

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

SENATOR MAZIE K. HIRONO

1. As Solicitor General, you would be responsible for supervising and conducting government litigation before the Supreme Court, as well as determining which cases the government will appeal, and which strategies to use and arguments to present. If confirmed, you will often face situations where the government has lost its case before a district or appeals court, in cases where the lower court's opinion calls into serious question the validity of the government's opinion.
 - a. If you believe a case is fruitless or that you don't have a sound legal or constitutional argument, yet the President is pushing for an appeal, will you be able to tell him no?

RESPONSE: Yes.

- b. Would you defend a law or policy before the Supreme Court that you felt to be unconstitutional? Would you resign if put in the position of having to do so? What if you believe the law or policy would be otherwise constitutional, but for statements or actions by the President or executive branch that reveal an unconstitutional motive?

RESPONSE: Traditionally, the Solicitor General will defend laws passed by Congress when a reasonable legal defense is available, unless the law encroaches on the President's Article II powers. I believe that a similar standard applies to Executive Orders and other executive actions. If confirmed, I will defend laws passed by Congress, the President's Executive Orders, and other executive actions when a reasonable defense is available, but not otherwise. If I were nonetheless directed to advance positions for which there was no reasonable basis, I would resign.

- c. Over the course of the presidential campaign and in the early months of his administration, the President has lashed out at judges and the federal judiciary in general when things do not go his way. Most recently, federal judges have halted his executive orders concerning the Muslim ban and so-called "sanctuary cities." The President belittled Judge Derrick Watson of the US District Court for Hawaii for ruling on the second travel ban, and he has threatened to break up the Ninth Circuit over their opinions, even though he lacks the power to do so. What is your view of the President's attacks on judges and the courts? As Solicitor General, would these kind of personal attacks on judges concern you as you consider the government's strategy in court?

RESPONSE: I have the utmost respect for the federal judiciary. If confirmed, I would do my best to ensure that cases are handled on behalf of the United States with the highest level of integrity.

- d. Do you believe the rulings of the Ninth Circuit, which the President attacked in a series of tweets on April 26, are less valid than other circuit courts'?

RESPONSE: I believe that the Ninth Circuit's rulings are as binding as the rulings of other circuit courts.

- e. How will you handle a matter that affects the President's business interests?

RESPONSE: The resolution of issues such as that referenced in the question above will turn on the facts and circumstances of the particular matter. Should such a matter arise, I would consult with the relevant officials within the Department of Justice to determine how it should be appropriately handled.

- 2. You served as counsel for the petitioners in *Zubik v. Burwell*, in which religiously-affiliated non-profits challenged the accommodation offered to them as part of the Affordable Care Act's requirement that employers provide coverage for contraception in employee-sponsored health plans.

- a. In a 2013 speech delivered at the Cato Institute, you argued that the contraceptive mandate "was adopted to discriminate against religious organization [with] certain views on abortion and contraception." Do you stand by those comments? How would your clearly expressed personal view impact the decisions you would make as Solicitor General as to whether and how to defend the contraception mandate, which remains the law of the land?

RESPONSE: In the *Zubik* litigation, I represented clients that believed that the contraceptive mandate violated their rights under the Religious Freedom Restoration Act ("RFRA"). In that litigation, I served as an attorney advancing my client's views, not my own views.

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 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.

- b. In *Burwell v. Hobby Lobby Stores*, the Supreme Court held that the government had a compelling interest in providing women with access to contraception. Do you agree or disagree with that holding?

RESPONSE: I do not believe it would be appropriate to state whether I agree or disagree with any particular Supreme Court decision.

- c. In a 2014 speech, you said “[c]ontraception is widely available. It’s cheap. And for those who can’t afford it, there are lots of other ways to get it for free.” According to Planned Parenthood, the out of pocket costs for a year of oral contraception is over \$600, plus the cost of going to a doctor. That may seem cheap for a partner at a law firm that bills several hundred dollars an hour. But is that cheap for an average American woman or family? If a woman does not qualify for Medicaid, and her employer does not cover contraception, how can she get contraception for free?

RESPONSE: In the *Zubik* litigation, I represented Catholic Charities and other Catholic organizations that believed that, under RFRA, the contraceptive mandate imposed a substantial burden on their sincerely held religious beliefs and it was not narrowly tailored to a compelling governmental interest. Briefs in that case argued that the contraceptive mandate was not the least restrictive means of furthering the relevant governmental interests because the government could provide contraceptive coverage through other government programs. For example, Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.*, provides federal funding for family-planning clinics. Briefs filed in the *Zubik* litigation also argued that the government could provide contraceptive coverage through other programs, including the insurance exchanges established under the Affordable Care Act, Medicaid, or other forms of tax subsidies.

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- d. The Supreme Court vacated *Zubik* for further consideration by the lower courts in light of supplemental briefings from the parties, but the issue may return to the Supreme Court in the future. If confirmed, would you recuse yourself from further litigation in this case? Would you defend the ACA from future challenges? Or would you advocacy in *Zubik* create a conflict of interest?

RESPONSE: See Response 2c. More generally, if confirmed, in any case where potential recusal issues arise, I will consult with the career ethics officials in the Department of Justice’s Ethics Office and recuse myself when appropriate.

- e. If you were recused from defending the ACA because of a conflict of interest—or from any other case or controversy that you have already litigated—would your office defend those policies?

RESPONSE: If I am confirmed, then on any matter in which I am recused, the Office of Solicitor General would make its determination on the matter without my participation.

- 3. After the Supreme Court struck down limits on individuals' aggregated political contributions in *McCutcheon v. FEC*, you said that you agreed with the decision and commented: "I've always thought these were relatively simple cases. We're talking about core political speech made at the single point in time when it's most important—in the midst of an election—and if you can restrict core political speech at the most important time that it is to make it, that is during an election . . . then you really are having the federal government directly influence the political process through restrictions on free speech and the basic principle, in my view, has always been [that] we're always better off with more speech."

- a. Prior to *Citizens United*, the Court recognized, as Congress and numerous state legislatures have, that there is a connection between limits on political giving and preventing corruption in our political system. Is that connection a concern for you? Is there a point at which donations become so large that they present a corruption concern?

RESPONSE: I do not believe it would be appropriate for me to comment on issues that may come before the courts. If confirmed, the positions that I advance on behalf of the United States would not be based on my personal views, but instead on the best interests of the United States.

- b. Doesn't the ability to give hundreds of thousands or even millions of dollars raise a risk of undue influence in a way that small donations do not?

RESPONSE: See Response 3a.

- c. In all the years you've donated to Republican campaigns, were you ever concerned with the flood of unfettered money into campaigns?

RESPONSE: See Response 3a.

- d. What level of scrutiny should apply to laws that limit campaign contributions?

RESPONSE: See Response 3a.

- 4. On May 4, the President signed an executive order instructing the Attorney General to provide guidance to all agencies on "interpreting religious liberty protections in Federal law." This sweeping approach could result in an unprecedented expansion of religious

exemptions affecting LGBTQ people in housing and homelessness programs, healthcare nondiscrimination regulations, and child welfare regulations.

- a. Were you involved in drafting this order?

RESPONSE: No.

- b. Should religiously-affiliated institutions that receive federal funds be permitted to deny services to same-sex couples or the children of same-sex couples? Is that not state-sponsored discrimination? What is the constitutional basis for such discrimination?

RESPONSE: I do not believe it would be appropriate for me to comment on issues that may come before the courts. If confirmed, the positions that I advance on behalf of the United States would not be based on my personal views, but instead on the best interests of the United States.

- c. Would the Solicitor General's office, as a general matter, be expected to review or advise federal agencies on the content of these regulations? If so, would you be obligated to recuse yourself from participation in any discussions related to amending the contraceptive coverage mandate, given your role in the *Zubik* case?

RESPONSE: As far as I am aware, the Solicitor General's Office generally does not advise on the content of regulations unless they affect cases that the Solicitor General's Office is handling. As noted above, I have recused myself from the *Zubik v. Burwell* litigation and so have not been involved in the Government's handling of that litigation on remand from the Supreme Court's *Zubik* decision.

5. In *Hobby Lobby*, the Supreme Court accepted the corporation's claims based on religious beliefs about contraception that directly contravened scientific research. In your involvement with *Hobby Lobby* and *Zubik*, you have argued that the government cannot question whether a religious belief is valid, but that courts must instead accept plaintiffs' description of their beliefs without question, including beliefs about when a person is complicit in the action of another. In your words, "[t]he question of whether one action (paying wages that may then be used to purchase abortion-inducing drugs and devices) is morally indistinguishable from another (providing coverage for abortion-inducing drugs and devices) is one for religious authorities and individuals, not the courts." Are there any limits—and what are the limits—on what a corporation may claim as a belief in justifying its denial of healthcare for its employees?

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.

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