

**Nomination of John Michael Gallagher to the United States District Court for the
Eastern District of Pennsylvania
Questions for the Record
Submitted October 23, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2017, you participated in a conference on the opioid epidemic, hosted by the Police Executive Research Forum. During a panel discussion, you stated that “[u]nder current federal laws, to get some teeth, to get a mandatory minimum sentence, you need 100 grams of heroin. That’s way too high.” (Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities*, 2017)

- a. **Is it your view that we should be arresting and incarcerating more people, as a response to the opioid epidemic?**

That is a subject of considerable political debate. As a judicial nominee, it would not be appropriate for me to offer an opinion on which criminal laws should be passed and how they should be enforced.

In 2017, I participated in an advisory panel about the opioid epidemic that was organized by the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing.

Like other advisory panels I have served on during my career, this advisory panel brought together leading police professionals to discuss ways that we can more effectively and professionally police in our free society. This particular panel brought together hundreds of participants from law enforcement, medicine, and addiction counseling to discuss the tools that could be brought to bear from their respective disciplines to address the opioid epidemic.

During the panel discussion, I noted that we “cannot arrest our way out of this problem, but arrest has to be part of the solution here.” The problem I was referring to is the opioid epidemic. I made this comment in the context of the panel’s discussion of the distinction between the criminal prosecution of drug dealers, who profit from the distribution of opioids to drug users, and the debatable value of prosecuting their addicted customers without providing avenues for these drug users to overcome their addictions.

At the same conference on the opioid epidemic, you said, “drug distribution is treated like a nonviolent offense. I think that’s a fallacy; it’s a violent crime.” (Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities*, 2017)

- b. **Do you think that companies that intentionally flooded the population with opioids have committed a violent crime?**

It is my understanding that there is litigation pending, and potentially impending, on the legal liability of companies that manufacture, produce, and distribute prescription opioids. Canon 3(a)(6) of the Code of Conduct for United States Judges prohibits me from making “public comment on the merits of a matter pending or impending in any court.”

My statement was intended to convey that drug distribution, and disputes related to such distribution, often also involve violence. Sadly, that has been my experience during my law enforcement career. For instance, I helped successfully prosecute a violent Philadelphia drug trafficking organization for 12 murders, including the arson murder of two women and four children who were burned to death to avenge the testimony of a former associate of the organization. As a result, the leader of that drug trafficking organization was held accountable for more murders than any person in the history of Pennsylvania.

2. You have worked on helping police departments develop policies and training methods regarding the use of force. It also appears—from your Committee Questionnaire—that you handled “police misconduct cases prosecuted before an administrative trial forum” as an Assistant Special Prosecutor with the New York Police Department.

a. Did any of the misconduct cases that you handled involve the use of force? Approximately how many and what were the outcomes in those cases?

I have investigated and prosecuted specific acts of official misconduct by police officers as an Assistant Special Prosecutor in the New York City Police Department, and as an Assistant United States Attorney. Several of these cases involved the excessive use of force, though I do not have a precise estimate. I recall at least two of these cases resulted in convictions.

b. What do you believe is the most important thing that police departments can do to minimize use-of-force incidents?

Regrettably, in my experience, it is not possible to eliminate all instances in which an officer must use force to protect himself or others. However, my work helping to develop police use of force policies for the Philadelphia and Miami police departments has demonstrated to me that police officers must be given clear guidance and training on use of force given the serious consequences that can result from the use of force. Such guidance and training can help minimize use-of-force incidents.

For instance, in Miami, I helped develop use of force policies and training that changed the focus from when a police officer was legally authorized to use force to emphasizing the use of force only as a last resort when no other options are available. These policies and training proved successful. After they were implemented, the number of police firearm discharges in Miami was reduced to zero over a prolonged period of time. At that time, the Mayor of Miami was Manny Diaz. He has written a letter to the Senate

Judiciary Committee in support of my nomination to the district court. His letter reiterates the critical importance of law enforcement agencies implementing effective use of force policies. In his letter, he stated:

"The most fundamental responsibility of government is to provide for the safety and security of its people. Successful policing involves more than just crime statistics; you must earn the trust of all residents through a professionally trained force governed by a clear set of rules, including the use of force that respects the dignity and rights of your residents. Chief Gallagher fully embraced that responsibility and helped implement the reforms that resulted in our becoming a model that other American cities sought to emulate."

Similarly, in Philadelphia, I helped develop use of force policies and training that emphasized the primary duty of police to protect and preserve life. These policies are summarized in a letter written to the Senate Judiciary Committee in support of my nomination. The letter is from Chuck Wexler, the executive director of the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing. In his letter, Mr. Wexler explained:

"[Philadelphia Police Commissioner] Timoney and Gallagher also revamped the department's policy on officers' use of force, including a prohibition on shooting at moving vehicles and the elimination of the 'blackjack' as a tool for overcoming resistance - a weapon that figured in an inordinate number of citizen complaints and lawsuits. Gallagher also helped write a policy requiring police officers to intervene if they believe that a fellow officer is losing his composure. The policies against shooting at moving vehicles and creating a 'duty to intervene,' implemented by Gallagher and Timoney 20 years ago in Philadelphia, have been recognized as best practices in policing."

c. Do you believe that a judge can play a role in ensuring that police officers do not commit misconduct?

Yes, a judge can by faithfully applying the law and precedent related to police misconduct. Matters involving allegations of police misconduct are not uncommon in federal courts. The Supreme Court has determined that evidence obtained through police disregard of constitutional protections is subject to suppression. *Mapp v. Ohio*, 367 U.S. 643 (1961). Officers who use the authority of their badge to deprive people of their civil rights face potential criminal charges for "color of law" violations, pursuant to 18 U.S.C. § 242. Officers also face potential civil liability for constitutional violations, often pursuant to 42 U.S.C. § 1983. If confirmed, I would faithfully apply the law and precedent related to police misconduct.

3. According to your Committee Questionnaire, you participated in two panel discussions in 2018, both of which were titled: "Sanctuary Cities and Their Impact on Community Safety." You stated that you had "no notes, transcript or recording" of these panel discussions.

Would you please tell us about your remarks at these panel discussions?

In 2018, I was a participant in two legal panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” at universities in Philadelphia.

One panel was held at the University of Pennsylvania Law School and was organized by the University of Pennsylvania Law School American Inns of Court. The American Inns of Court is an association of lawyers, judges, and other legal professionals from all levels and backgrounds who share a passion for professional excellence. U.S. Supreme Court Chief Justice Warren Burger helped to found the American Inns of Court. The other panel was held at Temple University and was organized by the Osher Lifelong Learning Institute, an academic institute where people 50 years and older can attend classes.

The attorneys and immigration rights advocates who participated on these panels discussed whether sanctuary cities pose a risk to public safety. The discussions acknowledged that this is a complex issue. On the one hand, the discussions noted that sanctuary city policies have resulted in the release of people with criminal records, some of whom have gone on to commit new crimes. There have been high profile examples of this occurring in Philadelphia. On the other hand, the discussions noted that there are strongly held concerns that involving local police in federal immigration enforcement deters victims and witnesses of crimes who are in the country illegally from coming forward to report crimes to the police. During the panel discussions, I explained that I have seen both sides of this complex issue play out in my professional career in law enforcement.

4. You were a police officer in the NYPD from 1989 to 1994. You worked as both a Community Patrol Officer and a Plainclothes Anti-Crime Officer.

How do you think your time as a police officer will inform your approach to being a judge?

My time as a police officer will inform my approach to being a judge in several ways. I learned early in my career as a young police officer in New York City the necessity and importance of applying the law equally and fairly. I will bring that same perspective to the bench, if I am confirmed. My time as a police officer also instilled in me a lifelong passion to serve the public, which is a passion I would also bring to the bench. Serving as a police officer also provided me a tremendous opportunity to meet and interact with people of diverse backgrounds and experiences both in the community and on the police force. I gained from that an appreciation for treating people with dignity and respect, especially when they are facing difficult circumstances. If confirmed, I would apply that same approach to how I interact with the parties, witnesses, and other people who appear in court.

5. During the 2000 Republican National Convention—which took place in Philadelphia—protestors alleged that the Philadelphia Police Department used too much force in managing the protests. At the time, you worked in the Philadelphia Police Department as Special Counsel to the Police Commissioner. You were quoted in the press as saying: “Where are all the injuries for all these people who were tortured?” You added, “It’s absolutely absurd.” (Philadelphia Inquirer, Aug. 20, 2000)

a. Are visible injuries necessary for a protester to have a valid claim that police officers have infringed their constitutional rights?

Incidents of police misconduct can occur both in and out of public view, and with and without visible injuries. My comments to the press in 2000 were in response to allegations that the police had used excessive force that was essentially being equated to torture. The press article referenced in your question cites an investigation by the Philadelphia Inquirer that found exceedingly thin evidence to support these allegations. That being said, I could have chosen my words more carefully when I was speaking to the press in 2000. With the benefit of almost twenty years of hindsight and further experience, I can say now that I would not make the same comment today.

Police officers have a responsibility to respect the dignity and rights of the people they encounter on the job, which is especially true when they must use force to protect the public or themselves. The use of force by police officers is a grave matter given the serious consequences that can result from the use of force. Throughout my career, including during my service with the Philadelphia and Miami police departments, I have helped develop use of force policies that were intended to reduce the police use of force.

b. Does the use-of-force need to amount to torture for it to be problematic?

No. Any exercise of police use-of-force beyond that necessary and proper under the law and police policy is problematic. Please also see my response to question 5.a.

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 binding 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. It is the role of the district court judge to faithfully apply, rather than question, precedent of the Supreme Court. In a rare particular instance where such precedent seemingly conflicts with other authority, the district court might respectfully note such an observation.

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

The Supreme Court has said, “A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 563 U.S. 692, 709, fn 7 (2011), citing 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed.2011). Generally, to foster predictability and reliance on the rule of law, the district

court should avoid rendering dissimilar decisions on similar issues and facts, without a reasoned opinion explaining the reasons for doing so.

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

The decision of whether and when to overturn its own precedent falls exclusively in the realm of the Supreme Court. A recent case involving a double jeopardy challenge demonstrates the varying opinions on the Court as to how and when to overturn its own precedent. *Gamble v. United States*, 139 S. Ct. 1960 (2019). If confirmed to the district court, I would faithfully apply all Supreme Court and Third Circuit precedent.

7. 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”?

For a district court judge, all Supreme Court precedent is binding, and must be faithfully followed, regardless of how it is labelled. *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. If confirmed, I will fully and faithfully apply *Roe* and all binding Supreme Court and Third Circuit precedent.

b. Is it settled law?

Yes. *Roe v. Wade* is binding Supreme Court precedent and I would faithfully apply the holding in *Roe v. Wade*, as I would that of all binding Supreme Court and Third Circuit precedent.

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. *Obergefell v. Hodges* is binding Supreme Court precedent and I would faithfully apply the holding in *Obergefell v. Hodges*, as I would that of all binding Supreme Court and Third Circuit precedent.

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?

The Supreme Court's majority's opinion in *Heller* is binding precedent on lower courts and I would follow it, as I would follow all precedent of the Supreme Court. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on any of the justices' opinions in *Heller*. If confirmed, I would faithfully apply *Heller* and all binding Supreme Court precedent.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626 (2008). Further, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms in sensitive places such as schools and government buildings." *Id.* at 626-37.

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

I have not had the opportunity to study *Heller* and prior Second Amendment precedent in depth. I understand that the Supreme Court stated in *Heller* that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment" and that the question presented was "judicially unresolved." *Id.* at 625. As a nominee to a lower court, I am bound by the Supreme Court's own reading of its precedent.

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. FEC*, the Supreme Court stated, "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). As a judicial nominee, it would not be appropriate for me to express an opinion about whether a corporation's First Amendment rights are equal to individuals' First Amendment rights. If the resolution of a case required this analysis, I would examine all relevant Supreme Court and Third Circuit precedent.

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

First Amendment protection of free speech is an important issue that is subject of numerous Supreme Court and Third Circuit opinions. As a nominee to the district court, it would not be appropriate for me to state how I would decide a potential case or controversy involving a conflict between the free speech rights of an individual and a corporation. However, I can say that in deciding such a case or controversy I would look to relevant Supreme Court and Third Circuit precedent.

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

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with Religious Freedom Restoration Act." The Court, however, also noted the limits of its holding. *Id.* at 2759-2760. There is ongoing debate, and pending or likely impending litigation, regarding the scope of the religious rights of corporation under the First Amendment. Therefore, as a district court nominee, it would not be appropriate for me to comment further on the matter. If confirmed, I would faithfully apply *Hobby Lobby* and all binding Supreme Court precedent.

11. 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. I have no recollection of being asked by anyone about my "views on administrative law."

- 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. I have no recollection of being asked by anyone about my “views on administrative law.”

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

I have generally not dealt with administrative law in my career as a federal prosecutor. I am generally aware of deference given to administrative agencies as developed by the Supreme Court, such as the deference to an agency’s “reasonable” interpretation of an ambiguous statute under the agency’s purview. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent regarding administrative law.

12. 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.

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

This is not a subject that I have studied in depth. I am generally aware that there are scientists who believe that human activity is contributing to or causing climate change.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. The Supreme Court has also stated that when “interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

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 any 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.

I received the questions on Thursday, October 24, 2019. I prepared draft responses and solicited feedback on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, October 28, 2019. Each answer herein is my own.

Written Questions for John Michael Gallagher
Submitted by Senator Patrick Leahy
October 23, 2019

1. In 1996 and 1997, as an Assistant Special Prosecutor in the New York Police Department, you handled “police misconduct cases prosecuted before an administrative trial forum in the New York City Police.” In 1999, after your departure, the NYPD relinquished its role in investigating misconduct complaints that had been adjudicated by the Civilian Complaint Review Board. But as *The New York Times* explained it, the process of reinvestigating cases had gone on “for years.” In fact, at the time, officers were “not disciplined in half the cases in which their conduct ha[d] been ruled improper by the board, mostly because police investigators often [threw] out the cases for insufficient evidence.”

(a) Please describe the types of matters you handled as an Assistant Special Prosecutor.

The Special Prosecutor’s Office (SPO) of the NYPD and the Department Advocate’s Office (DAO) were distinct offices which each handled the disciplining of police misconduct. The SPO, where I was assigned, focused on more serious police misconduct and corruption cases where it was likely that the department would seek termination of employment of guilty officers, and a swift adjudication was desired.

(b) What role did you play, if any, in the reinvestigations of cases adjudicated by the Civilian Complaint Review Board?

I had no role in reinvestigating cases adjudicated by the Civilian Complaint Review Board.

2. During the 2000 Republican National Convention in Philadelphia, the Philadelphia Police Department was tasked with managing protesters. According to the ACLU, the Department violated protestors’ rights in numerous ways. For example, the ACLU alleged that the Department violated the Fourth Amendment by searching protestors’ bags and abused protestors by choking them and pulling their hair. You subsequently dismissed these allegations, claiming that “if any illegal conduct occurred, it would be playing every night on the TV news.”

(a) Would you agree that evidence of misconduct at that event could extend beyond what was “playing every night on the TV news”?

Incidents of police misconduct can occur both in and out of public view. My comments to the press in 2000 were in response to allegations by certain protestors that they were randomly stopped and abused, in public, by Philadelphia police officers, on the streets of downtown Philadelphia, during a week of extremely heavy media coverage. My comment to the

press was: “There were hundreds, if not thousands, of cameras recording police actions that week. You know as well as I do that if any illegal conduct occurred, it would be playing every night on the TV news.”

In retrospect, I could have chosen my words more carefully when I was speaking to the press in 2000. With the benefit of almost twenty years of hindsight and further experience, I can say now that I would not make the same comment today. In my career, I have invested considerable time and effort into developing policies to prevent police misconduct, and investigating and prosecuting cases of police misconduct. I take allegations of police misconduct very seriously.

Police officers have a responsibility to respect the dignity and rights of the people they encounter on the job, which is especially true when they must use force to protect the public or themselves. The use of force by police officers is a grave matter given the serious consequences that can result from the use of force. Throughout my career, including during my service with the Philadelphia and Miami police departments, I have helped develop use of force policies that were intended to reduce the police use of force.

(b) Can you assure us that if you are confirmed, you will consider the totality of the evidence in any case before rendering a decision?

Yes. That is something I do in my role as a federal prosecutor. As a prosecutor, I am charged with seeking justice, not merely collecting convictions. I believe that my commitment to that principle is demonstrated by the letter of support submitted to the Senate Judiciary Committee by more than two dozen criminal defense attorneys, including the chief federal public defender for the Eastern District of Pennsylvania, against whom I have litigated cases as a prosecutor. In their letter supporting my nomination they stated:

“Mr. Gallagher has been fair and transparent in his dealings with us and is true to his word. Also, of great importance, he is collegial and accessible to defense counsel. Of course, we do not always agree, but he is always willing to listen, honestly and with an open mind, to the arguments and proposals we offer on behalf of our clients. Mr. Gallagher treats counsel and our clients with dignity and respect. Mr. Gallagher possesses an even and fair temperament and integrity in his dealings with counsel and their clients, which would no doubt be carried over and implemented by Mr. Gallagher as a judge.”

3. In 2017, you advocated for lowering the amount of heroin that would trigger a mandatory minimum sentence. You based this contention on comparisons with other drugs,

including methamphetamine, cocaine, and marijuana, which require smaller amounts to trigger minimum sentences.

- (a) Do you believe the mandatory minimum sentences for methamphetamine, cocaine, and marijuana are appropriately calibrated?**

Congress has established mandatory minimum sentences for certain federal crimes. As a federal prosecutor, these laws establishing mandatory minimum sentences have impacted my work, especially the prosecution of drug trafficking offenses. If confirmed, I will faithfully follow all applicable statutes and precedent regarding mandatory minimum sentences. As a judicial nominee, it would not be appropriate for me to express my personal opinion about mandatory minimum sentences because they are policy choices committed to the legislative branch. See Code of Conduct for United States Judges, Canons 2.A and 5.

- (b) If confirmed as a judge, you will have significant discretion in sentencing. How will you approach sentencing in a drug distribution case?**

There is perhaps no more serious or somber duty of a judge than to determine the appropriate sentence for a criminal defendant. In federal cases, sentencing of drug distributors is often determined by mandatory minimum sentences established by Congress. In sentencing any case, I will consider the applicable law, and the motions and arguments of the parties. I shall consider the advisory Sentencing Guidelines. As the Supreme Court has stated: “As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007); *see also*, *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013)(same). I shall also consider the statutory sentencing factors set forth in 18 U.S.C. § 3553(a), and seek always to “impose a sentence sufficient, but not greater than necessary” to comply with that statutory directive. 18 U.S.C. § 3553(a).

4. 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?**

Yes. I will adhere to the Supreme Court in its instructions on statutory interpretation, including the text of the statute as it fits into an overall statutory scheme.

5. 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 judiciary is crucial to its role as a distinct, co-equal branch of our government. Judges must rule based on law and not be influenced by outside criticism.

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

Please see response to 5(a) above.

6. 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?**

This is not an area in which I have experience. I understand, generally, that the Supreme Court has invoked authority to review executive action taken in the realm of national security. *See, e.g., Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952).

7. 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?**

Generally, when a party has disregarded a lawful order of the court, potential relief could include injunctive relief and sanctions.

8. 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?**

Yes. The Supreme Court has reviewed the actions of a president in times of war to ensure compliance with authority granted by the Constitution and Congress.

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?**

The Supreme Court established the governing framework for analysis of disputes between the President and Congress on war in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Supreme Court stated there:

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38, 72 S. Ct. 863, 871, 96 L. Ed. 1153 (1952). If confirmed, I will faithfully apply all binding Supreme Court and Third Circuit precedent.

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

If I were faced with such an issue as a district court judge, I would evaluate an action involving a national security matter by considering all relevant precedent, constitutional provisions and any pertinent statutory provision. The Supreme Court has set forth the analysis for judicial review of Executive action in certain cases, including *Hamden v. Rumsfeld*, 548 U.S. 557 (2006) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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

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

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Equal Protection Clause applies to classifications that discriminate based on gender. The government must demonstrate an “exceedingly persuasive justification” for gender-based classifications. *Id.* at 2274. If confirmed, I will faithfully follow this precedent and all other relevant precedent from the Supreme Court and the Third Circuit.

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

In 2009, the Supreme Court stated that the Voting Rights Act helped to remedy the disenfranchisement of African Americans and that its accomplishments are “undeniable.” *Northwest Austin Mun. Utility Dist v. Holder*, 557 U.S. 193, 201 (2009). *See, also, Bartlett v. Strickland*, 556 U.S. 1, 8-12 (2009) (“Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote”). If confirmed, I will faithfully apply all Supreme Court and Third Circuit precedent concerning the Voting Rights Act.

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

Article I, Section 9 of the Constitution states: “And no Person holding any Office or Profit of Trust under them, 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.”

13. 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?

The Supreme Court examines the record, including factual findings, as developed in the courts below.

14. 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 Constitution's Thirteenth, Fourteenth and Fifteenth Amendments were adopted to counter racial discrimination following the Civil War. These amendments all contain enforcement clauses. The Thirteenth Amendment, which abolished slavery, includes the following enforcement authority in Section 2: "Congress shall have power to enforce this article by appropriate legislation." The Fourteenth Amendment, which established "equal protection of the laws," includes the following enforcement authority in Section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Fifteenth Amendment, which guaranteed the right to vote, includes the following enforcement authority in Section 2: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress also has the authority to abrogate the States' Eleventh Amendment immunity pursuant to the remedial powers of the Thirteenth, Fourteenth and Fifteenth Amendments.

15. 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 has long held that the Constitution protects a right of privacy. *See, e.g. Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court has applied this right in subsequent cases, including *Lawrence v. Texas*. Each of these cases are binding Supreme Court precedent, and if confirmed, I will faithfully apply these and all binding precedent.

16. 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?

For a district court judge, all Supreme Court and Third Circuit precedent is binding, and must be faithfully followed. It is not appropriate for a district court to depart from these precedents. The Supreme Court has said, "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709, fn 7 (2011), citing 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed.2011). Generally, to foster predictability and reliance on the rule of law, the district court should avoid rendering dissimilar decisions on similar issues and facts, without a reasoned opinion explaining the reasons for doing so.

17. 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.

In actual conflict of interest situations based on my current position as an Assistant U.S. Attorney, I would recuse myself from any and all criminal cases and investigations in which I personally participated or supervised. In other potential conflict of interest situations, I would disclose all relevant information to all parties, invite the parties to be heard, and then rule on recusal based upon the application of all pertinent judicial guidelines. In reviewing actual or potential guidelines, I would be guided by 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States judges, and any other laws, rules, and practices governing such circumstances.

18. 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?

Footnote 4 in *Carolene Products* states in full:

“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, as to prohibition of peaceable assembly. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial

minorities. Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (internal citations omitted). This language played an important role in the development of strict scrutiny by the courts of laws that, for instance, facially violate a right or provision of the Constitution, interfere with the political process so as to prevent the repeal of undesirable legislation, or discriminate against “discrete and insular minorities.”

19. 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.

20. **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?**

This is not an issue that I have studied. If confirmed, and a case raising this issue came before me, I would carefully examine all applicable authority, including Supreme Court and Third Circuit precedent.

21. **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 Constitution gives Congress limited and enumerated powers. The Supreme Court has addressed the scope of Congress’ power under the commerce clause, at Art. 1, § 8, in many cases, including but not limited to, *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Lopez*, 514 U.S. v. 549 (1995), and *NFIB v. Sebelius*, 567 U.S. 519 (2012). Further, the Supreme Court has addressed the scope of Congressional authority to devise appropriate remedial measures under Section 5 of the Fourteenth Amendment in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997). The test is whether the legislative remedy exhibits a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 508.

22. 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 12I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

In *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), the Supreme Court rejected the idea of "a searching inquiry into the persuasiveness of the President's justifications." The Court stated that such an inquiry would be "inconsistent with the broad statutory text and deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S.Ct. at 2409. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent in this area.

23. 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 has stated that "qualified 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, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Accordingly, the doctrine of qualified immunity takes into account these interests. If

confirmed, I will faithfully apply this Supreme Court precedent and all other relevant Supreme Court and Third Circuit precedent.

24. 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?

This is not an issue that I have studied. As a nominee to the district court, I am not in a position to provide an answer to such a hypothetical question, pursuant to the Code of Judicial Conduct for United States Judges at Canons 2, 3(a)(6), and 5, incorporated to nominees by Canon 1. As a general matter, the Supreme Court has stated: “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38, 72 S. Ct. 863, 871, 96 L. Ed. 1153 (1952).

25. 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 not only contemplates but establishes an independent judiciary that is a co-equal branch of government with the executive and legislative branches. It is of the utmost importance that a judge carry out

his or her duties free from political influence. A judge must apply the law, equally and fairly, without regard to fear or favor.

**Nomination of John M. Gallagher
to the United States District Court for the Eastern District of Pennsylvania
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, as requested, I read the story and listened to the recordings.

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

I have no personal knowledge of anonymous or opaque spending related to judicial nominations. Judicial independence is a core constitutional principle. Canon 1 of the Code of Conduct for U.S. Judges states: “An independent and honorable judiciary is indispensable to justice in our society.” If confirmed, I will decide all matters before me fairly and impartially and uphold the integrity and independence of the 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?

I have not studied this issue. Further, to the extent that this question concerns a political matter relating to the nomination and confirmation process for judges, I respectfully refrain from responding further pursuant to Canon 5 of the Code of Conduct for United States Judges, which applies to judicial nominees.

- 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 do not.

- 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 role of a judge is to faithfully adhere to the oath of office in 28 U.S.C. 453. If confirmed, I will administer justice fairly and impartially to all parties. I will also faithfully follow Supreme Court and Third Circuit precedent.

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

To the extent that Justice Roberts was stating that the judge’s role is to impartially apply the law, as opposed to taking a side or creating the law, I agree with his metaphor. As a district court nominee, I understand that the rules are dictated by statute and precedent. The judge is to apply those rules, fairly and equally, to the facts and parties before the court.

- 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 consider the practical consequences of a particular ruling unless required to do so under law. For instance, the Federal Rules of Civil Procedure provide for issuance of a temporary restraining order when the Court determines that “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65. In such instances, the court is required by law to consider the consequences of taking or not taking a particular action.

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?

As the Supreme Court has explained, in determining whether a genuine dispute exists, “(t)here is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Said otherwise, the inquiry requires an objective determination as to “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52.

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?

Empathy can play a role in the execution of the judge’s duties so long as it does not impact the judge’s interpretation and application of the law. For instance, the judge can be reasonably accommodating and take measures to make nervous victims and witnesses

more comfortable, recognizing that for most litigants, participating in the judicial system can be confusing and disconcerting.

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

My background has involved extensive interaction with people from all walks of life. I have strived to treat each person fairly, and with dignity, often under challenging circumstances. This experience should provide insight into how I would operate a courtroom and interact with litigants and other participants in cases. For instance, this commitment on my part is demonstrated by the letter of support submitted to the Senate Judiciary Committee by more than two dozen criminal defense attorneys, including the chief federal public defender for the Eastern District of Pennsylvania, against whom I have litigated cases as a prosecutor. In their letter supporting my nomination they stated:

“Mr. Gallagher has been fair and transparent in his dealings with us and is true to his word. Also, of great importance, he is collegial and accessible to defense counsel. Of course, we do not always agree, but he is always willing to listen, honestly and with an open mind, to the arguments and proposals we offer on behalf of our clients. Mr. Gallagher treats counsel and our clients with dignity and respect. Mr. Gallagher possesses an even and fair temperament and integrity in his dealings with counsel and their clients, which would no doubt be carried over and implemented by Mr. Gallagher as a judge.”

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

No, it is not.

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

The Seventh Amendment protects the right to jury trial in civil cases as it existed at common law and it is a core principle of our American system of justice. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). The Supreme Court has espoused the virtues of the right to trial by jury: “It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.” *Sioux City & Pac. R.R. Co. v. Stout*, 657, 664 (1873). The Seventh Amendment has not been incorporated against the states. In criminal cases, trial by jury is a fundamental right guaranteed by the Sixth Amendment and incorporated against the states through the Fourteenth Amendment. See *Williams v. Florida*, 399 U.S. 78 (1970).

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

I have not encountered this issue in my practice as an attorney. If a matter came before me involving a tension between the enforcement of a pre-dispute arbitration clause and the Seventh Amendment, I would faithfully follow Supreme Court and Third Circuit precedent to resolve this issue.

- 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 6(b) above.

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

If confirmed, I will follow Supreme Court and Third Circuit precedent to determine the appropriate level of deference to afford to congressional fact-finding in legislation expanding or limiting individual rights. I would examine the precedent in Supreme Court cases including, but not limited to, *City of Boerne v. Flores*, 521 U.S. 507 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), as well as the authorities cited by the parties.

- 8. 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, I have.

- 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.

In sum, Advisory Opinion #116 is concerned with the potential for an appearance of partiality on the part of federal judges who attend certain seminars or conferences. If confirmed, and while a nominee, I will abide by all of the Canons of the Code of Conduct for United States Judges, and I will be mindful of, and carefully consider, the recommendations set forth in Advisory Opinion #116.

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

Please see my response to 8(b)(i) above.

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

Please see my response to 8(b)(i) above.

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

Please see my response to 8(b)(i) above.

- 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 8(b)(i) above.

- 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 8(b)(i) above.

**Nomination of John M. Gallagher, to be United States District Court Judge
for the Eastern District of Pennsylvania
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?

I would look to the factors identified and employed by the Supreme Court and the Third Circuit when examining whether a right is fundamental and protected by the Fourteenth Amendment. See, e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Holland v. Rosen*, 895 F.3d 272, 293 (3d Cir.), cert. denied, 139 S. Ct. 440 (2018).

- 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. As the Supreme Court explained in *Washington v. Glucksberg*, 521 U.S. 702 (1997), whether a right is deeply rooted in this nation's history and tradition is an important consideration in determining whether a right is fundamental. I would consult the types of sources that courts have used to determine whether a right is deeply rooted in history and tradition, including but not limited to historical records, statutes and legal texts. If confirmed, I would fully and faithfully apply the analysis set forth in *Glucksberg*.

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

Yes. If such a right had been previously recognized by the Supreme Court or the Third Circuit, that determination would be binding on me as district court judge.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had 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. *Casey* and *Lawrence* are binding precedent, and I would faithfully apply these and all binding precedent of the Supreme Court and the Third Circuit.

- f. What other factors would you consider?

I would undertake the process described in Question 1 above.

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

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Equal Protection Clause applies to classifications that discriminate based on gender. The government must demonstrate an "exceedingly persuasive justification" for gender-based classifications. *Id.* at 2274. If confirmed, I will faithfully follow this precedent and all other relevant precedent from the Supreme Court and the Third Circuit.

- 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?

I have not studied this issue. However, the Supreme Court has held that the Equal Protection Clause applies to gender. If confirmed, this holding would guide my analysis of cases. I would faithfully apply the Supreme Court's precedent.

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

I have not studied this issue. As a result, I am not able to offer an opinion as to why the Supreme Court had not addressed this issue earlier than its decision in *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 (2015), the Supreme Court held that the Fourteenth Amendment guarantees to gay and lesbian couples the same right to marry as heterosexual couples. The extent to which the Fourteenth Amendment prohibits discrimination based on sexual orientation in contexts other than marriage is a subject of ongoing litigation. It therefore would not be appropriate for me to comment further. See Code of Conduct for United States Judges, Canon 3(A)(6).

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

It is my understanding that there is litigation pending, and potentially impending, on this issue. Canon 3(a)(6) of the Code of Conduct for United States Judges prohibits me from making “public 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?

Yes. The Supreme Court has specifically recognized such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully follow this precedent and all Supreme Court precedent.

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

Yes. The Supreme Court has specifically recognized such a right in several cases, including *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully follow this precedent and all Supreme Court 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?

Yes. The Supreme Court recognized the right of privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders, in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully follow this precedent and all Supreme Court 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.

Each of the rights discussed above in Question 3 are binding precedent of the Supreme Court and I would faithfully follow these and all other Supreme Court precedents.

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 to consider evidence that sheds light on our changing understanding of society?

If confirmed, I would look to Supreme Court and Third Circuit precedent as to circumstances where it is appropriate to consider our changing understanding of society.

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

The judge has a “gatekeeping” responsibility for determining what scientific or other expert evidence is admissible, based upon reliability and helpfulness to the fact finder, pursuant to Rule 702 of the Federal Rules of Evidence and the cases in the progeny of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

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

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

In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. *Obergefell* is binding Supreme Court precedent and I would faithfully apply its holding, as I would that of all binding Supreme Court and Third Circuit precedent.

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

Obergefell is binding Supreme Court precedent and I would faithfully apply its holding, as I would that of all binding Supreme Court and Third Circuit precedent.

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?

I have not researched the extent to which *Brown* is consistent with originalism. Of course, *Brown v. Board of Education* is binding Supreme Court precedent and I would faithfully apply its holding, as I would that of all binding Supreme Court and Third Circuit precedent.

- 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).

I have not researched such criticism. If I am confirmed to the district court, my oath will be to fairly and equally apply the law, as guided by the binding precedent of the Supreme Court and Third Circuit.

- 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?

If I am confirmed to the district court, my oath will be to fairly and equally uphold the law, as guided by the binding precedent of the Supreme Court and Third Circuit, irrespective of whether that precedent was based on an interpretation of the understanding of the Constitution at the time of enactment.

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

Please see response to 6(c) above.

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

I would apply binding precedent of the Supreme Court and the Third Circuit. In the absence of such precedent, I would look to persuasive opinions of other circuit courts, scholarly commentary, and the text and context of the relevant provision. I would also look to historical sources bearing on the original public meaning of the provision at issue.

7. In 2017, while participating in a conference on law enforcement’s response to the opioid epidemic, you reportedly stated, “We cannot arrest our way out of this problem, but arrest has to be part of the solution here. . . . We’ve heard a lot of talk that ‘the prisons are full of drug users.’ But at the federal level, I always say, ‘Show me one.’ People are not going to federal prison for using drugs.”

- a. Do you believe that we have an over-incarceration problem in this country?

That is a subject of considerable political debate. As a judicial nominee, it would not be appropriate for me to express an opinion on this subject.

In 2017, I participated in an advisory panel about the opioid epidemic that was organized by the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing.

Like other advisory panels I have served on during my career, this advisory panel brought together leading police professionals to discuss ways that we can more effectively and professionally police in our free society. This particular panel brought together hundreds of participants from law enforcement, medicine, and addiction counseling to discuss the tools that could be brought to bear from their respective disciplines to address the opioid epidemic.

During the panel discussion, I noted that we “cannot arrest our way out of this problem, but arrest has to be part of the solution here.” The problem I was referring to is the opioid epidemic. I made this comment in the context of the panel’s discussion of the distinction between the criminal prosecution of drug dealers, who profit from the distribution of opioids to drug users, and the debatable value of prosecuting their addicted customers without providing avenues for these drug users to overcome their addictions.

During the panel discussion, I also noted that “people are not going to federal prison for using drugs.” I made this comment based on my experience as a federal prosecutor. In my experience, federal prosecutors, in contrast to state and local prosecutors, rarely prosecute individuals for low-level drug possession, which is often indicative of a drug user. In my experience, federal prosecutors generally focus their prosecutorial efforts on individuals engaged in drug trafficking.

- b. What should the court’s role be in determining whether medical intervention is necessary or whether prison alone is the appropriate sentence for a drug-related offense?

The court has a substantial role in determining whether medical intervention is necessary or whether prison alone is the appropriate sentence for a drug-related offense. The statutory sentencing factors set forth in 18 U.S.C. § 3553(a) include “the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.” The court can also impose drug testing and treatment as a condition of federal supervision. Some federal districts have implemented mental health courts that, among other things, deal with potential medical treatment for defendants who frequently have both mental health and addiction issues.

Questions for the Record for John M. Gallagher
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. According to your Senate Judiciary Questionnaire, you were a participant in two panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” in 2018.

- a. What were the circumstances that led you to participate on each of these panels?**

In 2018, I was a participant in two legal panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” at universities in Philadelphia. One panel was held at the University of Pennsylvania Law School and was organized by the University of Pennsylvania Law School American Inn of Court. The American Inns of Court is an association of lawyers, judges, and other legal professionals from all levels and backgrounds who share a passion for professional excellence. U.S. Supreme Court Chief Justice Warren Burger helped to found the American Inns of Court. The other panel was held at Temple University and was organized by the Osher Lifelong Learning Institute, an academic institute where people 50 years and older can attend classes.

The organizers of these panels invited a colleague of mine from the U.S. Attorney’s Office for the Eastern District of Pennsylvania and me to participate in the panels. Each panel consisted of a diverse group of attorneys and immigration rights advocates who discussed the issue of sanctuary cities based on their respective experiences.

- b. What views did you express with regard to the impact of so-called sanctuary cities on community safety during your participation on each of these panels?**

The attorneys and immigration rights advocates who participated on these panels discussed whether sanctuary cities pose a risk to public safety. The discussions acknowledged that this is a complex issue. On the one hand, the discussions noted that sanctuary city policies have resulted in the release of people with criminal records, some of whom have gone on to commit new crimes. There have been high profile examples of this occurring in Philadelphia. On the other hand, the discussions noted that there are strongly held concerns that involving local police in federal immigration enforcement deters victims and witnesses of crimes who are in the country illegally from coming forward to report crimes to the police. During the panel discussions, I explained that I

have seen both sides of this complex issue play out in my professional career in law enforcement.

3. 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. Based on my experience taking training on implicit bias, I believe there is value in judges taking such training.

b. Have you ever taken such training?

Yes. I have taken training on implicit bias as a trainee in the New York City Police Academy and, more recently, as part of annual training offered by the Department of Justice. During my professional career, I have also developed policies and training to educate police officers on the harms and risks of judging people based on their race, such as a Philadelphia Police Department policy prohibiting racial profiling.

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

Yes.

Nomination of John M. Gallagher
United States District Court for the Eastern District of Pennsylvania
Questions for the Record
Submitted October 23, 2019

QUESTIONS FROM SENATOR BOOKER

1. According to your Senate Judiciary Committee Questionnaire, while working as an advisor to the chiefs of police in Philadelphia and Miami you helped develop “a formal prohibition of racial profiling” and “new use of force policies.”¹

- a. What did you learn in helping develop a formal prohibition of racial profiling?

My work helping to develop a formal prohibition of racial profiling reinforced my core belief that policing and law enforcement must be fair and even-handed, and not based on race. The development of this policy is one instance in which I have worked to improve the way we police in our free society.

- b. Why do you think it is important for law enforcement agencies to have racial profiling prohibitions?

Policies that demonstrate a commitment by police to apply the law equally and fairly strengthen the bonds between police and community, which enables the police to better perform their duty to protect and serve the public.

- c. Please describe the use of force policy you helped develop.

During my service with the Philadelphia and Miami police departments, I helped develop use of force policies that were intended to reduce the police use of force.

In Philadelphia, I helped develop use of force policies and training that emphasized the primary duty of police to protect and preserve life. These policies are summarized in a letter written to the Senate Judiciary Committee in support of my nomination. The letter is from Chuck Wexler, the executive director of the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing. In his letter, Mr. Wexler explained:

“[Philadelphia Police Commissioner] Timoney and Gallagher also revamped the department's policy on officers' use of force, including a prohibition on shooting at moving vehicles and the elimination of the ‘blackjack’ as a tool for overcoming resistance - a weapon that figured in an inordinate number of citizen complaints and lawsuits. Gallagher also helped write a policy requiring police officers to intervene if they believe that a fellow officer is losing his composure. The policies against shooting at moving vehicles and creating a ‘duty to intervene,’ implemented by Gallagher and Timoney 20 years ago in Philadelphia, have been recognized as best practices in policing.”

In Miami, I helped develop use of force policies and training that changed the focus from when a police officer was legally authorized to use force to emphasizing the use of force only as a last resort when no other options are available. These policies and training proved successful. After they were implemented, the number of police firearm discharges in Miami was reduced to zero over a prolonged period of time.

- d. What did you learn in helping develop use of force policies?

My work helping to develop police use of force policies reinforced my belief that police officers must be given clear guidance on the use of force given the serious consequences that can result from the use of force. It also reinforced my belief that police officers are dedicated public servants who deserve policies, training and equipment that will keep them safe while they keep our communities safe.

- e. Why do you think it is important for law enforcement agencies to have use of force policies?

Police officers are an embodiment of the authority of government, and are often the most frequent contact between government and citizen. Their discretion to use force can have serious consequences for those involved in a use of force incident, but also to the relationship between police and the communities they serve.

During my service with the Miami Police Department, the Mayor of Miami was Manny Diaz. He has written a letter to the Senate Judiciary Committee in support of my nomination to the district court. His letter also expresses why I think it is important for law enforcement agencies to have use of force policies. In his letter, he stated:

"The most fundamental responsibility of government is to provide for the safety and security of its people. Successful policing involves more than just crime statistics; you must earn the trust of all residents through a professionally trained force governed by a clear set of rules, including the use of force that respects the dignity and rights of your residents. Chief Gallagher fully embraced that responsibility and helped implement the reforms that resulted in our becoming a model that other American cities sought to emulate."

2. In a 2008 newspaper article, you said that prosecuting drug cases lowered violent crime in Easton.² Separately, in 2017, at a law enforcement conference on the opioid epidemic, you said, "drug distribution is treated like a nonviolent offense. I think that's a fallacy; it's a violent crime."³

- a. What data did you rely on to conclude that violent crime was reduced in Easton after prosecuting drug cases?

In 2008, I helped successfully prosecute members of a drug trafficking

organization that included a drug dealer identified by the FBI as the primary supplier of cocaine to the city of Easton, Pennsylvania. The number of shootings and homicides in Easton decreased substantially following the arrest and prosecution of this drug trafficking organization. Easton police officers and city officials greatly credited the dismantling of this drug trafficking organization with the subsequent reduction in crime.

b. Why do you believe that drug distribution is a violent crime?

That statement was intended to convey that drug distribution, and disputes related to such distribution, often also involve violence. Sadly, that has been my experience during my law enforcement career. For instance, I helped successfully prosecute a violent Philadelphia drug trafficking organization for 12 murders, including the arson murder of two women and four children who were burned to death to avenge the testimony of a former associate of the organization. As a result, the leader of that drug trafficking organization was held accountable for more murders than any person in the history of Pennsylvania.

3. You previously argued for lowering the amount of heroin necessary to trigger a mandatory minimum sentence.⁴ You said, “Under current federal laws, to get some teeth, to get a mandatory minimum sentence, you need 100 grams of heroin. That’s way too high.”⁵

¹ SJQ at p. 23.

² Michael Buck, Drug Busts Making a Dent in Easton, EXPRESS-TIMES (Nov. 2, 2008) (SJQ Attachment 12(e) at p. 1523).

³ Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities* (2017) (SJQ Attachment 12(b) at p. 342).

⁴ Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities* (2017) (SJQ Attachment 12(b) at p. 267).

⁵ *Id.*

- a. Based on this comment, it appears your support mandatory minimum sentences. Is that accurate?

Congress has established mandatory minimum sentences for certain federal crimes. As a federal prosecutor, these laws establishing mandatory minimum sentences have impacted my work, especially the prosecution of drug trafficking offenses. If confirmed, I will faithfully follow all applicable statutes and precedent regarding mandatory minimum sentences. As a judicial nominee, it would not be appropriate for me to express my personal opinion about mandatory minimum sentences because they are policy choices committed to the legislative branch. See Code of Conduct for United States Judges, Canons 2.A and 5.

- b. Why do you support mandatory minimum sentences?

Please see my response to Question 3(a) above.

- c. What evidence do you rely on to show that mandatory minimums deter crime? If not, why do you support mandatory minimum sentences?

Please see my response to Question 3(a) above.

4. According to your Senate Judiciary Committee Questionnaire, you participated in two panel discussions on sanctuary cities in 2018.⁶ In the panel discussions did you take any positions on sanctuary jurisdiction policies? If so, what positions did you take?

In 2018, I was a participant in two legal panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” at universities in Philadelphia.

One panel was held at the University of Pennsylvania Law School and was organized by the University of Pennsylvania Law School American Inn of Court. The American Inns of Court is an association of lawyers, judges, and other legal professionals from all levels and backgrounds who share a passion for professional excellence. U.S. Supreme Court Chief Justice Warren Burger helped to found the American Inns of Court. The other panel was held at Temple University and was organized by the Osher Lifelong Learning Institute, an academic institute where people 50 years and older can attend classes.

The organizers of these panels invited a colleague of mine from the U.S. Attorney’s Office for the Eastern District of Pennsylvania and me to participate in the panels. Each panel consisted of a diverse group of attorneys and immigration rights advocates who discussed the issue of sanctuary cities based on their respective experiences. The attorneys and immigration rights advocates who participated on these panels discussed whether sanctuary cities pose a risk to public safety. The discussions acknowledged that this is a complex issue. On the one hand, the discussions noted that sanctuary city policies have resulted in the release of people with criminal records, some of whom have gone on to commit new crimes. There have been high profile examples of this occurring in Philadelphia. On the other hand, the discussions noted that there are strongly held concerns that involving local police in federal immigration enforcement deters victims and witnesses of crimes who are in the country illegally from coming forward to report crimes to the police. During the

panel discussions, I explained that I have seen both sides of this complex issue play out in my professional career in law enforcement.

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

As a district court judge, my obligation would be to apply binding precedent, rather than to apply any specific interpretative method. To my understanding, an originalist approaches constitutional interpretation by looking first and foremost to the original public meaning of the words of the Constitution. The Supreme Court has indicated that looking to the original public meaning of the terms in the Constitution can be a legitimate method of analysis. For example, in *District of Columbia v. Heller*, 544 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were each based on their respective understandings of the original public meaning of the Second Amendment.

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

As a district court judge, my obligation would to apply binding precedent, rather than to apply any specific interpretative method. To my understanding, a textualist approaches constitutional interpretation by looking first and foremost to the original public meaning of the words of the statute to be applied. The Supreme Court instructs that when “interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

7. 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 it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. However, when “interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

- 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 7(a) above.

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

Yes, judicial restraint is an important trait for all judges. Judicial restraint means that a judge respects his or her limited role in applying the law as written, without regard to personal or policy preferences or preferred outcome.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁷ Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on the correctness of the reasoning of *Heller*. If confirmed, I would faithfully apply *Heller* and all binding Supreme Court precedent.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁸ Was that decision guided by the principle of judicial restraint?

Citizens United is binding Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on the correctness of the reasoning of *Citizens United*. If confirmed, I would faithfully apply *Citizens United* and all binding Supreme Court precedent.

⁶ SJQ at p. 7.

⁷ 554 U.S. 570 (2008).

⁸ 558 U.S. 310 (2010).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁹ Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on the correctness of the reasoning of *Shelby*. If confirmed, I would faithfully apply *Shelby County* and all binding Supreme Court precedent.

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.¹⁰ 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.¹¹

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

This is not an issue which I have studied or litigated. I understand that there is currently pending litigation in several courts that may implicate this issue. Therefore, as a judicial nominee, I respectfully refrain from responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which states that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." See also Canons 2 and 5, 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 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.¹² Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹³ 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.¹⁴ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁵

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

I recognize there are racial inequalities in our criminal justice system. I am not familiar with the extent to which these disparities are the result of the potential for implicit bias. However, I have always carried out my duties fairly and mindful of the paramount need for ensuring equality under the law for all people.

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

Yes.

⁹ 570 U.S. 529 (2013).

¹⁰ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹¹ *Id.*

¹² 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>.

¹³ *Id.*

¹⁴ 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>.

¹⁵ *Id.*

- 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 had training on implicit bias, first as a trainee in the New York City Police Academy, and more recently as part of annual training offered by the Department of Justice. I have also developed policies and training that focus police officers on the harms and risks of judging people based on their race, such as the policy prohibiting racial profiling in the Philadelphia Police Department.

- 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.¹⁶ Why do you think that is the case?

I am not familiar with this report but given this troubling conclusion, I would be interested in learning more from the Sentencing Commission.

- 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.¹⁷ Why do you think that is the case?

I am not familiar with this study but given this troubling conclusion, I would be interested in learning more.

- 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?

A judge should maintain the conscious humility necessary to honestly self-assess his or her own potential for implicit racial bias to ensure that they are carrying out the oath to treat all people equally and fairly under the law.

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.¹⁸ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁹

- 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.

The potential relationship between reduction of incarceration rates and the decrease in crime is not an area in which I have any familiarity.

- 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(b) above.

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*²⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, *Brown v. Board of Education* was correctly decided. *Brown* is a landmark Supreme Court decision that overturned the abhorrent, false doctrine of separate but equal, and thereby reinforced the bedrock American principle of equal protection under law for all.

¹⁶ 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.

¹⁷ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹⁸ 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>.

¹⁹ *Id.*

²⁰ 347 U.S. 483 (1954).

15. Do you believe that *Plessy v. Ferguson*²¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, *Plessy* produced the abhorrent doctrine of separate but equal. In *Brown v. Board of Education*, the Supreme Court correctly and unanimously ruled that *Plessy* was wrongly decided.

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. These responses are my own.

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.”²² Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

I cannot foresee any circumstances under which recusal of a judge from a case would be based on race or ethnicity. If confirmed, I will determine whether to recuse myself from a case based upon the standards set forth in 28 U.S.C. § 455, Canon 3 of the Code of Conduct of United States Judges, as well as any other applicable rules, opinions or ethical guidance. I will also listen objectively to arguments of the parties and, as necessary and appropriate, consult with judicial colleagues and ethics officials within the judicial system.

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.”²³ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has ruled 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). As a district court judge, I would make sure every litigant receives fair treatment under law.

²¹ 163 U.S. 537 (1896).

²² 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>.

²³ 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**

John M. Gallagher, to the U.S. District Court for the Eastern District of Pennsylvania

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?**

There is perhaps no more serious or somber duty of a judge than to determine the appropriate sentence for a criminal defendant. In sentencing any case, I will consider the applicable law, and the motions and arguments of the parties. I shall consider the advisory Sentencing Guidelines. As the Supreme Court has stated: "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007); *see also, Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013)(same). I shall also consider the statutory sentencing factors set forth in 18 U.S.C. § 3553(a), and seek always to "impose a sentence sufficient, but not greater than necessary" to comply with that statutory directive. 18 U.S.C. § 3553(a).

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

Generally, I would follow the summary steps outlined in my response to 1(a) above. I would also avail myself of any pertinent guidance available from the U.S. Sentencing Commission to ensure a fair, proportional and individualized sentence.

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

The law provides authority for a sentencing judge to depart from the advisory sentencing guidelines and, separately, to grant a variance from the final calculated guidelines. The guidelines offer a non-exhaustive list of potential grounds for departure but, generally, a departure from the sentencing guidelines is appropriate in an "atypical case" where particular facts or circumstances place the case outside the "heartland" of cases of the type that informed the guidelines. *See* U.S.S.G. § 5K2.0(a)(2). In addition to requests for departure, the judge must also carefully consider requests for variance based on any reasons offered by the defendant.

- 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?

Congress has established mandatory minimum sentences for certain federal crimes. If confirmed, I will faithfully follow all applicable statutes and precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion about mandatory minimum sentences because they are policy choices committed to the legislative branch. See Code of Conduct for United States Judges, Canons 2.A and 5.

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?

I do not believe it is appropriate for me to commit to doing so at this time. However, if confirmed, I will make a determination on a case-by-case basis of whether it would be appropriate to comment on a defendant's sentence.

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

To the extent applicable case law and ethical rules permit a judge to discuss charging policies with the U.S. Attorney or his or her executive staff, I would consider doing so under certain, limited

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>

circumstances where the policies undermine confidence in the justice system. However, these conversation, if appropriate, must be on general policy and not in regards to a particular case as “the court must not participate in [plea] discussions.” Federal Rule of Criminal Procedure 11(c)(1).

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

Please see my response to Question 1.d.iv.2.

- 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. I would consider all options, including alternatives to incarceration for first offenders not convicted of violent or otherwise serious offenses, in determining an appropriate sentence consistent with the purposes of sentencing as defined by Congress in 18 U.S.C. § 3553.

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 have seen disturbing statistics indicating that black men are incarcerated in great disproportion to their representation in the population. The sentences imposed are also more severe for black men as compared to white men who have committed the same crimes. If I am confirmed to be a judge, I will continue to work tirelessly to ensure that our justice system operates fairly and equally under the law for all.

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?**

If confirmed, I intend to make staffing decisions on a case-by-case basis, and in doing so I will seek to recruit, and will seriously consider hiring, qualified minority and women applicants.