

QUESTIONS FOR THE RECORD
NOEL J. FRANCISCO
NOMINEE TO BE SOLICITOR GENERAL

SENATOR CHRISTOPHER COONS

1. In private practice, you represented religious organizations in *Zubik v. Burwell* and argued that signing a form that notified the government or an insurer of a religious objection to providing contraceptives was overly burdensome, even though the form freed them from further involvement in the provision of contraceptives. Given this previous representation, if you are confirmed, will you recuse yourself from any case that involves the Affordable Care Act's contraceptive mandate?

RESPONSE: I have recused myself from the *Zubik* litigation. If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials in the Department of Justice's Ethics Office and recuse myself whenever appropriate.

2. The President recently issued an Executive Order in which he called for agencies to consider "amended regulations . . . to address conscience-based objections to the preventive-care mandate promulgated under" the Affordable Care Act. Given your previous representation in *Zubik v. Burwell*, if you are confirmed, will you recuse yourself from providing any legal guidance on those regulations?

RESPONSE: See Response 1.

3. If you are confirmed, under what circumstances would you recuse yourself from involvement in cases involving Jones Day?

RESPONSE: If confirmed, in any case where potential recusal issues arise, I will consult with career ethics officials in the Department of Justice's Ethics Office and recuse myself whenever appropriate.

4. In a 2015 *National Review* article discussing the Affordable Care Act's mandate to provide access to contraception, you asserted your client's belief that filling out a one-page exemption form would make them "complicit in sin to offer their employees a health plan that comes with contraceptive" coverage. I am concerned there is no limiting principle to this complicity argument. If any attenuated role in supporting a third party's conduct can be claimed as a violation of the Religious Freedom Restoration Act, many neutral laws and personal freedoms are at risk. What limiting principle should be applied?

RESPONSE: As the Supreme Court explained in *Hobby Lobby*, this issue is governed by the Religious Freedom Restoration Act ("RFRA"), which establishes the contours and limits of the rights that an individual or entity has with respect to federal regulations that they believe infringe on their religious liberty. Generally, the threshold question is

whether the individual or entity is protected by RFRA. If it is, then under RFRA, the questions are (1) whether the federal regulation substantially burdens the person's sincere exercise of religion, and (2) if so, whether the regulation is the least restrictive means of furthering a compelling governmental interest.

I have recused myself from the *Zubik v. Burwell* litigation as a result of my prior work on this matter, and therefore do not believe it would be appropriate for me to comment further on this matter.

More generally, if confirmed, the positions that I advance on behalf of the United States would not be based on the views of my former clients, but instead on the best interests of the United States.

5. During the period when you served as Acting Solicitor General, you appeared on some of the administration's briefs challenging the travel ban executive orders.

- a. What was your role in these cases?

RESPONSE: During my tenure as Acting Solicitor General, I was involved in the drafting of briefs and formulation of the Government's legal arguments in these cases.

- b. Why is your name on some of the briefs and not others?

RESPONSE: To the best of my recollection: I participated in the normal process of drafting and revising the brief referenced above until the afternoon of February 6, 2017, when my former law firm, Jones Day, filed an amicus brief in the case. Upon learning of the filing, I promptly consulted the career ethics attorneys within the Department of Justice. They authorized me to participate in the case pending further review, but they advised me that I should refrain from signing the brief or communicating with Jones Day. During the evening of February 6, I discovered that companies in which I have small financial holdings also had filed an amicus brief in the case (separate from the amicus brief filed by Jones Day). Again, I consulted with career ethics officials. In an abundance of caution, I declined to work on the matter until the following morning of February 7, when career ethics officials again authorized me to participate in the case. On February 9, 2017, the career ethics attorneys in the Department completed a more comprehensive review and continued their authorization to work on the case and related litigation. Throughout this period, I consulted with career attorneys in the Departmental Ethics Office and followed their advice at all times. The Departmental Ethics Office has reviewed this answer and confirmed its accuracy.