been decided by the Supreme Court and Eleventh Circuit. I have no notes, transcript, or recording. The address for the Hugh Maddox Inn of Court is 150 South Perry Street, Montgomery, Alabama 36104.

August 22, 2014: Speaker, "Supreme Court Roundup: Review of 2013-2014 Term," Eleventh Circuit Practice Institute, Montgomery, Alabama. Notes supplied.

July 8, 2014: Speaker, "Supreme Court Roundup: Review of 2013-2014 Term," Federalist Society for Law & Public Policy Studies, Birmingham Lawyers Chapter, Birmingham, Alabama. Notes supplied as notes from August 22, 2014, event.

June 27, 2014: Speaker, "Supreme Court Roundup: Review of 2013-2014 Term," Federalist Society for Law & Public Policy Studies, Montgomery Lawyers Chapter, Montgomery, Alabama. Notes supplied as notes from August 22, 2014, event.

February 26, 2014: Speaker, "Remarks from Attorney General Luther Strange," Alabama Citizens for Life, Montgomery, Alabama. I read brief remarks on behalf of Attorney General Luther Strange who had been an invited speaker but could not attend at the last minute. I have no notes, transcript, or recording. The

address of Alabama Citizens for Life is Post Office Box 184, Montgomery, Alabama 36101. Press coverage supplied.

December 4, 2013: Speaker, "Understanding Alabama's Immigration Law and the Litigation About It," Administrative Law Section of the Alabama State Bar, Montgomery, Alabama. PowerPoint supplied.

November 20, 2013: Speaker, "Pre-Trial and Motions Practice in the Federal Courts," Faulkner Law School, Montgomery, Alabama. Notes supplied.

August 21, 2013: Speaker, "Understanding Alabama's Immigration Law and the Litigation About It," Alabama Association of County Commissioners Annual Convention, Orange Beach, Alabama. PowerPoint supplied.

Oct. 18, 2012: Speaker, Review of Supreme Court Term 2011-12, Alabama Government Lawyer's CLE, Montgomery, Alabama. PowerPoint supplied.

Sept. 5, 2012: Panelist, "Back to School Supreme Court Review: What You Need to Know About This Term and Last," Bradley Arant Boult Cummings LLP, Birmingham, Alabama. I spoke about cases that had been decided in the most recent Supreme Court term and cases in the upcoming term. I have no notes, transcript, or recording. The address for Bradley Arant Boult Cummings LLP is One Federal Place 1819 Fifth Avenue North, Birmingham, Alabama 35203.

Sept. 3, 2012: Judge/Panelist, Gordon T. Saad Appellate Advocacy Competition, Cumberland School of Law. I was a judge for the final round of this moot court competition. I have no notes, transcript, or recording. The address for Cumberland School of Law is 305 Riley Road, Birmingham, Alabama 35229.

In private practice, I presented at two teleconference CLEs about mortgage servicer litigation. I do not recall the precise date of those CLEs, nor can I find any records, notes, etc.

In college, I gave presentations at political science research conferences on my unpublished senior thesis, which concerned regional political parties in Spain. I cannot recall with any confidence the dates or locations of those conferences.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Fraimon Roberts III, *Frog Habitat Case Pending at U.S. Supreme Court Draws Interest from St. Tammany to Utah*, NEW ORLEANS ADVOCATE, Sept. 10, 2017. Copy supplied.

Pat Duggins, *Justice Reform: When the Jury Says "Life in Prison," and the Judge Says "Death...,"* ALA. PUBLIC RADIO, May 2, 2017. Transcript supplied.

Josh Moon, *Analysis: The Truth About Alabama's Proposed Gambling Bills*, MONTGOMERY ADVERTISER, Aug. 17, 2016. Copy supplied.

Marcia Coyle, *Water Wars Likely To Spill into Supreme Court; Foes of EPA Rules Filed Challenges in 21 Courts*, NAT'L L.J., July 11, 2016. Copy supplied.

Kathy Hagood, *Writing for the Judge*, BUS. ALA., Apr. 2016. Copy supplied.

Capitol Journal, Alabama Public Television, August 28, 2015. Recording supplied.

Dori Bernstein, Irv Gornstein, & Steven Goldblatt, *Supreme Court Institute Annual Report*, May 14. 2015. Copy supplied.

Nina Totenberg, *After Botched Executions, Supreme Court Weighs Lethal Drug Cocktail*, NPR MORNING EDITION, Apr. 29, 2015. Transcript supplied.

Kim Chandler, *Fight Over Legislative Districts Returns to District Court*, Associated Press, Apr. 18, 2015. Copy supplied. Reprinted in multiple outlets.

Patrick L. Gregory, *Alabama Gets Another Chance To Defend Diesel Tax on Rail Carriers*, BLOOMBERG BNA, Mar. 10, 2015. Copy supplied.

Mary Troyan, *State Revenue Could Take a Hit*, MONTGOMERY ADVERTISER, Dec. 12, 2014. Copy supplied. Reprinted in multiple outlets.

Mark Sherman & Kim Chandler, *Justices To Consider Alabama Voting Case*, Associated Press, Nov. 12, 2014. Copy supplied.

Nina Totenberg, *Supreme Court Case Seeks Source of Alabama Gerrymandering*, NPR MORNING EDITION, Nov. 12, 2014. Transcript supplied.

Nina Totenberg, *Should Short Beards Be Allowed Behind Bars?*, NPR ALL THINGS CONSIDERED, Oct. 6, 2014. Transcript supplied.

Shave and a Haircut, SCOTUSBLOG, Oct. 5, 2014. Recording supplied.

Richard Wolf, *Justices To Rule if Race-Based Districts Legal; Case Seeks To Dilute Black Voting Strength in Some Areas*, USA TODAY, Sept. 2, 2014. Copy supplied.

Capitol Journal, Alabama Public Television, August 8, 2014. Recording supplied.

Alexander Ripps, *Sales and Use Taxes: Supreme Court Agrees To Hear Alabama Diesel Tax Case*, BLOOMBERG BNA, July 2, 2014. Copy supplied.

Kevin P. McGowan, *Public Employee's Testimony in Criminal Trial Is Protected Speech, Supreme Court Decides*, BLOOMBERG BNA, June 25, 2014. Copy supplied.

Sam Hananel, *U.S. Supreme Court Rules for Whistleblower in Alabama Case*, Associated Press, June 20, 2014. Copy supplied. Reprinted in multiple outlets.

Brian Lyman, *AG Wants Decision Ending Gay Sex Ban Reconsidered*, MONTGOMERY ADVERTISER, June 19, 2014. Copy supplied.

Brian Lyman, *State AG Backs Tea Party in IRS Case*, MONTGOMERY ADVERTISER, May 8, 2014. Copy supplied. Reprinted in multiple outlets.

Richard Wolf, *Supreme Court Won't Hear Case on Gay Wedding Snub*, USA TODAY, Apr. 7, 2014. Copy supplied.

Brian Lyman, *Judge Orders Trial in Alabama Abortion Lawsuit*, MONTGOMERY ADVERTISER, Apr. 1, 2014. Copy supplied. Reprinted in multiple outlets.

Brian Lyman, *Judge Extends Temporary Restraining Order on Alabama Abortion Law*, MONTGOMERY ADVERTISER, Mar. 25, 2014. Copy supplied.

Richard Wolf, *Justices May Hear Gay Wedding Case: New Mexico Studio's Refusal To Take Photos Creates Legal Tussle*, USA TODAY, Mar. 21, 2014. Copy supplied.

Brian Lyman, *Impact of Tex. Abortion Ruling on Ala. Law Not Clear*, MONTGOMERY ADVERTISER, Nov. 27, 2013. Copy supplied.

Brian Lyman, *Experts in Abortion Clinic Case Come at a Price*, MONTGOMERY ADVERTISER, Aug. 1, 2013. Copy supplied.

Mike Cason, *New Rule for Doctors Delayed Again*, BIRMINGHAM NEWS, July 21, 2013. Copy supplied.

Brian Lyman, *Judgment in Abortion Clinic Suit Likely To Come Next Year*, MONTGOMERY ADVERTISER, July 20, 2013. Copy supplied.

Sebastian Kitchen, *Ala. Attorney General Asks Federal Judge To Close Creek Casinos*, MONTGOMERY ADVERTISER, Apr. 13, 2013. Copy supplied.

Robert McClendon, *Bingo Battle Heating up: Attorney General Expands Complaint Against Poarch Creek Tribe*, HUNTSVILLE TIMES, Apr. 12, 2013. Copy

supplied.

Robert McClendon, *Expert: Indian Bingo Suit 'Novel' But Won't Succeed*, MOBILE REGISTER, Feb. 22, 2013. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In the fall of 2017, I was appointed by the Alabama Board of Pardons and Paroles to be a hearing officer (akin to an administrative law judge) to resolve a personnel matter involving allegations against the Board's former executive director.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

One.

i. Of these, approximately what percent were:

jury trials:	0%
bench trials:	100%
civil proceedings:	100%
criminal proceedings:	0%

b. Provide citations for all opinions you have written, including concurrences and dissents.

None.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

In the one matter that I resolved as a hearing officer, the Board of Pardons & Paroles alleged that its former Executive Director had engaged in race and sex-based discrimination in violation of federal and state laws. Based on the evidence presented before me, I found that the executive director had violated federal law and state rules by assigning state vehicles to employees based on their race and sex. I found insufficient evidence that the executive director had treated employees differently in employee discipline based on race. Based on my findings, the former Executive Director was removed from his position. My decision was affirmed by the Board of State Personnel.

Counsel for Prosecution:
Meredith Barnes
Kevin Blackburn
Laura Best
Board of Pardons & Paroles
301 Ripley Street
Montgomery, Alabama 36104
(334) 514-5090

Counsel for Defendant:
John D. Saxon
2119 Third Avenue North
Birmingham, Alabama 35203
(205) 324-0223

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

A copy of my unpublished report is attached.

Counsel for Prosecution:
Meredith Barnes
Kevin Blackburn
Laura Best
Board of Pardons & Paroles
301 Ripley Street
Montgomery, Alabama 36104
(334) 514-5090

Counsel for Defendant:
John D. Saxon
2119 Third Avenue North
Birmingham, Alabama 35203
(205) 324-0223

e. Provide a list of all cases in which certiorari was requested or granted.

None.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

None.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I have acted as a hearing officer in only one case. As described above, I have issued one unpublished report.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

I have supplied a copy of the one unpublished report that I have issued.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

None.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have served as an adjudicator in only one case, described above. Recusal was not an issue in that case.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have never been a candidate for or held an elected public office. Since law school, I have held the following appointed positions:

Solicitor General, State of Alabama, 2014 – present. Appointed in January 2014 by then-Alabama Attorney General Luther Strange.

Deputy Solicitor General, State of Alabama, 2011 – 2014. Appointed in November 2011 by then-Alabama Attorney General Luther Strange.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Volunteer, Trump Transition Team (Dec. 2016 – Jan. 2017). I consulted on occasion with members of the Department of Justice "beachhead" team about criminal law issues with which they should familiarize themselves before the transition.

Volunteer, Bradley Byrne for Governor (2010). I made phone calls to tell supporters about scheduled events and to remind supporters to vote.

Volunteer, Luther Strange for Attorney General (2010). I made phone calls to remind supporters to vote. I also gave the campaign and transition team occasional advice about legal issues affecting the State.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 2006 to 2007, I served as a law clerk to the Honorable William H. Pryor Jr., Circuit Judge of the United States Court of Appeals for the Eleventh Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Summer 2006
Gibson Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Summer Associate

2007 – 2011
Bradley Arant Boult Cummings LLP
819 Fifth Avenue North
Birmingham, Alabama 35203
Associate

2011 – present
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Deputy Solicitor General (2011 – 2014)
Solicitor General (2014 – present)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My practice has always focused on complex trial and appellate litigation, but I have never specialized in any particular substantive area of the law. When I first graduated from law school, I was a pre-clerkship summer associate at a large law firm where I worked primarily on securities cases. When I returned to private practice after my clerkship, I worked on all aspects of complex commercial and product liability litigation, including pre-trial discovery, class certification, summary judgment, motions in limine, jury instructions, and appeals. As the Deputy Solicitor General from

2011 to 2014, I worked on constitutional cases in federal court—conducting discovery, pre-trial motions practice, filing briefs, and arguing appeals. I also worked on criminal appeals in the state court system and federal habeas matters in federal court. When I was promoted to Solicitor General in 2014, I became a supervisor as well as a litigator. As Solicitor General, I supervise other attorneys in three areas: (1) particularly important or complicated civil litigation in federal district court or state trial court, (2) civil and criminal appeals in the United States Supreme Court, Eleventh Circuit Court of Appeals, and Alabama Supreme Court, and (3) legal opinions issued by the Attorney General to state and local officers. I also appear in court and personally handle trial-level cases or appeals at the direction of the Attorney General.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

In private practice, I worked primarily for manufacturers, construction companies, financial services companies, and pharmaceutical companies. I also represented Alabama's then-governor in litigation and in an advisory capacity. During this period of my career, I also had a heavy pro bono practice and was frequently appointed by the federal courts to represent criminal defendants.

In November of 2011, I left private practice to work at the Alabama Attorney General's Office, first as Deputy Solicitor General and then as Solicitor General. My clients at the Attorney General's Office have been the State, its agencies, and its officers.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice has always been exclusively litigation and litigation-related advice. When I was in private practice, I appeared in court occasionally. At the Attorney General's Office, I appear in court frequently. I have presented oral argument three times in the United States Supreme Court, four times in the Alabama Supreme Court, approximately seventeen times in the Eleventh Circuit, and approximately five times in other state and federal appellate courts. I have argued dispositive motions and other pre- and post-trial matters in the Middle District of Alabama, Northern District of Alabama, and state trial courts.

i. Indicate the percentage of your practice in:

1. federal courts: 70%
2. state courts of record: 30%
3. other courts: 0%
4. administrative agencies: 0%

ii. Indicate the percentage of your practice in:
1. civil proceedings: 70%
2. criminal proceedings: 30%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

When I was in private practice, I was associate counsel in two jury trials. I represented the defendant in a federal criminal trial, and the defendant in a complex state court civil trial. At the Attorney General's Office, I have been chief counsel for three bench trials over constitutional issues: I defended the constitutionality of state laws in two federal bench trials. I also defended the prosecution team and other state employees against constitutional claims during a multi-day evidentiary hearing in a state-court public corruption prosecution. After the court entered judgment on those claims, the case proceeded to a jury trial on the criminal charges in which I did not actively participate.

i. What percentage of these trials were:
1. jury: 30%
2. non-jury: 70%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have practiced extensively before the Supreme Court of the United States both in private practice and at the Alabama Attorney General's Office. I have filed nine merits briefs as counsel of record or co-counsel, and I have argued three cases. I have also filed other kinds of briefs, such as amicus briefs and briefs in opposition to certiorari.

I have argued the following merits cases in the Supreme Court:

McWilliams v. Dunn, 137 S. Ct. 1790 (2017)
Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015)
Alabama Department of Revenue v. CSX Transp., Inc., 135 S. Ct. 1136 (2015)

I have filed briefs as counsel of record for either a party or *amicus curiae* in the following additional merits cases:

Weyerhauser Co. v. U.S. Fish & Wildlife Serv., No. 17-71 (Aug 14, 2017) (consolidated with *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, No. 17-

74)
Dunn v. Madison, 138 S. Ct. 9 (2017)
Johnson v. Alabama, 137 S. Ct. 2292 (2017)
Russell v. Alabama, 137 S. Ct. 158 (2016)
Barnes v. Alabama, 136 S. Ct. 2447 (2016)
Barnes v. Alabama, 136 S. Ct. 2446 (2016)
Flowers v. Alabama, 136 S. Ct. 2445 (2016)
Slaton v. Alabama, 136 S. Ct. 2445 (2016)
Bonds v. Alabama, 136 S. Ct. 2444 (2016)
Knotts v. Alabama, 136 S. Ct. 2443 (2016)
Wimbley v. Alabama, 136 S. Ct. 2387 (2016)
Johnson v. Lee, 136 S. Ct. 1802 (2016)
Adams v. Alabama, 136 S. Ct. 1796 (2016)
Wittman v. Personhuballah, 136 S. Ct. 1732 (2016)
Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)
Presley v. Alabama, 136 S. Ct. 1399 (2016)
Duke v. Alabama, 136 S. Ct. 1378 (2016)
Baker v. Alabama, 136 S. Ct. 1378 (2016)
McWilliams v. Alabama, 136 S. Ct. 1373 (2016)
Storey v. Alabama, 136 S. Ct. 1373 (2016)
Forman v. Alabama, 136 S. Ct. 1372 (2016)
Ingram v. Alabama, 136 S. Ct. 1372 (2016)
Flynn v. Alabama, 136 S. Ct. 1371 (2016)
Foster v. Alabama, 136 S. Ct. 1371 (2016)
Hogan v. Alabama, 136 S. Ct. 1370 (2016)
Iiams v. Alabama, 136 S. Ct. 1370 (2016)
Gardner v. Alabama, 136 S. Ct. 1369 (2016)
Reeves v. Alabama, 136 S. Ct. 1369 (2016)
Pratt v. Alabama, 136 S. Ct. 1368 (2016)
Stubbs v. Alabama, 136 S. Ct. 1368 (2016)
Black v. Alabama, 136 S. Ct. 1367 (2016)
Dunlap v. Alabama, 136 S. Ct. 1367 (2016)
Matthews v. Alabama, 136 S. Ct. 1366 (2016)
Wilson v. Alabama, 136 S. Ct. 1366 (2016)
Williams v. Alabama, 136 S. Ct. 1365 (2016)
Click v. Alabama, 136 S. Ct. 1363 (2016)
Hurst v. Florida, 136 S. Ct. 616 (2016)
Glossip v. Gross, 135 S. Ct. 2726 (2015)
Obergefell v. Hodges, 135 S. Ct. 2584 (2015)
Knight v. Thompson, 135 S. Ct. 1173 (2015)
Holt v. Hobbs, 135 S. Ct. 853 (2015)
Lane v. Franks, 134 S. Ct. 2369 (2014)
Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014)
Walden v. Fiore, 134 S. Ct. 1115 (2014)
Hinton v. Alabama, 134 S. Ct. 1081 (2014)
Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1 (2013)

McQuiggin v. Perkins, 569 U.S. 383 (2013)
Standard Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013)
Perry v. Perez, 565 U.S. 1090 (2011)

I have also filed briefs as counsel of record for either a party or *amicus curiae* in the following nonmerits matters:

Lee v. Alabama, No. 17-775 (petn. pending)
Kirksey v. Alabama, No. 17-6113 (Nov. 6, 2017)
Wimbley v. Alabama, No. 17-5663 (Oct. 30, 2017)
Peruta v. California, No. 16-894 (June 26, 2017)
Culbreth v. Alabama, No. 16-8186 (June 19, 2017)
Alaska v. Zinke, No. 16-596 (May 1, 2017)
Woolf v. Alabama, No. 16-8152 (Apr. 24, 2017)
Alabama Democratic Conference v. Marshall, No. 16-832 (Apr. 24, 2017)
Byrd v. Alabama, No. 16-479 (Mar. 20, 2017)
Bohannon v. Alabama, No. 16-6746 (Jan. 23, 2017)
Shaw v. Alabama, No. 16-5726 (Jan. 23, 2017)
Brohl v. Direct Mktg. Ass'n, No. 16-458 (Dec. 12, 2016)
Building Indus. Ass'n of the Bay Area v. Dept. of Commerce, No. 15-1350 (Oct. 11, 2016)
Knight v. Thompson, No. 15-999 (May 2, 2016)
Samra v. Price, No. 15-8089 (Apr. 18, 2016)
Brooker v. Alabama, No. 15-892 (Apr. 18, 2016)
Luong v. Alabama, No. 15-922 (Mar. 28, 2016)
Shanklin v. Alabama, No. 15-953 (Mar. 21, 2016)
McWane Inc. v. FTC, No. 15-706 (Mar. 21, 2016)
White v. Alabama, No. 15-5730 (Oct. 19, 2015)
Dunn v. DeBruce, No. 14-807 (June 15, 2015)
Lockhart v. Alabama, No. 14-8194 (Apr. 20, 2015)
Scott v. Alabama, No. 14-8189 (Apr. 20, 2015)
Strange v. Searcy, No. 14A840 (Feb. 9, 2015)
Arthur v. Thomas, No. 13-1451 (Oct. 6, 2014)
Lynch v. Alabama, No. 13-1232 (Oct. 6, 2014)
Elane Photography, LLC. v. Willock, No. 13-585 (Apr. 7, 2014)
Patterson v. Adkins, No. 13-85 (Oct. 7, 2013)
Reynolds v. Alabama, No. 12-10278 (Oct. 7, 2013)
Daniel v. Alabama, No. 11-10329 (Oct. 1, 2012)

I have been listed on briefs as supporting counsel for either a party or *amicus curiae* in the following merits cases:

McCoy v. Louisiana, No. 16-8255 (pending)
Lee v. United States, 137 S. Ct. 1958 (2017)
NLRB v. SW General, Inc., 137 S. Ct. 929 (2017)
NLRB v. Noel Canning, 134 S. Ct. 2550 (2014)

Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013)
Miller v. Alabama, 567 U.S. 460 (2012)
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)
Riley v. Kennedy, 553 U.S. 406 (2008)

I have been listed on briefs as supporting counsel for either a party or *amicus curiae* in the following nonmerits matters:

State of Indiana v. Commonwealth of Massachusetts, No. 22O149 (Dec. 11, 2017)
State of Missouri v. State of California, No. 22O148 (Dec. 4, 2017)
Arthur v. Dunn, No. 16-1407 (May 25, 2017)
Arthur v. Dunn, No. 16-602, 16A-451 (Feb. 21, 2017)
Arthur v. Alabama, No. 16-595 (Jan. 23, 2017)
Keunzel v. Alabama, No. 16-213 (Oct. 31, 2016)
Lee v. Thomas, No. 13-775 (Mar. 24, 2014)
Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 13-137 (Feb. 24, 2014)
Stroud v. Alabama Bd. of Pardons & Paroles, No. 13-635 (Jan. 13, 2014)
Clemons v. Alabama, No. 12-1478 (Oct. 7, 2013)
Alabama v. United States, No. 12-884 (Apr. 29, 2013)
Thaler v. McGowen, No. 12-82 (Nov. 26, 2012)
Thomas v. Madison, No. 12-308 (Nov. 13, 2012)
Lord Abbett Mun. Income Fund, Inc. v. Strange, No. 11-1332 (Oct. 1, 2012)
Alabama v. Lane, No. 11-627 (Jan. 23, 2012)
Beason v. Bentley, No. 11-157 (Jan. 9, 2012)

Although not listed in the briefs or docket, I also assisted in the preparation of the reply brief in the following case:

Allen v. Siebert, 128 S. Ct. 2 (2007)

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Alabama Legislative Black Caucus v. Alabama*,135 S.Ct. 1257 (2015); *Alabama Legislative Black Caucus v. Alabama*, 231 F.Supp.3d 1026 (M.D. Ala. 2017).

I defended the constitutionality of Alabama's house and senate legislative districts before a three-judge district court in the Middle District of Alabama and the Supreme Court of the United States. From 2012 to 2014, my principal role was to advise the Attorney General about various legal issues presented by the case. After the State prevailed in the district court, I briefed and argued the appeal in the Supreme Court in 2014. In a 5-4 decision authored by Justice Breyer and joined by Justices Kennedy, Ginsburg, Kagan, and Sotomayor, the Court reversed and remanded for further proceedings.

On remand, I participated in supplemental discovery, briefing, and argument before the three-judge district court. In an opinion authored by Judge William H. Pryor Jr. of the U.S. Court of Appeals for the Eleventh Circuit and joined by Chief Judge Keith Watkins of the Middle District of Alabama, the district court held 12 of Alabama's districts unconstitutional and rejected claims against all other districts. Judge Myron Thompson of the Middle District of Alabama concurred in part and dissented in part.

During the remedial phase of the litigation, I advised the Legislature on how to redraw the challenged house and senate districts. The Legislature redrew all the challenged districts, and the plaintiffs agreed that the new plans solved the legal infirmities in the old plans. The litigation ended in the fall of 2017.

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David Byrne
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Alabama Securities Commission
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University of Washington School of Law
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James U. Blacksher
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Honorable James H. Anderson
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Washington, D.C. 20004
(202) 220-1100

2. *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

I represent the Commissioner of the Alabama Department of Corrections in this capital case presenting questions about the meaning of "clearly established" law under the Anti-Terrorism and Effective Death Penalty Act. The inmate argued that *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that a State must provide an indigent defendant whose mental health will be a significant factor at trial the assistance of a mental health expert who is a member of the defense team rather than neutral. In an opinion written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, the Supreme Court declined to resolve that question, concluding instead that it was clearly established that in this particular case the neutral expert did not meet the State's obligations under *Ake*. Justice Alito wrote a dissenting opinion, joined by the Chief Justice and Justices Thomas and Gorsuch. I continue to represent the State on remand in the Eleventh Circuit.

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3. *State v. Hubbard*, 43-CC-2014-000565.00 (Lee Cnty. Circuit Court). Decisions supplied, with the exception of court orders that remain under seal.

During the State's public corruption prosecution of former Alabama Speaker of the House Mike Hubbard, I defended the Attorney General's Office, state employees, and the prosecution team in year-long proceedings against various state and federal constitutional claims. In particular, I acted as lead counsel in a multi-day evidentiary hearing with related depositions and discovery matters. Judge Jacob Walker of the Lee County Circuit Court granted judgment in favor of the State on all constitutional challenges. After a jury trial in which I did not actively participate, Speaker Hubbard was found guilty of 12 felony violations of state ethics laws. That conviction is presently on appeal.

Other attorneys for the State:

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4. *Alabama Democratic Conference v. Attorney Gen.*, 838 F.3d 1057, 2016 WL 5389276 (11th Cir. Sept. 27, 2016); *Alabama Democratic Conference v. Broussard*, 541 Fed. Appx. 931 (11th Cir. 2013); *Alabama Democratic Conference v. Strange*, Case No. 5:11-cv-02449-JEO (N.D. Ala.).

From 2012 to 2017, I successfully defended a state campaign contribution restriction – the "PAC-to-PAC transfer ban" – from a constitutional challenge based on *Citizens*

United. The Alabama Legislature had unanimously enacted the law to ban certain transfers between political action committees after such transfers had been implicated in a federal bribery prosecution. After Magistrate Judge John Ott of the Northern District of Alabama held the law unconstitutional, I appealed the decision to the Eleventh Circuit, drafting all relevant briefs and delivering oral argument. A panel of the Eleventh Circuit—Judge Rosemary Barkett, Judge Adalberto Jordan, and Visiting Judge Harvey Schlesinger—reversed and remanded for additional proceedings. Following those proceedings, Judge Ott upheld the law, and I successfully defended that ruling in a second appeal. A new panel of the Eleventh Circuit –Judge Charles Wilson, Judge Beverly Martin, and Visiting Judge Patrick Higginbotham – agreed that the law is constitutional.

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5. *Alabama Dept. of Revenue v. CSX Transp., Inc*, 135 S. Ct. 1136 (2015).

I defended the legality of Alabama's sales and use tax on railroad diesel fuel against a challenge under the federal 4-R Act in this case before Supreme Court of the United States. The Supreme Court granted review to consider two questions: whether a State violates federal law when it taxes diesel fuel purchases made by a rail carrier while exempting similar purchases made by the rail carrier's competitors and, if so, whether that violation is eliminated when other tax provisions offset that treatment. The Supreme Court ruled unanimously for the Alabama Department of Revenue on the second question and 7-2 against the Department on question one. Justice Scalia wrote the Court's majority opinion, which was joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Kagan, and Sotomayor. Justice Thomas and Justice Ginsburg dissented. I

continue to represent the Department on remand.

Co-Counsel:

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6. *Planned Parenthood Southeast v. Strange*, 2:13cv405-MHT (M.D. Ala.).

From 2013 until 2016, I defended the constitutionality of a state law that imposed an "admitting privileges" requirement on abortion clinics. I took and defended depositions, handled written discovery, and briefed and argued temporary restraining order and summary judgment motions. During the multi-week bench trial that followed, I also handled various evidentiary issues, directed the trial team's strategy, and gave the closing argument. Judge Myron Thompson of the Middle District of Alabama ultimately held the law at issue to be unconstitutional: *Planned Parenthood v. Bentley*, 951 F.Supp.2d 1280 (M.D. Ala. 2013) (preliminary injunction); *Planned Parenthood v. Strange*, 9 F.Supp.3d 1272 (M.D. Ala. 2014) (summary judgment); *Planned Parenthood v. Strange*, 33 F.Supp.3d 1330 (M.D. Ala. 2014) (post-trial judgment). After the Supreme Court held a similar Texas law unconstitutional in *Whole Woman's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292 (2016), I withdrew the State's appeal of Judge Thompson's permanent injunction, ending the litigation.

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7. *Lane v. Franks*, 134 S. Ct. 2369 (2014).

I represented the Acting President of Central Alabama Community College in this personnel dispute before the Supreme Court of the United States. The dispute arose after a former state employee alleged that he was fired because he testified against a state legislator during a federal public corruption trial. The Supreme Court granted certiorari to consider whether the First Amendment protects an employee in such circumstances. After I took over representation in this case, the State confessed error and argued that the First Amendment allows a state employee to sue if he or she is terminated because he or she testified about public corruption. The State also argued that the state supervisor who fired the employee could not be held personally liable for damages because of qualified immunity. The Supreme Court unanimously adopted our position.

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8. *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015); *Alabama v. PCI Gaming Auth.*, 15 F. Supp.3d 1161 (M.D. Ala. 2014).

I represented the State of Alabama in this public nuisance suit filed to challenge gambling that the Attorney General had concluded violated the Indian Gaming Regulatory Act. I drafted and filed the complaint and amended complaint, and I briefed various motions, including the defendants' motion to dismiss. Chief Judge Keith Watkins of the Middle District of Alabama dismissed the amended complaint, and I then briefed and argued the State's appeal. The Eleventh Circuit – Judge Jill Pryor, Judge Stanley Marcus, and Visiting Judge David Ebel – affirmed.

Co-Counsel:

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(334) 834-6500

9. *Riley v. Joint Fiscal Comm. of Alabama Legislature*, 26 So. 3d 1150 (Ala. 2009); *Ex parte Riley*, 11 So. 3d 801 (Ala. 2008); *Joint Fiscal Comm. of Alabama Legislature v. Riley*, No. CV-08-900752 (Montgomery Cty. Circuit Court).

From 2008 through 2009, I represented the then-Governor of Alabama, Bob Riley, in litigation challenging the constitutionality of his item veto of a conditional appropriation in the general-fund appropriations bill for fiscal year 2009. I briefed motions to dismiss and summary judgment in state trial court (Hon. Truman Hobbs), which ruled against the Governor. We appealed twice to the Supreme Court of Alabama, and I drafted the briefs in that Court as well. In the first appeal, the Supreme Court of Alabama (Justices, Cobb, See, Lyons, Woodall, Smith, Stuart, Bolin, Parker, and Murdock) held the dispute was justiciable. In the second appeal, the Supreme Court of Alabama (Justices Cobb, Lyons, Woodall, Smith, Stuart, Bolin, Parker, Murdock, and Shaw) held that the Governor's item veto message did not satisfy state constitutional requirements and that the vetoed section of the general-fund appropriations bill was not itself unconstitutional.

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10. *United States v. McCray*, No. 2:05-cr-00531-KOB-TMP (N.D. Ala.); 280 Fed.Appx. 945 (2008).

From 2007 until 2009, I represented the defendant Richard Orlando McCray in this federal criminal case. The Eleventh Circuit appointed my firm to represent the defendant on appeal from a guilty plea, and we successfully argued that he had pled guilty only because the district judge misled him about his likely sentence during the guilty plea colloquy. Judges Stanley Birch, Joel Dubina, and Stanley Marcus vacated the conviction and remanded for further proceedings. I continued to represent Mr. McCray pro bono during his subsequent trial in front of Judge Karon Bowdre. The jury found Mr. McCray guilty, but we secured the minimum possible sentence.

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18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

    As the Solicitor General of Alabama, I have had a substantial role in supervising the drafting of Attorney General's Opinions, which resolve questions of state law for the benefit of local and state officials. These opinions can be found at https://www.ago.state.al.us/Opinions.

    In private practice, I often represented clients in civil litigation resolved by a settlement before trial. One such case was a multi-million dollar contract and unjust enrichment action filed by a former employee against my client, Amquip Crane Co. After discovery, summary judgment, and rulings on pre-trial motions, the case settled shortly before trial.

    In private practice, I also represented a number of businesses in responding to investigations conducted by state regulators. One such business was required to respond to investigative demands from the Attorneys General of New York, Colorado, Florida, and Alabama.

    I have never acted or registered as a lobbyist.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    I have never taught a course.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    If confirmed, I may seek to teach a law school course once or twice a year. I have no commitments or agreements to do so, and no other plans for outside activities.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       If confirmed, I will recuse in any litigation where I have ever played a role. I intend to recuse from any current or future case that challenges a government law or policy that I have previously defended. I also intend to recuse from any current or future cases in which I was involved in a previous iteration of the case involving a criminal defendant. This means, for example, that I will recuse from a future federal habeas petition filed by a state or federal prisoner who was prosecuted in a state court case in which I was, or appeared to be, involved. For a period of two years, I anticipate recusing in all cases where the Office of the Alabama Attorney General represents a party. If I directly own stock in any business, I will recuse from any litigation involving that business. I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I will carefully review and address any real or potential conflicts by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I had a substantial pro bono caseload when I was in private practice. I counseled and represented homeless men through a pro bono legal assistance program at a Birmingham homeless shelter. And I was often appointed to represent criminal defendants in federal court. I tried one appointed federal case to verdict: *United States v. McCray*, No. 2:05-cr-00531-KOB-TMP (N. D. Ala. 2008). I litigated four more on appeal: *United States v. Hamaker*, 303 Fed.Appx. 855 (11th Cir. Dec. 18, 2008); *United States v. Ghertler*, 605 F.3d 1256 (11th Cir. 2010); *Madaio v. Roden*, 375 Fed.Appx. 921 (11th Cir. April 20, 2010); *United States v. Whitworth*, 10-13473-A (May 17, 2011). (To the extent my firm received partial compensation under the Criminal Justice Act, it is my understanding that the firm used it to fund other pro bono activities.)

My position at the Attorney General's Office precludes pro bono work, Ala. Code § 36-15-9, but I have volunteered in other ways. For example, for the last several years, I have been a member of the state bar committee that determines whether applicants for the bar meet the requisite character and fitness requirements to practice law.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In December 2016, I sent a letter of interest to Senator Richard Shelby for one of the vacancies in the United States District Court for the Middle District of Alabama. At various points over 2017, I discussed my continuing interest in a judicial nomination with personnel from Senator Shelby's office, former Senator Luther Strange's office, and the White House Counsel's Office. On December 9, 2017, I received a call from Senator Shelby's Chief of Staff to schedule an interview. I

interviewed with Senator Shelby and former Senator Strange on December 11, 2017. On December 21, 2017, I was told that Senator Shelby had passed my name on to the White House Counsel's Office for consideration. Since that time I have been in touch with attorneys from the White House Counsel's Office and the Office of Legal Policy at the Department of Justice about my candidacy. On April 10, 2018, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TREVA THOMPSON, et al.	)	
	)	
Plaintiffs,	)	
	)	
	)	**Civil Action No.**
v.	)	**2:16-cv-783-WKW**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

MOTION TO DISMISS AND BRIEF IN SUPPORT

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INTRODUCTION

The Complaint challenges as unconstitutional a 1996 law that disenfranchises certain felons. It also alleges that the process for disenfranchised felons to re-gain the ballot is unconstitutional. Each of the Complaint's fifteen counts should be dismissed for failure to state a claim upon which relief can be granted.

The United States Constitution expressly approves of the right of a State to disenfranchise felons. "[T]he exclusion of felons from the vote has an affirmative sanction in [section] 2 of the Fourteenth Amendment," which requires that congressional apportionment include persons who are denied the right to vote "for participation in rebellion, or other crime." *Richardson v. Ramirez*, 418 U.S. 24, 54, 72 (1974). The Supreme Court has held that one part of the Constitution cannot prohibit what another expressly contemplates. Therefore, "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [section] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance." *Id.* at 54.

The Complaint cannot surmount the wall of precedent built on *Richardson*. The Complaint's first three counts about intentional discrimination and the Voting Rights Act are precluded by the Eleventh Circuit's en banc decision on Florida's disenfranchisement law in *Johnson v. Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). The Complaint's other counts are no more persuasive. A criminal record is an

"obvious" factor that "a State may take into consideration in determining the qualifications of voters." *Lassiter v. Northampton Cty. Bd. of Elect*ions, 360 U.S. 45, 51 (1959). "Courts have uniformly held that [felon disenfranchisement] provisions do not constitute bills of attainder or ex post facto laws under U.S. Const. Art. I, § 10, cl. 1, and that the provisions do not violate the First Amendment, the Eighth Amendment prohibition of cruel and unusual punishment, the Nineteenth Amendment, the Twenty-Fourth Amendment, or, in the absence of an intent to discriminate on the basis of race, the Fifteenth Amendment." Robin Miller, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th 31 § 2 (2006) (citations omitted).

In short, the Complaint is a plea to change settled constitutional law, not an effort to state a cognizable claim under the law as it presently exists. Plaintiffs are entitled to neither discovery nor an evidentiary hearing. The Complaint is due to be dismissed in its entirety.

BACKGROUND

As noted above, the Fourteenth Amendment expressly contemplates felon disenfranchisement. When it was ratified, "29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson*, 418 U.S. at 48. Today, thirteen States disenfranchise felons beyond the term of their

prison sentence.[1] And all but two States (Maine and Vermont) disenfranchise felons while they serve their prison sentence.

The practice of disenfranchising those convicted of certain crimes comes from the very first democracies. "In ancient Athens, the penalty for certain crimes was placement in a state of 'infamy,' which entailed the loss of those rights that enabled a citizen to participate in public affairs, such as the rights to vote, to attend assemblies, to make speeches, and to hold public office." *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006) (en banc) (citing Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and their Removal: A Comparative Study*, 59 J. Crim. L., Criminology & Police Sci. 347, 351 (1968)). "The Roman Republic also employed infamy as a penalty for those convicted of crimes involving moral turpitude." *Id.*

Felon disenfranchisement is based on the philosophy of republican government and theory of social compact. "[S]uch provisions are for the protection of the public by permitting only those who have lived up to certain minimum moral and legal standards (by not committing a crime classed as a felony) to exercise the hight privilege of participating in government by voting." *State ex rel. Barrett v. Sartorious*, 175 S.W.2d 787, 788 (Mo. 1943) (en banc). In the words of Judge Henry Friendly, "[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to

[1] These are Alabama, Arizona (ARIZ. REV. STAT. ANN. §§ 13-904, 16-101(A)(5)); Delaware (DEL. CONST. Art. V, § 2); Florida (FLA. CONST. Art. VI, § 4 and FLA. STAT. ANN. § 97.041(2)(b)); Iowa (IOWA CODE ANN. § 48A.6); Kentucky (KY. CONST. § 145); Maryland (MD. CODE ANN., Elec. § 3-102); Mississippi (MISS. CONST. Art. XII, § 241 and MISS. CODE ANN. § 23-15-11); Nebraska (NEB. CONST. Art. VI, § 2 and NEB. REV. STAT. § 32-313); Nevada (NEV. CONST. Art. II, § 1 and NEV. REV. STAT. § 293.055); Tennessee (TENN. CONST. Art. I, § 5 and TENN. CODE ANN. §§ 2-19-143, 40-20-112); Virginia (VA. CONST. Art. II, § 1 and VA. CODE ANN. § 24.2-101); Wyoming (WYO. STAT. ANN. §§ 6-10-106, 22-1-102(xxvi).

participate in further administering the [social] compact." *Green v. Bd. of Elections,* 380 F.2d 445, 451 (2d Cir. 1967). The Alabama Supreme Court has further explained that, like children or the insane, "[t]he presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship." *Washington v. State*, 75 Ala. 582, 585 (1884) (rejecting ex post facto challenge to 1875 Constitution).

Alabama's Constitution has always disenfranchised persons who have been convicted of certain crimes. The 1819 Constitution provided that those convicted of "bribery, perjury, forgery, or other high crimes or misdemeanors" lost their right to vote. ALA. CONST. of 1819, art. VI, § 5. The 1865 Alabama Constitution, when Alabama was under military rule, provided that "no person who shall have been convicted of bribery, forgery, perjury, or other high crime or misdemeanor which may be by law declared to disqualify him, shall be entitled to vote at any election in this State." ALA. CONST. of 1865, art. VIII, § 1. The 1868 Radical Republican Constitution denied the vote to "[t]hose who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, crime punishable by law with imprisonment in the penitentiary, or bribery." ALA. CONST. of 1868, art. VII, § 3. The 1875 Constitution provided that those "convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by

imprisonment in the penitentiary" should not be permitted to "register, vote or hold office." ALA. CONST. of 1875, art. VIII, § 3.

This provision changed again in 1901. The Supreme Court held in *Hunter v. Underwood*, 471 U.S. 222 (1985), that the delegates to Alabama's 1901 constitutional convention "expanded the list of enumerated crimes substantially" because they were "motivated by a desire to discriminate against blacks on account of race." *Id.* at 226, 233. Specifically, the 1901 Alabama Constitution expanded the list to include a host of *misdemeanors*: "treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude." ALA. CONST. art. VIII, § 182. The Court explained that the delegates "selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks." *Hunter*, 471 U.S. at 232. The delegates' racist intentions made the 1901 provision unconstitutional as applied to misdemeanors.

In 1995, approximately ten years after the Supreme Court's opinion in *Hunter*, the Alabama Legislature proposed a new constitutional amendment to replace the 1901 article on elections. Doc. 1 ¶ 118; Exhibit A (Act. No. 95-443). The People ratified it as Amendment 579 in 1996. Doc. 1 ¶ 118. Amendment 579

repealed and replaced the entire Article VIII of the 1901 Constitution, which originally consisted of 21 separate sections. *See* Exhibit A (Act. No. 95-443). It repealed provisions about poll taxes, ALA. CONST. art. VIII, §§ 178, 194 & 195, provisions that limited the vote to "male citizens," *id.* § 177, provisions that limited the vote to those older than 21, *id.* § 177, provisions that "protect[ed] against the evils of intoxicating liquors at elections," *id.* § 191, and many others. It also changed the criminal disenfranchisement provision by limiting disenfranchisement to felons (instead of all criminals) and eliminating the specifically enumerated list of supposedly "black" crimes in the 1901 provision. The new section provided in relevant part: "No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability."

Although the 1996 amendment is the focus of the Complaint, the Complaint conspicuously omits important publically-available and judicially-noticeable information about how this amendment was enacted. As House Bill 38, the amendment was passed 79 to 0 in the House and 27 to 0 in the Senate in 1995. *See* Exhibit B (House and Senate Journals). At least 9 black House members and 6 black Senators voted for the bill.[2] The bill was enacted as Act. No. 95-443, and was approved by the voters in the 1996 election by 75% of the vote. *See* Exhibit C.

[2] The black Representatives were Locy "Sonny" Baker, Lucius Black, Laura Hall, Andrew M. Hayden, Edward A. Maull, Lawrence McAdory, Warren A. Minnifield, Joseph Mitchell, and John Rogers. The black Senators were George Clay, Sundra Escott Russell, Charles D. Langford, Edward "E.B." McClain, Hank Sanders, and Roger Smitherman. *See* Ex. B. *See also infra* n. 7.

In 2012, this law was modified again. Specifically, the Legislature reenacted the entirety of Amendment 579 with an additional section to recognize the "right of individuals to vote by secret ballot" as "fundamental." *See* Exhibit D. (Act No. 2011-656). The voters approved this amendment as Amendment 865 to the Alabama Constitution.

By the time these amendments were ratified, the phrase "involving moral turpitude" had long been in common usage. As early as 1951, the United States Supreme Court had held that the phrase "involving moral turpitude" was not void for vagueness in a statute that required the deportation of aliens convicted of such crimes. *Jordan v. De George*, 341 U.S. 223, 230–31 (1951). And, for its part, Alabama law had provided since the nineteenth century that a trial witness's credibility "may be examined touching his conviction for a crime involving moral turpitude." ALA. CODE § 12-21-162(b). For that reason, "[t]he Supreme Court of Alabama ha[d] defined the term 'moral turpitude' on many occasions." *Ex parte McIntosh*, 443 So. 2d 1283, 1284 (Ala. 1983) (quoting C. Gamble, *McElroy's Alabama Evidence,* § 145.01(7) (3d ed. 1977)). A crime of moral turpitude is "immoral in itself, regardless of the fact that it is punished by law." *Id.* It "must be *mala in se* and not *mala prohibitu*m." *Id.* "The inherent nature of the offense itself, rather than the mere fact that such acts are made criminal offenses, determines whether any given offense involves moral turpitude." *Meriwether v. Crown Inv. Corp.*, 268 So. 2d 780, 787 (1972). Applying this standard, the Alabama courts have

held that certain crimes involve moral turpitude, such as murder and income tax evasion,[3] and that other crimes do not, such as bootlegging and trespass to land.[4]

Approximately ten years after the 1996 amendment, a felon sued the Secretary of State for removing him from a voter list based on a felony that did not involve moral turpitude. The Attorney General of Alabama intervened in the case, confessed judgment, and "acknowledged that [the plaintiff's] felony conviction—driving under the influence—is not a crime involving moral turpitude, and, therefore, that he was not barred from registering and voting by § 177(b)." *Chapman v. Gooden*, 974 So. 2d 972, 980 (Ala. 2007). The Alabama Supreme Court held that the Attorney General's concession was binding and mooted the case:

> Upon learning of this litigation, the attorney general intervened to assume control of the case, thereby eliminating any dispute regarding the duties of the secretary of state. When he joined this action on November 18, 2005, he brought with him the construction and application of § 177 advocated by the plaintiffs and made it binding on the defendants.

Id. at 988.

The Attorney General also issued an opinion about the proper definition of the term "moral turpitude," which was "sent to every board of registrars in the State, and the registrars were invited to seek the advice of the attorney general, if necessary, in determining whether a particular felony involved moral turpitude." *Id.* at 980. *See also* Doc. 1 ¶ 24. The Attorney General's Opinion No. 2005-092, (available at 2005 WL 1121853 (March 18, 2005)), explains that an "act involving

[3] *Johnson v. State*, 91 So. 2d 476 (Ala. 1956) (murder); *Meriwether*, 268 So. 2d 780 (Ala. 1972) (income tax evasion)
[4] *Wiggins v. State*, 173 So. 890 (Ala. Ct. App. 1937) (bootlegging); *United States Lumber & Cotton Co. v. Cole*, 81 So. 664 (Ala. 1919) (trespass).

moral turpitude is immoral in itself, regardless of the fact that it is punished by law." Moreover, "while a crime is not required to have fraud as an element to be considered a crime involving moral turpitude, the presence of fraud in a crime ensures a finding of moral turpitude." The opinion also identifies specific felonies that are, and are not, crimes of moral turpitude under Alabama law.

In 2007 and 2008, the Administrative Office of Courts issued memoranda concerning the definition of moral turpitude at the request of the Governor for the purposes of fulfilling his obligations as a special master in *United States v. State of Alabama*, No. 2:06-cv-392-WKW (M.D. Ala.).[5] *See* Doc. 1 ¶ 32; Exhibit E. The Help America Vote Act of 2002 directs States to remove disenfranchised felons from their lists of those eligible to vote in federal elections. *See* Pub. L. No. 107–252, 116 Stat. 1666 (Oct. 29, 2002) (codified at 42 U.S.C. § 15483 (a)(2)(A)(ii)(I)). "As a part of setting up the electronic voting system required by [the Help America Vote Act], the Governor needed a listing of the felonies that involved moral turpitude under Alabama law in order to specify which felony convictions should be supplied by [the electronic database management company] to the boards of registrars." Exhibit E (2008 Memo at 3). In 2007, the AOC provided a list of specific felonies by statute, but this list was limited to "felony offenses which an Alabama appellate court opinion, a state statute or an opinion of the Alabama Attorney General has specifically by name determined to involve moral turpitude." Exhibit E (2007 memo

[5] The Complaint refers to these memoranda as "Exhibit A," but they were not attached to the Complaint as filed. They are attached to this brief as documents mentioned in the complaint and susceptible to judicial notice. *See* Exhibit E.

at 5). The AOC distributed its list to local officials, and that list has been incorporated into the Alabama Law Institute's Election Handbook. Doc. 1 ¶ 35-36.

Alabama law establishes two procedures that are relevant for the purposes of this motion to dismiss. First, it provides for judicial review of the decision of a board of registrars to deny voting registration—an appeal to the probate court, circuit court, and Alabama Supreme Court. *See* ALA. CODE § 17-3-55. Second, it provides an expedited process for re-enfranchising certain felons. The Board of Pardons and Paroles "shall" grant a "Certificate of Eligibility to Register to Vote" to an otherwise disenfranchised felon if that felon satisfies four conditions: (1) lost his right to vote, (2) has no pending criminal felony charges, (3) paid all fines, court costs, fees, and victim restitution, and (4) has completed his sentence, including probation or parole. *See* ALA. CODE § 15-22-36.1(a)&(b). Felons who committed the following crimes are not eligible for a CERV: "impeachment, murder, rape in any degree, sodomy in any degree, sexual abuse in any degree, incest, sexual torture, enticing a child to enter a vehicle for immoral purposes, soliciting a child by computer, production of obscene matter involving a minor, production of obscene matter, parents or guardians permitting children to engage in obscene matter, possession of obscene matter, possession with intent to distribute child pornography, or treason." *Id.* § 15-22-36.1(g). Those felons can become eligible to vote by receiving a pardon with the restoration of rights pursuant to Alabama Code § 15-22-36.

STANDARD OF REVIEW

The relevant legal standards favor dismissal here. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified—and substantially tightened—the standard for evaluating the sufficiency of a complaint. The Federal Rules of Civil Procedure require a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under prior doctrine, even a "'wholly conclusory'" claim would survive a motion to dismiss if the pleadings "'left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 561). Now, by contrast, a complaint must go beyond that mere possibility and "'state a claim to relief that is *plausible* on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570 (emphasis added)).

Courts applying the facial-plausibility standard must adhere to "[t]wo working principles." *Iqbal*, 556 U.S. at 678. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. "A claim has facial plausibility," the Court explained, only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

Courts should consider not just the complaint itself but also "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). *See also* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."). Ultimately, when "the well-pleaded facts do not permit the court to infer more than the mere *possibility* of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2) (emphasis added)).

ARGUMENT

The Court should dismiss each and every count of the complaint for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). But there are also important jurisdictional principles that should guide this Court's judgment. This Court does not have jurisdiction to instruct state officers on the meaning of state law, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), and this Court cannot overrule the Alabama courts on state law issues, *Eerie Railroad Co. v. Thompkins*, 304 U.S. 64, 71 (1938). But much of the Complaint proceeds on the notion that state officers and state courts are misapplying state law. For example, the Complaint proceeds as if theft is *not* a crime of moral turpitude because it is not listed in a statute, even though the Attorney General, the Administrative Office of Courts, the Madison County Board of Registrars, and the Alabama Supreme Court[6]

[6] *See Stahlman v. Griffith*, 456 So. 2d 287 (Ala. 1984) ("settled law" that "offense of theft is a crime involving moral turpitude").

have determined that it is a crime of moral turpitude. Doc. 1 ¶ 45. If Plaintiffs believe that these state officers or state precedents are wrong, then they are free to sue in state court. But, for the purposes of evaluating the constitutional claims in this case, this Court should accept that state law means what state officers and state courts say it means.

I. The Complaint does not plead a plausible claim of intentional racial discrimination under the Fourteenth or Fifteenth Amendment (Count 1 & Count 2).

The First and Second Counts attack Alabama's felon disenfranchisement provision as racially motivated, but the Complaint does not contain sufficient factual allegations to state a plausible claim of discriminatory purpose. "Discriminatory purpose," in this context, "implies more than intent as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' . . . its adverse effects upon an identifiable group." *Id.*

This intent claim has to surmount a very high bar. Sufficiently alleging discriminatory purpose is hard enough where the decisionmaker is a single government official. *See Iqbal*, 556 U.S. at 680–83. But as the Supreme Court has explained, plaintiffs face even more "difficulties" where the decisionmaker is a legislative body as large as the Alabama Legislature. *Hunter v. Underwood*, 471 U.S. at 228; *see also Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001) (evidence of racial motivation of "one member of a three-member majority"

does not give rise to liability). It is even harder still to state a plausible claim of discriminatory intent when the decisionmaker is as large as the entire statewide electorate. Moreover, it gets even more difficult to state a plausible claim of discriminatory intent where there are obvious legitimate reasons supporting the government's decision. *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987); *Personnel Adm'r of Mass.*, 442 U.S. at 275. And numerous courts have recognized that a "state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies." *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). For the reasons explained below, Plaintiffs cannot clear these hurdles.

A. Plaintiffs have not plausibly alleged that the Legislature and voters passed Amendment 579 or Amendment 865 for a racial purpose.

It is implausible that the Legislature proposed, and the voters ratified, constitutional amendments in 1996 and 2012 for racist reasons. The primary effect of Amendment 579 in 1996 was to *expand* the voting rights recognized by the Alabama Constitution by *repealing* provisions that established poll taxes, that limited the right to vote to males over the age of 21, and that disenfranchised persons convicted of misdemeanor offenses. And that is precisely how the Legislature described the amendment to voters on the ballot:

> Proposing an amendment of the Constitution of Alabama of 1901, repealing Article VIII, relating to suffrage and elections. The amendment would repeal the existing Article VIII, and provide that, in accordance with constitutional requirements, suffrage would extend to

> residents who are citizens, 18 years of age or older who have not been convicted of a felony involving moral turpitude.

Exhibit A (Act. No. 95-443) (setting forth ballot language). The vote in both houses of the Legislature was unanimous. *See* Ex. B (Journals). The amendment was supported by at least 15 black legislators[7] and, presumably, many more black voters. Moreover, this same amendment—with an additional protection for the secret ballot—was reenacted in its entirety in 2012. *See* Ex. D.

Perhaps because of this innocuous history, the Complaint contains almost no allegations about events contemporaneous with the passage of Amendment 579 in 1996 or any mention at all of Amendment 865's passage in 2012. There are no allegations of racist floor speeches or racial overtones during the campaign to enact these amendments. The Complaint says that, in 1995, "Governor James revived the chain gang" and that "the State Legislature must have been keenly aware" of the racial history of this method of punishment. Doc. 1 ¶ 122. But the Complaint never links the Governor's decision to bring back the chain gang with the Legislature's and public's decision to enact Amendment 579. Proposed constitutional amendments like Amendment 579 are controlled entirely by the Legislature; they

[7] The black Representatives were Locy "Sonny" Baker, Lucius Black, Laura Hall, Andrew M. Hayden, Edward A. Maull, Lawrence McAdory, Warren A. Minnifield, Joseph Mitchell, and John Rogers. The black Senators were George Clay, Sundra Escott Russell, Charles D. Langford, Edward "E.B." McClain, Hank Sanders, and Roger Smitherman. *See* Ex. B (Journals). The Court can take judicial notice of the race of these legislators under Federal Rule of Evidence 201. *See* Ex. F (list of legislators with black legislators identified by "B") *available at* http://www.legislature.state.al.us/aliswww/history/past_legislators.html (last visited Nov. 16, 2016). This Court's previous cases also establish the race of five of these legislators. *Kelley v. Bennett*, 96 F. Supp. 2d 1301, 1318–19 (M.D. Ala. 2000) (Locy Baker); *Thompson v. Smith,* 52 F. Supp. 2d 1364, 1366 n.5 (M.D. Ala. 1999) (Andrew Hayden); *Buskey v. Oliver*, 565 F. Supp. 1473, 1474 (M.D. Ala. 1983) (Charles Langford); *Ala. Legis. Black Caucus v. Ala.*, 989 F. Supp. 2d 1227, 1246 (M.D. Ala. 2013) (Hank Sanders); *Id*. at 1248 (Roger Smitherman).

are not presented for the Governor's signature or veto. *See* ALA. CONST. art. XVIII, § 284. And the chain gang has nothing to do with voting in any event.

Instead of addressing events in 1996 and 2012, the Complaint suggests that the intent that matters is not the intent of legislators and voters about Amendment 579 and Amendment 865, but the intent behind the 1901 provision that Amendment 579 repealed. Specifically, the Complaint alleges that the "only legislative history on the intent behind the [1996] adoption of the 'involving moral turpitude' clause is the 1901 legislative history." Doc. 1 ¶ 164. But Plaintiffs cannot rely on the history of the 1901 provision to support an inference of racial intent about the amendment that repealed and replaced it. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion by Stewart, J.). "Unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey*, 481 U.S. at 298 n.20.

The en banc Eleventh Circuit expressly rejected this guilt-by-history argument when addressing the constitutionality of Florida's felon disenfranchisement law in *Johnson*. There, the "essence of the plaintiffs' Equal Protection claim [was] that racial animus motivated the adoption of Florida's disenfranchisement law in 1868 and this animus remains legally operative today despite the re-enactment in 1968." 405 F.3d at 1223. The Court assumed that the 1868 provision was racially motivated. But the Court nonetheless held that the legislative reenactment in 1968 "eliminated any taint from the allegedly

discriminatory 1868 provision." *Id.* at 1224. In doing so, the Court expressly adopted the reasoning of the Fifth Circuit in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1988), which held that Mississippi's 1968 reenactment of its felon disenfranchisement provision "removed the discriminatory taint associated with the original version." *Johnson*, 405 F.3d at 1224 (quoting *Cotton*, 157 F.3d at 391).

Plaintiffs' claim here is even weaker than the one that the Eleventh Circuit rejected in *Johnson*. The Court in *Johnson* found it important that the provision "narrowed the class of disenfranchised individuals to those convicted of felonies." *Id.* The provision here narrows the class even further to those convicted of a class of "felonies involving moral turpitude." The Court in *Johnson* found it important that Florida's "voters approved the new Constitution" in 1968, even though 1968 was still a time of race-based voting suppression. Here, black legislators voted for the 1996 amendment, which passed unanimously. And the voters approved Alabama's new provisions in 1996 and 2012, long after black voters were registering and voting at rates equivalent to white voters. *See Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2628 (2013) ("During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers."). Finally, the dissenting judge in *Johnson* conceded that the plaintiffs' claim would be weaker if Florida's amendment had substantively changed the category of offenses and "remov[ed] 'black crimes' from the disenfranchising list." 405 F.3d at 1246 (Barkett, J., dissenting). Here, of course, Alabama's 1996 amendment did exactly

that by eliminating the laundry list of purported "black crimes" that the Supreme Court identified as problematic in *Hunter*. A straightforward application of *Johnson* dooms this intentional discrimination claim.

Plaintiffs' claim is also similar to the claim that the Second Circuit rejected in *Hayden v. Paterson,* 594 F.3d 150 (2d Cir. 2010). In *Hayden*, the district court dismissed an equal protection challenge to New York's 1894 felon disenfranchisement law, and the Second Circuit affirmed. "The issue" before the Court was "whether the enactment of the 1894 constitutional provision, albeit preceded by earlier provisions that plausibly admit of racist origins, can support an equal protection claim." *Id.* at 165. Applying *Iqbal*, the Court held that, although "we find plaintiffs' allegations sufficient with regard to the 1821, 1846, and 1874 constitutional provisions, we find that plaintiffs fail to allege any non-conclusory facts to support a finding of discriminatory intent as to the 1894 provision or subsequent statutory enactments." *Id.* at 161. The Court noted, among other things, that "the 1894 amendment was not only deliberative, but was also substantive in scope." *Id.* at 167. Citing the history and widespread practice of disenfranchising felons, the Court held that an "'obvious alternative explanation' exists to support the propriety of the 1894 enactment." *Id.* at 167 (quoting *Iqbal*, 129 S.Ct. at 1951–52). "[T]he New York Constitution's requirement that the legislature pass felon disenfranchisement laws is based on the obvious, noninvidious purpose of disenfranchising felons, not Blacks or Latinos." *Id.* at 168.

B. The phrase "involving moral turpitude" does not give rise to an inference of racial intent.

Despite the innocuous history of Amendment 579 and the clarity of *Johnson*, Plaintiffs suggest that the Legislature's use of "involving moral turpitude" is itself sufficient to state a plausible claim of racial intent. But contrary to the conclusory allegations of the Complaint—allegations that need not be believed under *Iqbal*—there is nothing suspect about the Legislature's decision to limit disenfranchisement to felonies involving "moral turpitude" instead of disenfranchising *all* felons.

The Legislature was not writing on a blank slate when it invoked "moral turpitude" as a way to distinguish between crimes. As noted above, before Alabama adopted the Federal Rules of Evidence, Alabama law provided that a witness could be impeached with evidence of a crime involving moral turpitude. Texas and California still follow this rule of evidence.[8] Similarly, Model Code of Professional Responsibility's Disciplinary Rule 1-102(A)(3), requires the Bar to sanction a lawyer who engages in "illegal conduct involving moral turpitude."[9] The standard is used in other professional licensing schemes as well.[10] And federal immigration law requires the deportation of aliens who commit crimes involving moral turpitude. *See*

[8] Tex. R. Evid. 609(a) ("Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if . . . the crime was a felony or involved moral turpitude, regardless of punishment"); *People v. Pearson*, 297 P.3d 793, 830 (Cal. 2013) ("evidence of nonfelonious conduct reflecting moral turpitude may be admitted for purposes of impeachment").

[9] *See, e.g., Md. State Bar Ass'n v. Agnew*, 271 Md. 543, 551 (1974) (Vice President Spiro Agnew disciplined for crime involving moral turpitude); *In re Grant*, 317 P.3d 612, 612 (Cal. 2014) (affirming disbarment for possessing child pornography as crime of moral turpitude).

[10] *See* ALA. CODE § 34–24–217(a)(3) (physical therapist license may be suspended for crime of moral turpitude); *Oltman v. Maryland State Bd. of Physicians*, 875 A.2d 200, 212 (Md. Ct. Spec. App. 2005) (physician's assistant license revoked for crime of moral turpitude).

8 U.S.C. § 1227(a)(2)(A)(ii) (2006) ("[A]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude ... is deportable."). Accordingly, there are scores of federal and state cases defining and applying "moral turpitude." *See, e.g., Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002). Exhibit G is a list of the many places where "moral turpitude" is used in the Alabama Code. In short, the Legislature used a well-established term of art to distinguish between disqualifying and other felonies.

Plaintiffs are also wrong to suggest that the Supreme Court's decision in *Hunter* casts doubt on the use of "moral turpitude" as a term of art. *Hunter* was about the 1901 Convention's decision to expand disenfranchisement to *misdemeanor* offenses, not about the use of the phrase "involving moral turpitude." The Eleventh Circuit held that the 1901 disenfranchisement provision "violates on account of race the fourteenth amendment *with respect to those convicted of crimes not punishable by imprisonment in the penitentiary*." *Underwood v. Hunter*, 730 F.2d 614, 621 (11th Cir. 1984) (emphasis added). The Eleventh Circuit did not question the continued application of the law to those convicted of felonies—*i.e.* crimes punishable by imprisonment.

The Supreme Court affirmed the Eleventh Circuit's reasoning about misdemeanors. It explained that Alabama's earlier constitutions had limited disenfranchisement to "largely, if not entirely, felonies." *Hunter*, 471 U.S. at 226. But the "1901 convention, expanded the list of enumerated crimes substantially" such that the "enumerated crimes contain within them many misdemeanors." *Id.*

On top of the new crimes specifically listed in the 1901 amendment, the Court noted that a "new catchall provision covering 'any . . . crime involving moral turpitude'" was added to "the general felon provision." *Id.* The effect of this additional provision was to differentiate between the misdemeanors that would lead to disenfranchisement: "[v]arious minor nonfelony offenses" would result in disenfranchisement "while more serious nonfelony offenses" would not be disenfranchising "because they are neither enumerated in [the law] nor considered crimes involving moral turpitude." *Id.* at 226–27.

Because *Hunter* was about disenfranchising misdemeanants, neither the Eleventh Circuit nor the Supreme Court addressed the use of moral turpitude to distinguish between felonies. Instead, the Supreme Court expressly declined to address whether a provision addressed to "felonies and moral turpitude" would be "acceptable bases for denying the franchise." *Id.* at 233.

* * *

The Complaint does not plausibly allege a racist intent behind this law. To the extent the Complaint alleges anything at all, it makes the same kind of history-based allegations that the en banc Eleventh Circuit rejected in *Johnson*. But there are quite plainly "more likely explanations" for this law's passage than the purposeful discrimination that motivated the delegates in 1901. *Iqbal*, 556 U.S. at 681. The 1996 amendment repealed a host of racist and unconstitutional restrictions on voting. It was passed by the Legislature without a single dissenting vote and by public referendum. And it had the affirmative support of black

legislators. It was then reenacted in 2012, with an additional provision about the secret ballot. This intentional discrimination claim should be dismissed.

II. Plaintiffs have no claim under Section Two of the Voting Rights Act (Count 3).

The Third Count brings two types of claims under Section Two of the Voting Rights Act. Doc. 1 ¶ 169–72. It alleges a "results" claim that, "[u]nder the totality of the circumstances," the felon disenfranchisement provision "results in racial discrimination in voting because it denies black voters an equal opportunity to participate effectively in the political process." Doc. 1 ¶ 171. It also alleges an "intent" claim that the felon disenfranchisement provision "purposefully denies black voters an equal opportunity to participate in the political process." Doc. 1 ¶ 172.

The results claim fails for two reasons.

First and most importantly, the en banc Eleventh Circuit in *Johnson* held that felon disenfranchisement laws cannot be challenged under Section Two. Because *Richardson* holds that the Fourteen Amendment expressly authorizes States to disenfranchise felons, the Eleventh Circuit reasoned that "applying Section Two of the Voting Rights Act to felon disenfranchisement provisions raises grave constitutional concerns." *Johnson*, 405 F.3d at 1234. Moreover, based on the history of Section Two, the Court concluded that "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." *Id.* at 1232. The Court joined several other circuits in holding that felon disenfranchisement cannot be challenged under Section Two. *Id.* at 1227.

Second, even if the results test applied, allegations about racial disparities in the criminal justice system are insufficient to show that disenfranchising felons based on their conviction abridges the right to vote "on account of race or color." *Id.* at 1235 (Tjoflat, J., concurring). Instead, "something more than a mere showing of disparate effect is essential to a prima facie vote-denial case." *Id.* at 1238. Ultimately, a vote-denial claim requires "a causation requirement" that links the denial to race. *Id.* In the Ninth Circuit, which appears to be the only circuit to allow a Section Two claim in this circumstance, a plaintiff "bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by intentional discrimination." *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc). Here, the Complaint alleges that "Alabama prosecutes and convicts its black citizens at substantially higher rates than its white citizens." Doc. 1 ¶ 135. But, like the failing plaintiffs in *Johnson* and *Gregoire*, Plaintiffs do not allege "a single showing of contemporary race bias that ostensibly is producing" this disparate impact in Alabama's criminal justice system. *Johnson*, 405 F.3d at 1239 (Tjoflat, J., concurring). Accordingly, for the reasons explained in Judge Tjoflat's concurrence in *Johnson* and the Ninth Circuit's opinion in *Gregoire*, the results claim would fail even if Section Two applied to felon disenfranchisement.

The intent claim fails for all the reasons explained above. The Complaint does not plausibly allege that the Legislature and voters intended to discriminate

against black people when they enacted this provision in 1996 and again in 2012. And Section Two does not apply in any event.

III. Plaintiffs have not stated a claim for a violation of the Equal Protection Clause or First Amendment (Counts 4, 5, 6, 7, 9 & 10).

The Supreme Court rejected non-race-related attacks on felon disenfranchisement in *Richardson*. There, the Court rejected arguments that equal-protection and first-amendment precedents recognizing the fundamental right to vote "require us to invalidate the disenfranchisement of felons." *Richardson v. Ramirez*, 418 U.S. at 54. Instead, based on the Fourteenth Amendment's text and history, the Court held that "the exclusion of felons from the vote has an affirmative sanction in [section] 2 of the Fourteenth Amendment." *Id.* "We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [section] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court." *Id.*

In an attempt to get around *Richardson*, Plaintiffs assert four overlapping legal theories under the Fourteenth and First Amendments. First, in Count 4 and Count 5, they ask this Court to extend the Supreme Court's fundamental rights jurisprudence to the context of felon-disenfranchisement—which is exactly what the Supreme Court declined to do in *Richardson*. *See* Doc. 1 ¶¶ 174–91. Second, in Count 6 and Count 7, they allege that Alabama law "imposes an unconstitutional

burden on those qualified to vote" because "a reasonable person cannot determine whether her felony conviction 'involves moral turpitude'" and registrars may "improperly determine[] that a voter applicant's crime is disqualifying." Doc. 1 ¶¶ 197–207. Third, in Count 9, they argue that Alabama law is void for vagueness. Doc. 1 ¶¶ 217–25. Fourth, in Count 6 and Count 10, they argue that Alabama law "cannot withstand even rational basis scrutiny" and purportedly "allows for arbitrary disenfranchisement." Doc. 1 ¶¶ 228–31. We address each legal theory in turn.

A. *Richardson* clearly forecloses Count 4 and Count 5.

Count 4 and Count 5 of the Complaint are clearly and directly foreclosed by *Richardson*.

Citing *Kramer* and its progeny, Count 4 argues that a disenfranchised felon's right to vote is "fundamental" under the Equal Protection Clause such that the state must show a compelling interest and narrow tailoring in order to restrict it. *See* Doc. 1 ¶¶ 174–75 (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969)). This is exactly the same argument that the Supreme Court rejected in *Richardson*. Like Plaintiffs here, the plaintiffs in *Richardson* "rel[ied] on such cases as *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), *Kramer v. Union Free School District* . . . that a State must show a 'compelling state interest' to justify exclusion of ex-felons from the franchise." *Richardson*, 418 U.S. at 54. But the Court held that this line of cases did not apply because the "express language of

[section] 2 . . . is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court." *Id.* *See also Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir. 1981) ("The decision in *Richardson* is generally recognized as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime."), *cert. granted, judgment vacated on mootness grounds*, 454 U.S. 807 (1981); *Owens v. Barnes,* 711 F.2d 25, 27 (3d Cir. 1983) ("Plaintiff's argument fails because the right of convicted felons to vote is not 'fundamental.' That was precisely the argument rejected in *Richardson*.").

Count 5 adds the First Amendment to this mix, but a citation to the First Amendment does nothing to improve the argument. The fundamental rights analysis that the Supreme Court held *not* to apply to felons in *Richardson* is based jointly on the Fourteenth and First Amendment. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 786 n. 7 (1983) (discussing "'fundamental rights' strand of equal protection analysis" based on "First and Fourteenth Amendment rights"). Moreover, to recognize the fundamental right of felons to vote under the First Amendment, "the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment also prohibits disenfranchisement under other amendments" and "that the Supreme Court's declaration of the facial validity of felon disenfranchisement laws in *Richardson v. Ramirez* was based only of the fortuity that the plaintiffs therein did not make their arguments under different sections of the Constitution." *Farrakhan v. Locke*, 987 F.

Supp. 1304, 1314 (E.D. Wash. 1997) *rev'd in part on other grounds*, 338 F.3d 1009 (9th Cir. 2003). In fact, the existence of the Fourteenth Amendment—which expressly allows felon disenfranchisement—is the only reason the First Amendment applies to the States to begin with. *See e.g.*, *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938). For these reasons, "it is clear that the First Amendment does not guarantee felons the right to vote." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) *aff'd on other grounds*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

To try to evade *Richardson*, Plaintiffs argue that the right reading of the Fourteenth Amendment "is to limit Section 2's affirmative sanction to crimes that are meaningfully connected to the political act of voting such as treason, bribery, or perjury." Doc. 1 ¶ 179. In the alternative, Plaintiffs argue that Section 2's reference to "'other crime' must be restricted to common law felonies and/or particularly serious crimes." Doc. 1 ¶ 183. As Justice O'Connor explained when she was sitting with the Ninth Circuit in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), there are three problems with this argument.[11] This "interpretation of Section 2's 'other crime' provision . . . is [1] in extreme tension with *Richardson*, [2] contrary to the phrase's plain meaning and its past and contemporary usage, and [3] belied by the Fourteenth Amendment's history." *Id.* at 1078.

First, *Richardson* did not recognize any limitation on the State's right to disqualify felons. *Id.* at 1074. The Court in *Richardson* expressly said that "the exclusion *of felons* from the vote has an affirmative sanction in [section] 2 of the

[11] The Court should also note that these proposals would raise the same definitional problems that the Plaintiffs contend are unacceptable in their vagueness challenge to the phrase "moral turpitude."

Fourteenth Amendment." *Richardson*, 418 U.S. at 54 (emphasis added). The holding of the Court was that California may "exclude from the franchise *convicted felons* who have completed their sentences." *Id.* at 56 (emphasis added). Moreover, the plaintiffs in *Richardson* had not been convicted of "treason, bribery, or perjury" or only common-law felonies. They were disenfranchised because of robbery, heroin possession, and forgery. *Id.* at 32 n.9. Heroin possession is obviously not a common law felony. In short, it is impossible to read *Richardson* as Plaintiffs suggest.

Second, even if this were an open question, Plaintiffs' reading of the Fourteenth Amendment makes no textual sense. The Fourteenth Amendment addresses disenfranchisement for "participation in rebellion, or other crime." As a matter of plain text, "[t]he word 'crime' of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony." *Kentucky v. Dennison*, 65 U.S. 66, 99 (1860). As Justice O'Connor explained for the Ninth Circuit, "[w]hile a litigant could use [certain dictionary] definitions to support the proposition that the word 'crime' in Section 2 refers only to serious crimes or felonies (such that misdemeanors would not fit within the definition), that is not plaintiffs' argument." *Harvey*, 605 F.3d at 1074. Instead, "[e]ven if we were to assume arguendo that Section 2 is limited to serious crimes or felonies (as plaintiffs' definitions suggest), a far better reference point for determining whether a crime is serious is to look at how the crime is designated by the modern-day legislature that proscribed it, rather than indulging the anachronisms of the common law." *Id.* Here, of course, Alabama has

disenfranchised only persons who have committed *felonies* and, even then, only a particularly egregious class of those.[12]

Third, again assuming an open question, Plaintiffs' proposal finds no support in history. Plaintiffs note that the Reconstruction Acts imposed as a condition of reentry to the Union that Alabama and other States limit disenfranchisement to punishment "for such crimes as are now felonies at common law." Doc. 1 ¶ 185. But "[t]he Reconstruction Act's reference to felonies at common law only shows that when the 39th Congress meant to specify felonies at common law, it was quite capable of using that phrase." *Harvey*, 605 F.3d at 1077. "Simply because the Fourteenth Amendment does not itself prohibit States from enacting a broad array of felon disenfranchisement schemes does not mean that Congress cannot do so through legislation," such as the Reconstruction Acts. *Id.* "That Congress used the phrase 'other crime' in Section 2, while specifying 'felony at common law' in a later act, clearly indicates that the two phrases have different meanings and Congress was capable of using each when it intended to do so." *Id.*

B. The law does not unconstitutionally burden the rights of those who have *not* been convicted of felonies involving moral turpitude (Count 6 & Count 7).

Count 6 and Count 7 are brought by plaintiffs who purportedly have *not* been convicted of felonies involving moral turpitude but "who cannot be legally certain

[12] Plaintiffs also suggest that Alabama's disenfranchisement provision should be construed to reach only Class A felonies. Complaint ¶187. To the extent this is an argument about how state law should be interpreted, Plaintiffs cannot raise it in this federal lawsuit against state officers. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 123. To the extent this is an argument about what the Constitution allows, the historical dividing line is between felonies and misdemeanors. For the purposes of disenfranchisement, there is no constitutionally relevant dividing line between Class B and Class A felonies.

that their convictions are not disqualifying." *See* Doc. 1 ¶¶ 44, 57, 193, 207.[13] The Complaint alleges that "Alabama citizens who have not been convicted of felonies involving moral turpitude are entitled to vote under Alabama law and the Fourteenth Amendment protects that right." Doc. 1 ¶ 193. Even if that were true, the felon disenfranchisement provision does not restrict the right of these persons to vote. By its terms, the provision does not apply to these persons at all.

Plaintiffs erroneously argue that a supposedly unconstitutional "burden" arises, not from the felon disenfranchisement law itself, but from the "federal and state voter registration forms." Doc. 1 ¶ 196. These forms require a voter to "sign under penalty of perjury that they have not been convicted of a felony involving moral turpitude' (federal form) or a 'disqualifying crime' (state form)." Doc. 1 ¶ 196. Plaintiffs suggest that "[a] reasonable person cannot determine whether her felony conviction 'involves moral turpitude' or is 'disqualifying' under state law," Doc. 1 ¶ 197, and the Plaintiffs themselves are "uncertain" or "not sure" about whether their convictions are disqualifying, Doc. 1 ¶ 44, 46.

There are at least five problems with this argument.

First, this supposed burden on *eligible* voters is based on the registration forms, not the felon disenfranchisement provision. But Plaintiffs have not challenged the forms or sought to enjoin their use. *See* Doc. 1 at 56–58. They also have not sued the federal entity that promulgates and maintains the federal form.

[13] The Complaint purports to bring these claims on behalf of all Plaintiffs, but the only plaintiff who can rightly bring this claim—because she has not been convicted of a crime involving moral turpitude—is Plaintiff Corley. *See* Doc. 1 ¶44 (Corley informed by the Board of Pardons and Paroles that her convictions are not disqualifying).

Second, the forms impose this burden—to the extent it exists—only on persons who have been convicted of a felony. Plaintiffs do not assert, and could not plausibly assert, that a *non*-felon would have difficulty determining his or her eligibility to vote. But, because of *Richardson*, felons do not have a protectable constitutional right to vote. States may constitutionally "exclude from the franchise convicted felons who have completed their sentences." *Richardson*, 418 U.S. at 56. It would be passing strange for the Constitution to allow States to *deny* all felons the right to vote outright but, at the same time, prohibit a State from *burdening* a felon's non-existing right to vote by asking her to fill out a supposedly ambiguous form. Instead, the upshot of *Richardson* is that a State can constitutionally require a felon to jump through any hoop that is rationally related to a legitimate government interest. *See Shepherd*, 575 F.2d at 1114–15. Obviously, it is rational to require someone registering to vote to aver that they are, in fact, eligible to vote.

Third, if felons had a fundamental right to vote—and they do not under *Richardson*—the forms pose a minimal burden on that right. Although the forms may require Plaintiffs to investigate whether their felony convictions are disqualifying, Plaintiffs are not penalized if they turn out to be incorrect. Perjury requires a showing that the person "sw[o]re falsely," ALA. CODE § 13A-10-101(a), which is defined as making a statement that "the declarant does not believe to be true," *id.* § 13A-10-100(b)(1). Voting offenses similarly require willfulness and knowledge. *See* ALA. CODE § 17-17-8, -36, -46. *See also Gordon v. State*, 52 Ala. 308, 310 (1875**)** ("Illegal voting, when it is supposed to arise from the want of legal

qualifications, is dependent on the voter's knowledge of the particular facts which make up the qualification."). The Complaint does not allege that anyone has been, or ever will be, prosecuted for registering to vote on the good-faith belief that his or her felony is not disqualifying. *See Thiess v. State Admin. Bd. of Election Laws, State of Md.*, 387 F. Supp. 1038, 1043 (D. Md. 1974) (three-judge court) (rejecting similar constitutional claim against felon disenfranchisement law because "there is no basis for concluding that any ex-convict who merely attempts to register will put himself in jeopardy of prosecution").

Fourth, again assuming a fundamental right that does not exist, the burden on that right would be amply supported by "the State's regulatory interests." *Burdick v. Takushi*, 504 U.S. 428 (1992) (quoting *Anderson*, 460 U.S. at 788). "'[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Id.* at 433. The forms simply require voters to affirm that they are *eligible* to vote when they *register* to vote. Federal law expressly recognizes the importance of these interests. Under the National Voter Registration Act, a state motor voter form "may require only the minimum amount of information necessary" for state officials to carry out their eligibility-assessment and registration duties. 52 U.S.C. § 20504(c)(2)(B). But the form *must* "include a statement that—(i) states each eligibility requirement (including citizenship); (ii) contains an attestation that the applicant meets each such requirement; and (iii) requires the signature of the applicant, under penalty of perjury." *Id.* § 20504(c)(2)(C). That federal law requires

all forms—nationwide—to include "each eligibility requirement" and the applicant's signature "under penalty of perjury" attests to the importance of the governmental interests served by these features.

Fifth, as explained at greater length below, the phrase "involving moral turpitude" is sufficiently definite to allow a felon to decide whether to register to vote. This is especially true with respect to the felons in this case.

C. The law is not unconstitutionally vague (Count 9).

Count 9 alleges that the "prohibition on voting for those convicted of felonies 'involving moral turpitude' is void for vagueness under the First and Fourteenth Amendments." Doc. 1 ¶ 225. There are several problems with this claim

First, this claim proceeds on the same kind of fundamental rights theory that the Supreme Court rejected in *Richardson*. The Complaint alleges that "voting and participating in the election process is a fundamental right protected by the Fourteenth Amendment" and also "entitled to First Amendment protection." Doc. 1 ¶¶ 218–19. The Supreme Court has warned lower courts against "[a]ttributing to elections a more generalized expressive function" under the First Amendment. *Burdick v. Takushi*, 504 U.S. at 438. For its part, vagueness doctrine is based on the due process clause, not the first amendment. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 304 (2008) ("[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment"). And, as explained extensively above, *Richardson* means that neither the Fourteenth Amendment nor the First Amendment grants a felon the right to vote.

Second, there is no threat of prosecution if someone erroneously votes based on a good faith belief that his crime is not disqualifying. The void-for-vagueness principle means that "laws which regulate persons or entities must give fair notice of conduct that is *forbidden or required*." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (emphasis added). A "conviction or punishment fails to comply with due process if the statute or regulation *under which it is obtained*" is impermissibly vague. *Id.* (emphasis added). The Complaint does not allege that the Alabama's criminal laws are impermissibly vague. As explained above, those laws do not require a person to correctly understand the term "moral turpitude." They require only that putative voters act in good faith when attesting to their qualifications. *See, e.g.*, ALA. CODE § 17-17-36 ("Any person who . . . knowingly attempts to vote when not entitled to do so . . . shall be guilty . . . upon conviction, of a Class C felony.").

In this respect, the Complaint fails for the same reasons that the Supreme Court reversed the Eleventh Circuit in *United States v. Williams*, 553 U.S. 285, 306 (2008). There, the Eleventh Circuit held unconstitutionally vague a criminal prohibition on promoting "any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe" that the material is child pornography. *See United States v. Williams*, 444 F.3d 1286, 1294, 1306 (11th Cir. 2006). The Eleventh Circuit reasoned that the phrase "in the manner that reflects the belief" is so vague that grandparents could be prosecuting for forwarding pictures of their partially clothed grandchildren. *Id.* The Supreme Court

reversed because the intent requirement of the statute solved any vagueness concern. The Court explained that "[t]he statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe." *Williams*, 553 U.S. at 306. These are "questions of fact" because "[w]hether someone held a belief or had an intent is a true-or-false determination." *Id.* Although "[c]lose cases [such as the grandparent hypothetical] can be imagined under virtually any statute," that problem "is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt" of a person's subjective intent. *Id. See also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("a scienter requirement may mitigate a law's vagueness").

Third, the Supreme Court has expressly held that the phrase "involving moral turpitude" is *not* void for vagueness. In *Jordan v. De George*, 341 U.S. 223 (1951), the Court addressed whether a statute that required the deportation of aliens for crimes of "moral turpitude" was unconstitutional "under the established criteria of the 'void for vagueness' doctrine." *Id.* at 231. The Court held that it was not. The Court found it "significant that the phrase has been part of the immigration laws for more than sixty years" and "has also been used for many years as a criterion in a variety of other statutes." *Id.* at 229–30. The Court also found it significant that "[t]he phrase 'crime involving moral turpitude' presents no greater uncertainty or difficulty than language found in many other statutes repeatedly

sanctioned by the Court." *Id.* at 231 n. 15. Although the Court recognized that there may be "peripheral cases," the Court held that "doubt" about how the phrase "moral turpitude" applies in "less obvious cases does not render that standard unconstitutional for vagueness." *Id.* at 232. *See also United States v. Shahla*, No. 3:11-CR-98-J-32TEM, 2013 WL 2406383, at *5 (M.D. Fla. June 3, 2013), *aff'd sub nom. United States v. Chahla*, 752 F.3d 939 (11th Cir. 2014) (rejecting vagueness argument when defendants prosecuted for lying to federal government by denying that they had committed "crimes of moral turpitude").

Fourth, in addition to the Supreme Court's holding in *Jordan*, the State has sufficiently defined the phase "moral turpitude" to provide guidance of which crimes fall under the term. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). It is well established that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Therefore, the Court has found void-for-vagueness only where statutes "tied criminal culpability" to "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. Here, the Alabama appellate courts and other courts have extensively addressed the definition of crimes of "moral turpitude," creating a body of case law on the subject. Moreover, there are: (1) specific crimes identified in an Alabama statute, ALA. CODE § 15-22-36.1(g), (2) general principles, such as fraud and malum in se, and specific

crimes identified in an Attorney General's opinion, 2005 WL 1121853, and (3) a list of specific crimes provided by the Administrative Office of Courts, Exhibit E. This body of statutory, administrative, and judicial case law eliminates any constitutional vagueness concerns. *See Thiess,* 387 F. Supp. at 1043 (rejecting similar vagueness claim against felon disenfranchisement law "in view of the currently existing 'laundry list' of crimes issued by the Attorney General").

In fact, only three of the ten named plaintiffs cannot find their specific crime in the statute, AG opinion, or AOC list: Giles (stalking), Corley (possession of controlled substance), Yow (trafficking controlled substance). *See* Doc. 1 ¶¶ 42, 44, 46. Two of these crimes—possession of a controlled substance and trafficking a controlled substance—are addressed by Alabama case law, which holds that mere possession of a controlled substance is *not* a crime "involving moral turpitude" but that trafficking of a controlled substance is a crime "involving moral turpitude." *Ex parte McIntosh*, 443 So. 2d at 1286. Although the Alabama courts have not specifically addressed stalking under Alabama Code § 13A-6-90, it fits the general definition of a crime of moral turpitude as being "*mala in se* and not *mala prohibitum*." *McIntosh*, 443 So. 2d at 1284 (citing Gamble's *Evidence*). And other courts have expressly held that stalking is a crime of moral turpitude. *See also Raya-Moreno v. Holder*, 504 F. App'x 589, 590 (9th Cir. 2013) (stalking is crime of moral turpitude). And, of course, any of these felons could achieve certainty by appealing his or her disqualification all the way to the Alabama Supreme Court. *See* ALA. CODE § 17-3-55.

D. The distinction based on "moral turpitude" is rational and non-arbitrary (Count 6 & Count 10).

Plaintiffs' equal protection claims for irrationality and lack of uniformity in Count 6 and Count 10 fare no better than their First Amendment mishmash claims. On behalf of all felons in Count 10, the Complaint argues that the law "irrationally disenfranchises an arbitrary set of Alabama citizens," "cannot withstand even rational basis scrutiny," and is "not uniform across the state." Doc. 1 ¶¶ 228, 229. Similarly, on behalf of felons who are eligible to vote in Count 6, the Complaint alleges that the law is unconstitutional because a registrar might "improperly determine[] that a voter applicant's crime is disqualifying." Doc. 1 ¶ 202. These claims should be dismissed.

First, the moral turpitude standard is rational. The old Fifth Circuit, in a case that is binding on this Court, explained that the import of *Richardson* is that States have substantial latitude to distinguish between felons that should be disenfranchised and those that should not. *See Shepherd*, 575 F.2d at 1114. "The Court [in *Richardson*] clearly envisioned that a state could grant the right to vote to some persons convicted of a felony while denying it to others." *Id.* This is so because "Section 2's express approval of the disenfranchisement of felons . . . grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens." *Id.*

Accordingly, there is no heightened review of a State's decision to disenfranchise some felons and not others. Instead, the "selective

disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws . . . a rational relationship to the achieving of a legitimate state interest." *Shepherd*, 575 F.2d at 1114–15. *Accord Hayden*, 594 F.3d at 170; *Harvey*, 605 F.3d at 1079. When legislation is reviewed for a rational basis, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws." *Gregory v. Ashcroft*, 501 U.S. 452, 470–71 (1991). A Court may "not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

It is rational to limit the category of offenders who are disenfranchised to those who are convicted of crimes involving moral turpitude. There is a good argument under political theory to disenfranchise *all felons*: "It can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." *Green*, 380 F.2d at 451 (per Friendly, J.). But it also makes sense to allow some felons to vote who have committed crimes that are less serious or less likely to indicate their unfitness to participate. Because the difference between the two types of crimes may not be "consistently predictable by simply considering 'the nature of the punishment,' in this day of indeterminate sentences and proliferation of technical, malum prohibitum offenses," the

Legislature was rational to conclude that "the inquiry must focus more precisely on the nature of the crime itself." *Otsuka v. Hite*, 414 P.2d 412, 422 (Cal. 1966) (addressing disenfranchisement for "infamous crime"), *abrogated by Ramirez v. Brown*, 507 P.2d 1345 (Cal 1973). *Cf. Meriwether*, 268 So. 2d at 787 (moral turpitude turns on "[t]he inherent nature of the offense itself"). Here, the Legislature rationally chose to limit the felons who would be disenfranchised by way of a commonly used descriptor—"involving moral turpitude."

Second, the Equal Protection Clause does not require state officers to be perfectly uniform in applying state law. Although the State may not "unequally administer[] a facially neutral statute," "[m]ere error or mistake in judgment when applying a facially neutral statute does not violate the equal protection clause." *E & T Realty v. Strickland*, 830 F.2d 1107, 1112 & 1114 (11th Cir. 1987). Plaintiffs cannot "bootstrap[] all misapplications of state law into equal protection claims." *Id.* at 1114. Instead, "[t]he good faith of [state] officers and the validity of their actions are presumed." *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352–53 (1918). Accordingly, "[t]here must be something more" than "mere error" to state a claim under the Equal Protection Clause—"something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Id.* "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

In *E & T Realty*, the Eleventh Circuit held that a claim like this one requires a plaintiff to identify a similarly situated person who was treated differently and allege that the disparate treatment was intentional. A defendant cannot state a claim "merely by showing an arbitrary and irrational difference between the results of two particular applications of a facially neutral statute." 830 F.2d at 1112. Instead, a plaintiff must show (1) different treatment of similarly situated individuals, *id*. at 1109, and (2) "intentional or purposeful discrimination," *id*. at 1112–13. "'[A]bsent proof that defendant[ ] acted with discriminatory intent,' there can be no equal protection violation where the theory is that the defendant unequally administered a facially neutral law." *Hope For Families & Cmty. Serv., Inc. v. Warren*, 721 F. Supp. 2d 1079, 1156–57 (M.D. Ala. 2010) (quoting *E&T Realty*, 830 F.2d at 1113).

In light of this standard, Plaintiffs have not alleged a viable claim. The Complaint does not identify similarly situated persons who have been treated differently than Plaintiffs. And it does not allege anything approaching intentional discrimination in the application of the statute. Instead, everything in the Complaint suggests that state officers are working to apply the law in a uniform manner. As noted above, the registrars are guided in applying the moral turpitude provision by: (1) the specific crimes identified in an Alabama statute, ALA. CODE § 15-22-36.1(g), (2) the general principles, such as fraud and *malum in se*, and specific crimes identified in an Attorney General's opinion, 2005 WL 1121853, (3) a list of specific crimes provided by the Administrative Office of Courts, Exhibit E, and (4) a

substantial body of case law from the Alabama and federal courts. Registrars are also encouraged to "consult, if they so decide[], the Attorney General's Office if they are unsure of a crime's classification as disqualifying." Doc. 1 ¶ 156.

Apart from conclusory statements about a purported lack of uniformity, the most that the Complaint alleges is that "there is no uniform system for determining the eligibility of voter applications and voter registrants across the state" such that a registrar might incorrectly classify a voter applicant's crime is disqualifying. Doc. 1 ¶¶ 160, 202, 232. Of course, a "uniform system" is not the standard for equal protection. But, even if it were, Alabama law provides that "[a]ny person to whom registration is denied shall have the right of appeal . . . by filing a petition in the probate court in the county in which he or she seeks to register." ALA. CODE § 17-3-55. The putative voter may then appeal the determination to circuit court and the Alabama Supreme Court. *Id.* If the voter wins, his or her registration is retroactive to "the date of his or her application to the registrars." *Id.* This state-law appeal procedure provides "practical uniformity," *Sunday Lake*, 247 U.S. at 352–53, just as similar appellate procedures ensure that 2,700 federal district judges apply open-ended terms like "due process" and "free exercise" in a practically uniform manner.

IV. Alabama law does not violate procedural due process (Count 8).

Count 8 is a "procedural due process" claim under "the Fourteenth Amendment." Doc. 1 ¶ 216. It alleges that felon-disenfranchisement violates the Due Process Clause because Alabama law "provides Alabama citizens with little to

no pre-deprivation process before revoking their right to vote, a fundamental right protected by both the Alabama and United States Constitutions." Doc. 1 ¶ 210.

This claim fails for at least five reasons.

First, this claim is precluded by *Richardson*. Section 1 of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Richardson* held that this provision must be applied consistent with Section 2, which expressly recognizes the power of States to disenfranchise felons. 418 U.S. at 55. Accordingly, felons have no "liberty" interest to vote under the Due Process Clause of Section 1 of the Fourteenth Amendment. *See Williams v. Taylor*, 677 F.2d 510, 514 (5th Cir. 1982) (rejecting procedural due process claim in part because a felon's "interest in retaining his right to vote is constitutionally distinguishable from the 'right to vote' claims of individuals who are not felons").

Second, "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003). In *Connecticut DPS*, the Supreme Court rejected a convicted sex offender's asserted procedural due process right to a hearing to prove that he was not "dangerous" before being listed on the State's sex-offender registry. *Id*. at 6. There, as here, the Court explained, "the fact that [the offender] [sought] to prove . . . [was] of no consequence under" the challenged provision. *Id.* at 7. And there, as here, "the [challenged] law's requirements turn[ed] on an offender's

conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.* To be sure, the Court reserved the question in *Connecticut DPS* whether, as a matter of *substantive* due process, a State could classify people based on their convictions alone. *See id.* at 8. But it emphasized that "States are not barred by principles of '*procedural* due process' from drawing such classifications." *Id.* (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion) (emphasis in original)).

Third, none of the named plaintiffs can show prejudice because none has been erroneously removed from the voting list.[14] *See supra* 49. "To establish a due process violation, the petitioner must show that [he] was deprived of liberty without due process of law and that the purported errors caused [him] substantial prejudice." *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010). As noted above, all but three plaintiffs have been denied registration or removed from the list based on felonies that are specifically listed in the AG Opinion and Administrative Office of Courts' guidance. One of those three has not been removed or denied; she has been told she will be allowed to vote. *See* Doc. 1 ¶ 44 (Corley). The second has committed a felony—trafficking illegal drugs—that the Supreme Court of Alabama has held to be a crime of moral turpitude. Doc. 1 ¶ 46 (Yow). And the third has committed a felony—stalking—that satisfies the mens rea for a crime of moral

[14] For the same reason, Plaintiffs cannot invoke a state-law fundamental right to vote. To make a procedural due process claim based on a state-law right, the plaintiff must show that it has "a *sufficiently certain* property right under state law." *Greenbriar Village, L.L.C. v. Mountain Brook*, City, 345 F.3d 1258, 1265 (11th Cir. 2003) (emphasis added). Plaintiffs have not satisfied that standard. At the very least, Plaintiffs' purported right to vote is far from "certain" under Alabama law, *Greenbriar Village*, 345 F.3d at 1265, and that alone is fatal to their claim here. *See also Pennhurst State Sch. & Hosp.*, 465 U.S. at 123.

turpitude and has been held to be a crime of moral turpitude by the Ninth Circuit. Doc. 1 ¶ 42 (Giles). A felon cannot "claim prejudice in the denial of a pre-disenfranchisement hearing" if he has no "viable defense to disenfranchisement." *Williams*, 677 F.2d at 515.

Fourth, even assuming these felons had a liberty interest in voting and it had been erroneously denied, Alabama law provides sufficient process. To determine whether a procedure violates due process, this Court should consider three factors: (1) the private interest at stake; (2) the risk that the challenged procedure will wrongly impair the private interest and the likelihood that additional procedural safeguards can effect a cure; and (3) the government's interest in avoiding the added procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Here, Plaintiffs were convicted of felonies through the criminal justice system, with all its various procedural protections. Under *Richardson*, this process ends their fundamental right to vote. But, even if this process did not negate their right to vote entirely, it would at least greatly reduce the constitutional importance of their interest.

Moreover, Alabama law already provides the same kind of procedural safeguards—notice, right to appeal, etc.—that are used in other areas to reduce the risk of an erroneous deprivation of a right. Although Plaintiffs complain that the registrars are not lawyers, "[t]he Due Process Clause 'has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or

administrative officer.'" *Washington v. Harper*, 494 U.S. 210, 231 (1990) (quoting *Parham v. J.R.*, 442 U.S. 584, 607 (1979)). If the Board of Registrars declines to register an applicant, he or she has the right to appeal. *See* ALA. CODE § 17-3-55. If the Board of Registrars decides to remove someone from the voting list, that person "must be notified by certified mail sent to the voter's last known address of the board's intention to strike his or her name from the list," and he or she has the right to appeal. ALA. CODE § 17-4-3; Doc. 1 ¶ 212; *Williams v. Lide*, 628 So. 2d 531, 534 (Ala. 1993). In a similar case, the Fifth Circuit "refuse[d] to impose the requirement of a pre-disenfranchisement hearing on election boards" because "mandat[ing] a hearing as a prerequisite to any action by the Election Board would cost the state substantial time and money, and it would not guarantee, any more than the current mechanism, that only felons within the statute are disenfranchised." *Williams*, 677 F.2d at 515.

In fact, in Plaintiffs' view, there is *no* additional procedural safeguard that can effect a cure. Plaintiffs do not request that the Court enjoin Defendants to follow any additional procedural steps before removing voters or declining to register them.[15] Instead, Plaintiffs' position is that registrars must simply stop "denying any voter registration applications" or "removing any voters from the voter registration rolls on the basis of felony convictions." Doc. 1 at 56-57. The State obviously has a strong interest in avoiding the only "additional procedure" offered

[15] Plaintiffs suggest, on information and belief, that "a voter applicant's notice and opportunity to be heard is not uniformly enforced in Alabama." Doc. 1 ¶ 213. A claim that state officers are violating state law is a claim that must be made in state court. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 123.

by Plaintiffs—ceasing to enforce Alabama law in its entirety. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (noting practicality of additional procedural safeguards is an appropriate judicial consideration).

Fifth, Plaintiffs cannot complain about the lack of due process when they have not availed themselves of all procedures allowed in state court. "[U]nlike substantive due process violations, procedural due process violations do not become complete 'unless and until the state refuses to provide due process.'" *McKinney v. Pate*, 20 F.3d 1550, 1562 (11th Cir. 1994). For this reason, "even if [a felon] suffered a procedural deprivation at the hands of a [registrar], he has not suffered a violation of his procedural due process rights unless and until the State of [Alabama] refuses to make available a means to remedy the deprivation." *Id.* at 1563. Here, the State provides extensive avenues for appellate review such that a person who is wrongfully removed from a voting list or denied voter registration may still vote. *See* ALA. CODE § 17-3-55; *see also id.* § 17-10-2 (procedures for casting provisional ballot). Plaintiffs have inexplicably declined to pursue those remedies. *See Williams*, 677 F.2d at 515 (no due process violation when felon "chose to disregard the avenues of procedural protection afforded by the state"); *Dodge v. Evans*, 716 P.2d 270, 276 (Utah 1985) ("Due process does not require an administrative hearing when a judicial hearing is available simply for the asking.").

V. Alabama law does not violate the Ex Post Facto Clause or Eighth Amendment (Count 11 & Count 12).

Counts 11 and 12 argue that felon disenfranchisement is a form of criminal punishment that cannot be imposed retroactively under the Ex Post Facto Clause and cannot be imposed at all because of the prohibition on "cruel and unusual punishment" under the Eighth Amendment. *See* Doc. 1 ¶¶ 233–44.

These claims fail for several reasons.

First, these claims suffer from the same flaw as Plaintiffs' Fourteenth and First Amendment claims: "the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment also prohibits disenfranchisement under other amendments." *Farrakhan*, 987 F. Supp. at 1314.

Second, these claims are precluded because the Supreme Court has held that felon-disenfranchisement is not punishment. *Simmons v. Galvin*, 575 F.3d 24, 43 (1st Cir. 2009). In *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), the plurality opinion used felon-disenfranchisement as an example of a restriction that is *not* punitive and would *not* violate the Ex Post Facto Clause:

> [A] statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. . . . The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

Id. at 96–97. Only a punitive measure can violate the Ex Post Facto Clause or Eighth Amendment. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 92 (2003); *see also United States v. Salerno*, 481 U.S. 739 (1987) (holding preventative detention under the Bail Reform Act was permissible because it was regulatory and preventative, rather than punitive). Accordingly, Courts have universally held that felon-disenfranchisement does not violate the Ex Post Facto Clause or Eighth Amendment. *See Simmons*, 575 F.3d at 43 (Ex Post Facto); *Green v. Bd. of Elections*, 380 F.2d 445 (2d Cir. 1967) *cert. denied*, 389 U.S. 1048 (1968) (Eighth Amendment); *King v. City of Boston*, 2004 WL 1070573 (D. Mass. May 13, 2004) (Ex Post Facto); *Farrakhan v. Locke*, 987 F. Supp. at 1314 (Eighth Amendment); *Kronlund v. Honstein*, 327 F. Supp. 71, 74 (N.D. Ga. 1971) (three-judge court) (Eighth Amendment).

Third, these claims fail for a host of other reasons specific to each count and each plaintiff. Disenfranchisement is neither cruel nor unusual. It has been common throughout history and remains common in the United States. *See supra* 14–15. And Alabama felons' rights may be restored when they satisfy the terms of their sentence. *See supra* 22. With respect to the Ex Post Facto claim, Alabama's 1996 amendment had no relevant retroactive effect because Alabama's 1901 Constitution already disenfranchised *all* felons.[16] The 1996 amendment *reduced* the scope of disenfranchisement; it did not disenfranchise anyone who was not already

[16] None of Plaintiffs were convicted of crimes before 1901. Plaintiff King is the only plaintiff who was convicted before the 1996 amendment took effect, and she was already disenfranchised as a murderer under the 1901 Constitution. Doc. 1 ¶ 49.

disenfranchised by the 1901 Constitution. For its part, the 2012 amendment also had no retroactive effect because it simply maintained the status quo.

VI. Although Alabama does not have a legal financial obligations requirement, States may require felons to pay legal financial obligations before restoring their right to vote (Counts 13, 14, & 15).

Counts 13, 14, and 15 of the Complaint challenge as unconstitutional the expedited procedure for felons to re-secure the right to vote under Alabama Code § 15-22-36.1. Specifically, the Complaint contends that the State cannot "require[] an otherwise eligible Alabama citizen to pay all legal financial obligations" or "fines and fees" before restoring the right to vote under the Fourteenth Amendment, Section 2 of the Voting Rights Act, or (with respect to federal elections) the Twenty-Fourth Amendment. *See* Complaint ¶¶ 245–60.

These theories fail for several reasons.

As an initial matter, Alabama law does not actually require a felon to pay all legal financial obligations ("LFOs") before restoring his or her rights. This requirement applies to the expedited process for the restoration of voting rights under Alabama Code § 15-22-36.1, but the availability of that process does not affect the "right of any person to apply to the board for a pardon with restoration of voting rights pursuant to Section 15-22-36." ALA. CODE § 15-22-36.1. In fact, some felons are statutorily excluded from the expedited process and must go through the full pardon process regardless of whether they have paid court costs and restitution. ALA. CODE § 15-22-36.1(g) (exclusion for those convicted of murder, rape, sodomy, *etc*.). For persons who are not eligible for the expedited procedure, the Board of

Pardons and Paroles has the power to restore "civil and political rights" by "grant[ing] pardons" under Alabama Code § 15-22-36. It also has the independent power "to remit fines and forfeitures." *Id.* The availability of a pardon under Alabama Code § 15-22-36 dooms these claims about the constitutionality of the additional expedited procedure. *See Johnson*, 405 F.3d at 1214 n.1 ("voting rights restoration scheme" does not "violate[] constitutional and statutory prohibitions against poll taxes" because "[a] felon who has completed his sentence may apply for clemency to have his civil rights restored").

Nonetheless, even if Alabama law did require a felon to pay LFOs as a condition to restore his or her voting rights, that requirement would not violate any provision of the United States Constitution or the Voting Rights Act.

Fourteenth Amendment. Requiring felons to pay LFOs does not violate the Equal Protection Clause. Because of *Richardson*'s reading of the Fourteenth Amendment, the old Fifth Circuit held that the "selective disenfranchisement *or reenfranchisement* of convicted felons must pass the standard level of scrutiny applied to state laws . . . a rational relationship to the achieving of a legitimate state interest." *Shepherd*, 575 F.2d at 1114–15 (emphasis added). The State has several legitimate interests that are rationally related to the requirement that felons pay all restitution and fees before having their rights restored: (1) encouraging felons to pay full restitution to their victims so that victims are made whole, (2) protecting the ballot box from felons who continue to break the law by not abiding by enforceable court orders, (3) withholding the restoration of voting rights

from felons who have not completed their entire sentence, and (4) a determination that only those convicted felons who have fully paid restitution are sufficiently rehabilitated to be entitled to vote. Conditioning reenfranchisement on the payment of court costs, restitution, *etc.*, is rationally related to these state interests. *See Harvey,* 605 F.3d at 1079 ("We have little trouble concluding that Arizona has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders."); *Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1054 (M.D. Tenn. 2008) (dismissing equal protection claim on this ground); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1343 (S.D. Fla. 2002) ("The Court finds that victim restitution is a crucial part of the debt the convicted felon owes to both the victim and society."), *aff'd on other grounds*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Madison v. State*, 163 P.3d 757, 770 (Wash. 2007) (finding "rational relationship between requiring felons to satisfy all of the terms of their sentences, including full payment of their LFOs" and legitimate state interest).

Twenty-Fourth Amendment/Poll Tax. A requirement to pay all LFOs also does not violate the Twenty-Fourth Amendment. The Amendment provides: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." Insofar as we are aware, no court has ever applied this provision outside of the

context of an explicit and unambiguous poll tax. *Compare Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax) *with Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007) (rejecting argument that requirement that citizens spend money to obtain documents necessary to register to vote was tax on voting). Instead, courts have uniformly held that fees imposed on the restoration of felon voting rights are not poll taxes because they are not a condition to exercise a constitutional right but a condition to regain a right that was constitutionally removed. *See Harvey*, 605 F.3d at 1080 ("Having lost their right to vote, they now have no cognizable Twenty–Fourth Amendment claim until their voting rights are restored."); *Howard v. Gilmore*, 2000 WL 203984, at *2, (4th Cir. Feb. 23, 2000) ("it is not [plaintiff's] right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned"); *Johnson*, 214 F. Supp. 2d at 1333 ("The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored.").

Voting Rights Act. In addition to the fact that Alabama law does not actually impose an LFO requirement, Plaintiffs' claim under the Voting Rights Act fails for two reasons.

First, as the en banc Eleventh Circuit held in *Johnson*, the Voting Rights Act does not allow a results claim about felon disenfranchisement. *See Johnson*, 405 F.3d at 1234. The Complaint suggests that *Johnson* is somehow distinguishable

because Count 15 challenges the conditions of *re*-enfranchisement instead of the conditions of *dis*-enfranchisement. Doc. 1 ¶ 259. But the theory of the Complaint admits no difference between the two. It expressly claims that "Alabama Code 15-22-36.1(a)(3) disproportionately *disenfranchises* black citizens" by making it disproportionately difficult for black felons to be re-enfranchised. Doc. 1 ¶ 258 (emphasis added).

Moreover, the holding of *Johnson* is that a state law that restricts felons from voting—whether on the front end or back end—is simply not a "voting qualification or prerequisite to voting or standard, practice, or procedure" under the terms of the Voting Rights Act. 52 U.S.C. § 10301. The motivating factor in *Johnson* was the Supreme Court's admonition that the Fourteenth Amendment expressly allows the disenfranchisement of felons. And, as the Washington Supreme Court explained, a challenge to a re-enfranchisement statute is no different from a challenge to a disenfranchisement scheme:

> [I]t is not Washington's *re-enfranchisement* statute that denies felons the right to vote but rather the continuing applicability of its *disenfranchisement* scheme. . . [W]e conclude that the requirement that felons pay their LFOs should not be divorced from the context in which that requirement arose, which was as a result of the individual's commission of a felony.

Madison, 163 P.3d at 771. *See also Harvey*, 605 F.3d at 1079. It makes no sense to say that "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions," *Johnson*, 405 F.3d at 1232, and at the same time conclude that Congress did intend the Voting Rights Act to reach the conditions a state imposes on felon re-enfranchisement.

Second, even if Plaintiffs could bring a Section Two claim, they have not sufficiently pleaded one. The relevant factual allegations are that "blacks are 10% more likely to have a non-zero LFO balance" and "16% more likely to have their voting rights applications denied due to outstanding LFOs." Doc. 1 ¶ 143. Even for courts—unlike the Eleventh Circuit—that allow a Section Two claim over felon disenfranchisement, bare statistical disparities like these have been held insufficient to sustain such a claim. *See Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (disproportionate impact insufficient); *Howard v. Gilmore*, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (affirming dismissal because of lack of nexus between race and disenfranchisement). Even in the Ninth Circuit (the only circuit that still allows a Section Two challenge to felon disenfranchisement), a plaintiff "bringing a section 2 VRA challenge to a felon disenfranchisement law" must show that the "system is infected by intentional discrimination." *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc). *See also id.* at 995–96 (Thomas, J., concurring). Plaintiffs have made no such allegations here—about the Alabama criminal justice system or the process for re-enfranchisement. Finally, the alleged statistical disparity here—roughly 10%—is not even that significant. *See Swain v. Alabama*, 380 U.S. 202, 208–09 (1965) ("We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%."), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 90–96 (1986).

CONCLUSION

The Court should dismiss each and every count in the Complaint for the failure to state a claim upon which relief may be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 16, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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