Nomination of James Knepp to the United States District Court for the Northern District of Ohio
Questions for the Record
Submitted August 5, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. In a 2015 case, *United States v. Valadez-Lara*, you denied a defendant's request for pre-trial release on the basis that the defendant was unlawfully present in the country. According to your opinion in that case, the defendant's "illegal presence [would] be a *per se* violation of the conditions of his ball" because he would "by virtue of his very presence here [be] committing an illegal act." (2015 WL 1456530 (N.D. Ohio Mar. 30, 2015)

    a. **On what basis did you conclude that the defendant's unlawful presence in the United States would be a "per se violation of the conditions" of the defendant's bail?**

    The first condition of pretrial release pursuant to 18 U.S.C. § 3142(c) is that the defendant "not commit a Federal, State, or local crime during the period of release". Given this Defendant's history of prior removals from the United States, 8 U.S.C. § 1326 provides that him being found in the United States without the consent of the Attorney General of the United States or his successor constituted a felony.

    b. **How does your decision in this case square with the Supreme Court's opinion in *Arizona v. United States*, 567 U.S. 387 (2012), which held that "[a]s a general rule, it is not a crime for a removable alien to remain in the United States"?**

    Pursuant to 8 U.S.C. § 1326(a), any alien who has been previously removed who is subsequently found in the United States without first obtaining consent of the Attorney General of the United States (or his successor pursuant to 6 U.S.C. § 202(3), (4) and § 557) is guilty of a felony. I do not believe this statute was at issue in *Arizona v. United States*, 567 U.S. 387 (2012), which involved a challenge to the constitutionality of laws passed by the State of Arizona.

2. You presided over aspects of a 2011 suit in which plaintiffs, including several immigrant rights organizations, alleged that Customs and Border Patrol (CBP) and local police departments maintained a policy, pattern, and practice of targeting Hispanic individuals in conducting stops, detentions, interrogations, and searches, in violation of the Fourth and Fifth Amendments. In the early stages of litigation, you allowed for defendant-requested interrogatories that sought the Social Security numbers of all named plaintiffs. The plaintiffs objected that providing the requested information could "chill numerous

other victims of law enforcement misconduct from bringing actions to vindicate their own rights." (*Muniz v. Gallegos*, 2011 WL 13078376 (N.D. Ohio 2011))

a. On what basis did you allow these interrogatories?

I based my decision on Fed. R. Civ. P. 26(b)(1) which at that time, provided, in pertinent part, that discovery is permissible as to "any nonprivileged matter that is relevant to any party's claim or defense – including [ ] the identity and locations of persons who know of any discoverable matter." I held that Defendants were entitled to discover the true identities of the named Plaintiffs pursuant to the broad scope of discovery under the Rule and that providing Social Security Numbers (for individuals who had already been identified by name) was an appropriate indicia of the Plaintiffs' true identities.

b. What was the defendants' purpose in requesting the plaintiffs' Social Security numbers?

The Defendants stated, *inter alia*, that they required the Social Security numbers to assist with identification of Plaintiffs in computer databases where there can be multiple records under the same name. *See Muniz v. Gallegos*, No. 09-CV-2865 (N.D. Ohio) (Motion to Compel, Doc. 107, at 7).

c. On what basis did you conclude that providing Social Security numbers would not create a chilling effect discouraging other victims of misconduct from bringing suits to enforce their rights?

I do not recall making such a conclusion. I held, under the circumstances in this case, Defendants were entitled to discovery of this information pursuant to Fed. R. Civ. P. 26(b)(1). I did specifically provide, however, that to the extent Plaintiffs could subject themselves to self-incrimination with their answers or inability to provide this information, they could assert their privilege under the Fifth Amendment.

3. 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 district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

No. A district court judge is required to faithfully apply all Supreme Court precedent.

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

A district court does not create precedent. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

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

The decision whether, and under what circumstances, to overturn its own precedent is for the Supreme Court alone to make. The Supreme Court has identified factors that it considers in determining whether to overturn its own precedent.

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

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

As a sitting United States Magistrate Judge and District Judge nominee, I am both bound to apply all Supreme Court precedent and prohibited from commenting as to the degree to which I may believe any decision has obtained greater precedential status than another. If I am confirmed, I will continue to faithfully apply all Supreme Court precedent.

b. Is it settled law?

Yes.

5. 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.

6. 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 Magistrate Judge and District Judge nominee, I am not permitted to express my agreement or disagreement with Supreme Court decisions or dissents. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will continue to faithfully apply the majority opinion in *Heller*.

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

The Court in *Heller* acknowledged that the rights secured by the Second Amendment are "not unlimited" and cited "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). If confirmed, I will faithfully apply the majority decision in Heller. As a sitting Magistrate Judge and nominee to the District Court, it would be otherwise improper for me to comment otherwise on this issue. See Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

Please see my response to Question 4(a).

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

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

In *Citizens United*, the Supreme Court held that the First Amendment protected a corporation's right to engage in political speech. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. See Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

In *Citizens United*, the Supreme Court held that the First Amendment protected a corporation's right to engage in political speech. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

In *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), the Supreme Court determined that the Religious Freedom Restoration Act of 1993, which protects a person's exercise of religion from infringement by the federal government, applies to for-profit corporations. The Court also held that its "decision on that statutory question makes it unnecessary to reach the First Amendment claim." *Id.* at 736. Because that constitutional question may arise in the future, it would be inappropriate for me, as a sitting Magistrate Judge and District Judge nominee, to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

   As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to express my views on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

   The Supreme Court held unanimously in *Loving v. Virginia*, 388 U.S. 1 (1967), that the freedom to marry is a fundamental right and that the Fourteenth Amendment prohibits state actors from conditioning marriage based on race. If confirmed, I will faithfully apply *Loving*. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

    Please refer to my answer to question 7 above. In addition, federal civil rights statutes, including but not limited to 42 U.S.C. § 1981, prohibit discrimination on the basis of race in nongovernmental commercial transactions. If confirmed, I will faithfully apply Loving and any applicable federal civil rights statutes and precedents. As to the specific

hypothetical question posed, it would be improper for me, as a sitting Magistrate Judge and District Judge nominee, to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

11. 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 discussed my interest in being nominated as a District Judge with many individuals, including some I understand to be members of the Federalist Society. I was introduced by friend of a friend to Dean Reuter, whom I understood to be General Counsel of the Federalist Society, in late 2019. Although I do not recall specifics, my general recollection is that we discussed my qualifications and experience and he offered some general advice about the nomination process.

12. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) in since 2013.

    a. Are you currently a member of the NRA?

    Yes

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

    I am a life member and have no present plans to resign.

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

    As I have done during the decade in which I have served as a United States Magistrate Judge, I commit to faithfully follow the recusal statute, 28 U.S.C. § 455, and to obtain ethics guidance from the Committee on Codes of Conduct or Committee Counsel at the Administrative Office of the United States Courts where appropriate.

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

    I am not aware of all of the publicly stated positions of the NRA. Moreover, as a sitting Magistrate Judge and District Judge nominee, I am precluded by the Code of Conduct for United States Judges from expressing my opinions about matters pending or impending in any court or about political matters. *See* Canons 3A(6) and 5 of the Code of Conduct for United States Judges.

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

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

    No.

    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"?

    I do not have any particular views on "administrative law." If I am confirmed, I will faithfully apply all sources of federal law, including the United States Constitution, the United States Code, and properly enacted federal regulations, consistent with any binding precedents of the Supreme Court and the Sixth Circuit.

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

    Because this is a political issue and an issue about which litigation is currently pending, or is likely to arise in the future, it would be improper for me, as a sitting Magistrate Judge and District Judge nominee, to comment on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

    As a general matter, a district court judge may consider legislative history in construing an ambiguous statutory provision when the legislative history is relevant to resolving that ambiguity, consistent with Supreme Court and the applicable Court of Appeals precedent. *See Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011).

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

    No.

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

    I received these Questions for the Record on August 5, 2020. I conducted brief legal research on the issues raised and reviewed the responses of other nominees. I drafted my answers and transmitted a copy to attorneys in the Office of Legal Policy at the U.S. Department of Justice, from whom I requested comment and suggested revisions. I reviewed that feedback and made revisions to my answers as I deemed appropriate. I then authorized the submission of my answers to the Senate Judiciary Committee.

Questions for the Record for James Ray Knepp II
From Senator Mazie K. Hirono

1. In a July 4, 2018, naturalization ceremony, you spoke about a negative aspect of the internet and social media. You said, "sometimes I fear that this ease of communication has some down side—some of us are probably getting lazy about believing what we see or hear without questioning who it is who is behind the message."

   As I'm sure you're aware, one of the main sources of misinformation on social media is President Trump. From spreading lies about the prevalence of voter fraud to advancing conspiracies theories about mail-in ballots to any number of other subjects, President Trump spreads misleading and outright false information via his social media accounts.

   Do you think it is appropriate for the President of the United States to be spreading lies and conspiracy theories via his social media accounts?

   Respectfully, the President of the United States engages in political debate about which, I, as a sitting United States Magistrate Judge and District Judge nominee, I am precluded from commenting. *See* Canons 2, 3A(6) and 5 of the Code of Conduct for United States Judges.

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 sitting Magistrate Judge, I have attended training sessions provided by the Federal Judicial Center and the United States Probation and Pretrial Service that included discussions of implicit bias.

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

   Yes.

Nomination of James Ray Knepp II
United States District Court for the Northern District of Ohio Questions for the Record
Submitted August 5, 2020

QUESTIONS FROM SENATOR BOOKER

1. As a magistrate judge, you heard a case involving a teenage biracial student who experienced bullying from her classmates and teachers because of her race.[1] Jackson was the subject of racial slurs and at least one teacher told her to tie up her "distracting" natural hair and to sit in the back of assemblies. According to a news report, Jackson's main goal in bringing the lawsuit was to "[o]btain proof of the racial discrimination she says she endured, from both students and school employees alike."

   Apparently, after the case settled, you sealed the depositions because you believed that they contained material protected by the Family Educations Rights and Privacy Act (FERPA). However, Frank LaMonte, the former Executive Director of the Student Press Law Center, wrote that "[w]hile [your] position [wa]sn't entirely unsympathetic—the testimony probably does include the names of kids accused of bullying 16-year-old Jayda Jackson—it's a certainty that the depositions do not contain 'great measures of FERPA-protected material,'" because "FERPA doesn't protect information; it protects records."[2]

   a. In making the decision to seal the depositions, did you consider the public benefits of shining a light on discrimination at the school given that the justification for sealing the depositions under FERPA was specious?

      The child you reference, whose name does not appear in the public docket, through her mother and acting through counsel, agreed to a protective order pursuant to which discovery could be conducted without the need to redact the names of other children and references to matters otherwise protected from public disclosure.

      The depositions referenced were taken and maintained as confidential by the parties and were never filed of record in the case, and I never reviewed them. The case resolved following a seven-hour emotionally-charged settlement conference which I personally conducted. My observation was that the child and her sister and their mother, acting as guardian, were represented by highly competent counsel who acted at all times in the best interest of these children.

[1] Alissa Widman Neese, *Jayda Won, but They Hide Documents*, SANDUSKY REGISTER (Nov. 26, 2014); *see also* SJQ Attachments to 12(e) at 325.
[2] STUDENT PRESS LAW CENTER, *Ohio Judge Thinks Sealed Court Testimony in School Bullying Suit Is a FERPA Record* (Dec. 14, 2014), https://splc.org/2014/12/ohio-judge-thinks-sealed-court-testimony-in-school/.

The Order you reference does not cite FERPA, but, rather, is premised upon the Stipulated Protective Order entered on behalf of all parties. As a courtesy, I spoke with a newspaper reporter making an informal inquiry about the deposition transcripts. I explained that the case was resolved and that the parties (including the child and her guardian, through counsel) had agreed to maintain the depositions as confidential. I explained to the reporter that in the absence of some challenge to my Order, I saw no basis to require either party to go back through the transcripts and sanitize them for identifiable student information or other matters protected from public disclosure which would have been required prior to release. I further explained that based on what I knew about the case and the representations of counsel, there would be considerable reference to information protected from disclosure by FERPA in the transcripts. No motion to unseal the documents was ever filed.

b. Do you stand by your decision to seal the depositions?

Upon the totality of the circumstances, including my understanding of the settlement between the parties, I stand by my Order to permit the parties to rely upon the Protective Order which they entered by stipulation.

c. What is your response to Mr. LaMonte's commentary on your decision to seal the depositions?

Respectfully, prior to your question, I was not aware of Mr. LaMonte or his commentary. It appears to be based upon what he read in the newspaper. It would not be appropriate for me to engage him regarding his understanding of the basis of my Order.

2. During your tenure as a Magistrate Judge, you denied a 26-year old's request for pre-trial release on bail. The individual was an undocumented immigrant who was arrested and charged with illegal re-entry after removal.[3] Previously, the defendant had been arrested several times on alcohol-related charges and misdemeanor assault. You wrote, "Although it presents a close call, particularly as relates to Defendant's propensity to live 'off the grid' and undetected in this country, the Court would be inclined to grant Defendant bail absent one factor, his unlawful presence in this country. It is not that his illegal presence renders him dangerous or a flight risk; rather his illegal presence will be a *per se* violation of the conditions of his bail."[4]

Unlawful presence in the United States is a civil immigration offense and not a crime. Given that, why did you find that his unlawful presence was a "*per se* violation" of the conditions of bail?

The first condition of pretrial release pursuant to 18 U.S.C. § 3142(c) is that the defendant "not commit a Federal, State, or local crime during the period of release". Given this Defendant's history of prior removals from the United States, 8 U.S.C. § 1326 provides that him being found in the United States without the consent of the Attorney General of the United States or his successor would be a felony.

[3] United States v. Valadez-Lara, 2015 WL 1456530 (N.D. Ohio 2015).
[4] *Id.* at *8.

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

   I am reluctant to categorize myself into any particular nomenclature, as I have found such categorization to be imprecise and sometimes fluid. As I understand the term, "originalism" is a method of interpreting the U.S. Constitution with primary reference to the original public meaning of the constitutional provision at issue, at the time that provision was ratified. I can state that such would be my preferred methodology of constitutional interpretation. If I am confirmed, I will faithfully follow all Supreme Court and Sixth Circuit precedent, including precedent regarding the appropriate method of constitutional interpretation.

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

   Given the lack of precision of the term "textualism", I am reluctant to cast myself into such a categorization. My understanding is that textualism is a method of statutory interpretation with primary reference to the original public meaning of the statutory provision at issue, at the time that statute was enacted. Generally speaking, and with that understanding, I would say that textualism is an appropriate approach to statutory interpretation. If I am confirmed, I will fully and faithfully follow all Supreme Court and Sixth Circuit precedent, including that pertaining to the appropriate method of statutory interpretation.

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

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

      Yes, I would be willing to consider legislative history in appropriate cases. The Supreme Court has held that courts may consider legislative history in construing a statute when the text of the statute is ambiguous, and that reference to legislative history is unnecessary when the statute is unambiguous. *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 will fully and faithfully apply Supreme Court and Sixth Circuit precedent concerning statutory interpretation and 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 5(a).

6. 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?

I believe judicial restraint is an important aspect of judging. The judiciary has an important, but limited, role in our constitutional system. Judicial action is limited to deciding actual cases and controversies that are subject to the court's jurisdiction. A judge should decide those cases and controversies based on the rule of law and not seek to intrude upon the policymaking functions of the political branches.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[5] Was that decision guided by the principle of judicial restraint?

If I am confirmed, I will faithfully apply and follow *Heller*, which is binding Supreme Court precedent. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[6] Was that decision guided by the principle of judicial restraint?

In *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), the Supreme Court recognized a corporation's First Amendment right to engage in political speech. If I am confirmed, I will faithfully apply and follow *Citizens United*, which is binding Supreme Court precedent. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[7] Was that decision guided by the principle of judicial restraint?

[5] 554 U.S. 570 (2008).
[6] 558 U.S. 310 (2010).
[7] 570 U.S. 529 (2013).

In *Shelby County v. Holder*, 570 U.S. 529 (2013), the Supreme Court held that the Voting Rights Act's coverage formula and preclearance requirement was unconstitutional. If I am confirmed, I will faithfully apply and follow *Shelby County*, which is binding Supreme Court precedent. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

7. 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.[8] 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.[9]

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

      I believe that the right to vote is one of the foundational rights of our democracy. However, as a sitting Magistrate Judge and District Judge nominee, it would be improper for me to discuss my personal views on whether in-person voter fraud is a widespread problem, because the question calls for an opinion on a matter that is or may become the subject of pending or impending litigation. *See* Canons 2(A) and 3(A)(6) of the Code of Conduct for United 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 7(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 7(a).

[8] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[9] *Id.*

8. 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.[10] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[11] 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.[12] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[13]

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

      I believe there are instances where participants in the criminal justice system have acted with implicit racial bias. I have attempted to be aware of this fact and have always tried to treat each and every individual who appears before me with dignity and respect and to exclude implicit racial bias from my proceedings.

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

      I have not studied this issue, but generally yes, compared to the general population, a disproportionate portion of our prison population are people of color.

   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.

      Although I do not recall specific articles or reports, I have attended multiple training sessions at judges' meetings pertaining to the issue of implicit racial bias, and ways in which it could affect pretrial release and sentencing determinations.

   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.[14] Why do you think that is the case?

      I have not studied this issue and am not familiar with the cited report, thus, I do not feel I could offer a fully informed opinion on this topic.

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[10] 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.
[11] *Id.*
[12] 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.
[13] *Id.*
[14] 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.[15] Why do you think that is the case?

I have not studied this issue and am not familiar with the cited report, thus, I do not feel I could offer a fully informed opinion on this topic.

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

All judges, including appellate court judges, must be cognizant of implicit racial bias and strive to ensure that all litigants are treated fairly, respectfully and with dignity.

9. 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.[16] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[17]

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied the issue closely enough to offer an informed opinion on this question.

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

I have not studied the issue closely enough to offer an informed opinion on this question.

10. 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.

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

[16] 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.

[17] *Id.*

11. 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.

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

    Although it is generally inappropriate for a judicial nominee to express a personal opinion on a Supreme Court precedent, I believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) is an exception to the general rule, as *Brown* overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896) the case in which the separate but equal doctrine was formulated. I believe *Brown* was correctly decided.

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

    The Supreme Court in *Brown* made clear that *Plessy v. Ferguson* was wrongly decided. 347 U.S. 483, 495 (1954)

14. 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.

15. 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."[20] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    A judge's race or ethnicity is a not a basis for disqualification. *See* 28 U.S.C. § 455.

[18] 347 U.S. 483 (1954).
[19] 163 U.S. 537 (1896).
[20] 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.

16. 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."[21] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    It is well established 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 fully and faithfully follow Supreme Court and Sixth Circuit precedent on this issue.

[21] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted August 5, 2020
For the Nomination of:

James Ray Knepp II, to be United States District Judge for the Northern District of Ohio

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

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

    I believe imposing a sentence is one of the most important duties of a United States District Court Judge. If confirmed, I will make an individualized assessment for each defendant, in order to arrive at a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

    I would carefully review the Presentence Investigation Report, the recommendation of the United States Probation Office, the trial record or plea agreement, any sentencing agreement between the parties, the parties' sentencing memoranda and supporting materials, including any victim impact statements, and letters submitted on behalf of the defendant. After reviewing the record, I would consider the objectives and statutory factors set forth in § 3553(a), in order to arrive at a fair and just sentence for each defendant.

    During the sentencing hearing, I would provide the defendant and, if applicable, victim(s), an opportunity to address the court, and would consider their statements and the arguments of counsel. In deciding what sentence to impose, I would rely on Section 3553, the United States Sentencing Commission Guidelines, and relevant Supreme Court and Sixth Circuit precedent.

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

    In addition to my answer to Question 1(a), I would carefully consider the decisions by other judges in comparable cases. Specifically, I would examine sentencing data in the Northern District of Ohio, as well as data from across the nation.

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

    The Sentencing Guidelines are advisory, not mandatory, so district courts may depart from them in appropriate circumstances. *See United States v. Booker*, 543 U.S. 220 (2005).

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

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

I have not studied the impact of mandatory minimum sentences on the crime rate. As a judicial nominee, it would not be appropriate for me to comment on Congress's decisions regarding mandatory minimum sentences as this is a matter of public policy. *See* Canons 2(A), 3(A)(6) and 5(C) of the Code of Conduct for United States Judges.

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

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

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

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

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

1. **Describing the injustice in your opinions?**

If confirmed, I would make a record regarding the sentence imposed. However, under the separation of powers, a district court judge has an obligation to faithfully apply laws enacted by Congress, including mandatory minimum sentences. That said, in an exceptional case, it may be appropriate for a district court judge to call attention to the injustice of a sentence as applied to a specific defendant.

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

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

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

   The Constitution vests charging decisions in the executive branch, not the judicial branch. If, however, I believed that a U.S. Attorney's charging policies were leading to abuse or injustice, I would base any action on my ethical duties, consistent with the Code of Judicial Conduct.

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

   The Constitution vests decisions about clemency in the executive branch, not the judicial branch.

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

   Yes.

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

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

      Yes.

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

      I am aware of statistics indicating that the rate of incarceration is higher for African-American men than for white men. If confirmed, I will continue to treat each person who comes before me with fairness, dignity, and respect, regardless of color or creed.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

   a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

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

Yes.

Senator Josh Hawley
Questions for the Record

James Ray Knepp II
Nominee, U.S. District Court for the Northern District of Ohio

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

   In *Glossip v. Gross*, the Supreme Court held that a petitioner challenging an execution protocol must show the protocol creates a "demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives." 135 S. Ct. 2726, 2737 (2015). The Sixth Circuit applied this standard in *In re Ohio Execution Protocol Litigation*, explaining that a petitioner must "(1) show that the intended method of execution is "sure or very likely to cause serious illness and needless suffering," and (2) "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." 946 F.3d 287, 289 (6th Cir. 2019) (quoting *Glossip*, 135 S. Ct. at 2737). If confirmed, I will continue to follow all precedent from the Supreme Court and the Sixth Circuit. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

   The Supreme Court in *Glossip v. Gross* held that the petitioners were not entitled to relief in part because they "failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims." 135 S. Ct. 2726, 2731 (2015) (citing *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion)). If confirmed, I will continue to follow all precedent from the Supreme Court and the Sixth Circuit. As a sitting Magistrate Judge and District Judge nominee, it would be improper for me to comment further on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

crime?

No.

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

   No.

5.

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

      Assuming a facially neutral and generally applicable state action, and the absence of an applicable state or federal statute, the state action must be rationally related to a legitimate governmental interest. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). However, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). In that instance, the state action is not neutral and is subject to strict scrutiny. *Id.* at 531-34, 546.

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

      The Supreme Court held that a law burdening religious practice that is not neutral or not of general application is subject to strict scrutiny, which means that it must be narrowly tailored to advance a compelling government interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). If confirmed, I will fully and faithfully follow Supreme Court and Sixth Circuit precedent with respect to this issue.

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

The Supreme Court has explained that a court's "narrow function is to determine whether the party's asserted religious belief reflects "an honest conviction." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). The Sixth Circuit has explained that "Courts are 'to determine whether the line drawn' by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs 'reflects an honest conviction.'" *New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 586 (6th Cir. 2018) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 683, 725 (2014) (quoting *Thomas*, 450 U.S. at 716)). If confirmed, I will fully and faithfully follow Supreme Court and Sixth Circuit precedent with respect to this issue.

d. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.

Not that I recall.

6.

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

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court held that the Second Amendment establishes an individual's right to possess a firearm, without connection to service in a militia, for traditionally lawful purposes, such as self-defense within the home.

b. Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.

Not that I recall.

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

I agree. This statement clearly and concisely describes my understanding of discerning the original public meaning of a statute, which is how I believe judges should conduct statutory interpretation.