

**Nomination of William Scott Hardy to the United States District Court for the
Western District of Pennsylvania
Questions for the Record
Submitted January 15, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2018, you represented an industry trade group in a challenge to a Pittsburgh ordinance that required employers to provide paid sick leave. In an amicus brief, you argued that characterizing the paid sick leave ordinance as a public health statute was “attenuated” and “farfical.” The Pennsylvania Supreme Court disagreed and upheld the ordinance in July 2019. (Amicus Curiae Brief of Restaurant Law Center in Support of Appellees, *Pennsylvania Restaurant and Lodging Association v. City of Pittsburgh*, No. 64 WAP 2017 (Pa. Mar. 19, 2018))
 - a. **How did you reach your conclusion that paid sick leave – which allows sick employees to stay home and reduces the spread of disease – has no rational connection to public health?**

The issue presented in the case referenced in Question 1 was whether the City of Pittsburgh had the statutory authority under the Pennsylvania Home Rule Charter and Optional Plan of Government Law (the “Home Rule Law”), 53 Pa.C.S. §2962(f), to enact an ordinance mandating employers to provide employees with paid sick days and to maintain certain employment records or whether such regulation of employers and businesses is reserved to the authority of the Pennsylvania General Assembly (i.e., the state legislature) to promulgate on a unified, state-wide basis rather than individually by each of Pennsylvania’s 2,560 separate municipalities.

My client in this case was the Restaurant Law Center and I filed an *amicus* brief on its behalf in its support of parties to the case who contended that such regulation of employers and businesses was reserved to the General Assembly to regulate on a unified, state-wide basis. The *amicus* brief reflected my client’s position in the case.

The *amicus* brief did not challenge or question the efficacy or prudence of the public policy goals underlying the City of Pittsburgh’s ordinance but merely argued that under Pennsylvania law the General Assembly is solely authorized to enact it on a state-wide basis rather than leaving it to each of Pennsylvania’s 2,560 separate municipalities to do so separately and each in their own way. The amicus brief reflected my client’s position in the case. A foundational principle in our legal system is that lawyers represent clients and we do not ascribe the position of a client to a lawyer.

The *amicus* brief I filed on behalf of my client sought to uphold two lower court rulings and to rebut contentions made by appellants’ that the City of Pittsburgh’s sick pay ordinance is a “public health” ordinance within the meaning of the Pennsylvania Home Rule Law because the ordinance mandates workplace standards customarily governed by both federal and state labor and employment laws such as compensation, leave of absence,

and employment record-keeping obligations. The principle argument made was that the plain text of the Home Rule Law does not authorize home rule municipalities, such as the City of Pittsburgh, to enact ordinances that impose “duties, responsibilities, or requirements” upon “businesses, occupations and employers.” Instead, the *amicus* brief argued on behalf of my client that the Home Rule Law reserves such legislation to the General Assembly.

The phrase “‘rational connection’ to public health” was advocated by appellants and the brief I filed attempted to argue that even if the ordinance had such a rational connection to public health, such a connection was too elastic or attenuated to constitute a “public health” ordinance as that term is used by the Home Rule Law and related statutes governing the limited delegation of legislative authority to local municipalities. To cite one such example, the appellants argued that the Pennsylvania Disease Prevention and Control Law (“DPCL”) authorized the enactment of the local ordinance at issue and my brief counter-argued that the DPCL was not applicable to the City of Pittsburgh in this particular case because the DPCL expressly limits municipalities’ authority to issue rules and regulations relating to “disease prevention and control” to those municipalities who “have boards or departments of health.” The City of Pittsburgh did not have its own board or department of health.

b. In your view, why is the United States the only developed country in the world that doesn’t guarantee paid time off – whether to care for a new baby, a sick family member, or an employee’s own health?

I have not had occasion to review or study surveys regarding the nature and extent of laws in foreign countries that pertain to guaranteed paid time off from work to care for a newborn, a sick family member, or an employee’s own health, nor would it be appropriate for me to comment on a political question. However, I have had extensive experience assisting employers within the United States to comply with the Family and Medical Leave Act, and I have assisted those employers to develop compensation and benefits policies that routinely provide their employees with paid time off benefits for a new baby, a sick family member, or an employee’s own health.

2. You have criticized the Equal Employment Opportunity Commission, which is tasked with enforcing federal antidiscrimination laws. For example, in 2007, you wrote that “it is not uncommon for EEOC personnel to disregard controlling legal principles and take irrational positions.” (*Successful Strategies for Dealing with Government Agencies in Health Care, Labor, and Employment Law*, chapter in *Successful Strategies for Dealing with Government Agencies in Health Care Law*, Aspatore Books’ *Inside the Minds* series (2007))

a. Considering these remarks, how could EEOC representatives expect to be treated fairly in your courtroom?

During my twenty-three years practicing law, I have had the privilege of working with

many outstanding professionals at the Equal Employment Opportunity Commission (“EEOC”) while handling legal matters for my clients. I have great respect for the work that EEOC personnel do in carrying out the EEOC’s important mission to enforce federal laws that prohibit employment discrimination based on race, sex, religion, and other characteristics.

The publication referenced in Question 2 contains a chapter that I co-authored thirteen years ago in 2007 with a senior partner at my then-law firm who had nearly forty years of legal experience at the time of publication. The observations made in the chapter at the time of publication were of the authors individually and collectively, and particularly from the extensive experiences of my co-author.

The chapter was written in our role as legal counsel for employers, and primarily for an audience of employers, to emphasize the importance of compliance with the laws enforced by government agencies such as EEOC. Likewise, the chapter expressed the value legal counsel can have in assisting employers to be compliant with those laws, and it exhorts employers that “[i]t is critically important to maintain a professional tone and protect . . . credibility in all interactions with EEOC personnel at all levels” and to “always be polite, courteous, civil, and professional” when dealing with such governmental personnel.

I have endeavored always to be polite, courteous, civil, and professional with them. Moreover, I have written and spoken extensively on topics of compliance with the laws and regulations enforced by EEOC. In my role as legal counsel for employers, an important part of my job has been helping clients understand and comply with employment laws and address employment and workplace misconduct. For example, I have advised clients to fire, or take other serious action, against employees, including executives and other managers, who I believed had engaged in misconduct. I have provided this advice directly and forcefully, even when clients have not wanted to take such steps. Additionally, on numerous occasions, EEOC personnel have approved of me to personally provide compliance training to managers and employees of settling employers as a term of settlement. I believe that the EEOC personnel with whom I have had dealings during the course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view.

One such former EEOC lawyer with whom I have had many professional dealings during her time as an EEOC lawyer sent a letter to the Senate Judiciary Committee strongly supporting my nomination, along with almost three dozen other lawyers that I have litigated against or worked with. The letter states their belief I am “fair-minded, respectful, and of the highest integrity,” I seek “common ground and mutually beneficial solutions to problems,” and I will be “an outstanding jurist.” This letter is just one of multiple letters that attorneys, judges, and community leaders who know me well have sent to the Senate Judiciary Committee in support of my nomination.

If confirmed, every litigant appearing before me can be assured that I will treat every person involved in every case fairly, impartially, and with dignity and respect. I will faithfully observe and apply all binding Supreme Court and Third Circuit precedent, and I will uphold

the oath of office to administer justice without respect to persons. *See* 28 U.S.C. § 453.

b. Do you believe that the EEOC is entitled to any deference as the agency authorized to promulgate guidance and enforce federal employment law?

As a federal agency, regulatory interpretations made by EEOC may be entitled to deference in accord with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019). If confirmed, I will apply all binding Supreme Court and Third Circuit precedents, including *Chevron* and *Kisor*.

3. You have accused union organizers of spreading misinformation and engaging in unfair recruitment tactics. In 2007, you wrote that union elections “can be won or lost based upon...the amount of time an employer has to debunk the propaganda disseminated and promises made by professional union organizers.” (*Successful Strategies for Dealing with Government Agencies in Health Care, Labor, and Employment Law*, chapter in *Successful Strategies for Dealing with Government Agencies in Health Care Law*, Aspatore Books’ *Inside the Minds* series (2007))

a. Please cite an example of what you consider to be “propaganda” spread by union organizers.

I have great respect for the history and role of labor unions in the United States, and the federal agencies that enforce federal labor laws, such as the National Labor Relations Board (“NLRB”). On a personal level, that respect comes from having grown up in a union household in a blue-collar neighborhood in Pittsburgh filled with many other union households. My father, a career Pittsburgh firefighter, was a union member, as was my grandfather, a career Pittsburgh police officer. One of my great uncles served briefly as the president of his local union representing his fellow operating engineers. I have uncles and cousins who work or worked as laborers and in the skilled trades who are or were members of unions, and for a time, my wife taught elementary school while being a member of a union. Moreover, on a professional level, that respect comes from my interactions with labor unions and their attorneys in legal matters. In those interactions, I have endeavored always to be polite, courteous, civil, and professional with them. The vast majority of my labor union-related work has involved SEIU Healthcare Pennsylvania.

The publication referenced in Question 3 contains a chapter that I co-authored thirteen years ago in 2007 with a senior partner at my then-law firm who had nearly forty years of legal experience at the time of publication. The observations made in the article that are referenced in this question were made at the time of publication by the authors individually and collectively, and drawn particularly from the extensive National Labor Relations Board (“NLRB”)-related experiences of my co-author.

The chapter was written in our role as legal counsel for employers, and primarily for an

audience of employers, to emphasize the importance of compliance with the laws that are intended to protect workers' rights and which are enforced by government agencies such as NLRB. The article expressed the value legal counsel can have in assisting employers to be compliant with those laws. The reference to "propaganda" was intended to be a reference to informational materials sometimes used to persuade workers to join a union; and, there are times when employers and unions disagree as to the factual predicates or meaning of those materials. The use of that term was colorful in its context, but could have been clearer and less "loaded" in describing the underlying issue. Read thirteen years later and based upon my professional experiences in interacting with unions in the intervening period, I recognize that the referenced statement in the chapter could have been clearer in qualifying that point. Accordingly, I would not use the same tone or write that text in the same way today.

I believe that union representatives and lawyers with whom I have had dealings during the course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view. I am honored that current and former union representatives and attorneys for SEIU Healthcare Pennsylvania, the state's largest union of nurses and health care workers, have signed letters of support for my nomination, which the Senate Judiciary Committee has received. The letter sent by current and former union representatives states, among things, that: "In the many matters we have each handled with Scott over the years, Scott has been professional and fair-minded, and he has put his intellect and energies into seeking common ground and mutual interests with our constituents. Scott has always been respectful even when his clients and our members were in a dispute or otherwise disagreed on a given matter."

b. Considering these remarks, how could labor union representatives expect to be treated fairly in your courtroom?

See generally my response to Question 3(a). I have great respect for the history and role of labor unions in the United States, and the federal agencies that enforce federal labor laws, such as the National Labor Relations Board ("NLRB"). On a personal level, that respect comes from having grown up in a union household in a blue-collar neighborhood in Pittsburgh filled with many other union households. My father, a career Pittsburgh firefighter, was a union member, as was my grandfather, a career Pittsburgh police officer. One of my great uncles served briefly as the president of his local union representing his fellow operating engineers. I have uncles and cousins who work or worked as laborers and in the skilled trades who are or were members of unions, and for a time, my wife taught elementary school while being a member of a union. Moreover, on a professional level, that respect comes from my interactions with labor unions and their attorneys in legal matters. In those interactions, I have endeavored always to be polite, courteous, civil, and professional with them. The vast majority of my labor union-related work has involved SEIU Healthcare Pennsylvania.

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course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view. I am honored that current and former union representatives and attorneys for SEIU Healthcare Pennsylvania, the state's largest union of nurses and health care workers, have signed letters of support for my nomination, which the Senate Judiciary Committee has received. The letter sent by current and former union representatives states, among things, that: "In the many matters we have each handled with Scott over the years, Scott has been professional and fair-minded, and he has put his intellect and energies into seeking common ground and mutual interests with our constituents. Scott has always been respectful even when his clients and our members were in a dispute or otherwise disagreed on a given matter."

If confirmed, every litigant appearing before me can be assured that I will treat every person involved in every case fairly, impartially, and with dignity and respect. I will faithfully apply all binding Supreme Court and Third Circuit precedents, and I will uphold the oath of office to administer justice without respect to persons. *See* 28 U.S.C. § 453.

4. It appears that a large portion of your experience in private practice has involved defending employers – including corporations and non-profit organizations – against discrimination, harassment, hostile work environment, and other claims from their employees.

Have you ever represented an employee in a discrimination or harassment suit against an employer? If so, please describe the case and the nature of your representation.

While I have not had occasion to represent an employee in a discrimination or harassment lawsuit against an employer in court, I have advised and counseled employees regarding their rights concerning discrimination or harassment in the workplace. Additionally, on many occasions I have advised employer clients to address workplace misconduct, including discrimination, harassment, and retaliation; and, I have advised clients to fire or take other serious action against executives or other employees who in my judgment engaged in such misconduct. I have been direct and forceful in telling clients to take such actions even when they were reluctant to do so. Also, on occasion, I have represented individual employees in court litigating claims against their employers for wages or to vindicate other workplace rights.

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

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

It is never appropriate for a lower court to depart from Supreme Court precedent. The Supreme Court has instructed that it is its prerogative alone to overrule one of its precedents. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

- b. **Do you believe it is proper for a district court judge to question Supreme**

Court precedent in a concurring opinion? What about a dissent?

No. A district court judge is required to apply all applicable binding Supreme Court precedent in all decisions. A district court judge generally does not author concurring or dissenting opinions. There may be rare instances in which a district court can helpfully mention a gap in Supreme Court precedents or circuit conflicts regarding proper application of such precedents, while adhering to its understanding of controlling precedent, in order to facilitate subsequent Supreme Court review. *See e.g., Eberhard v. U.S.*, 546 U.S. 12, 19-20 (2005).

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

A district court is bound by the controlling precedents of the Supreme Court and applicable Court of Appeals in accordance with 28 U.S.C. § 41. The district court itself does not create precedent but should abide by rule-of-law principles and thus render similar decisions when presented with similar facts absent a written opinion explaining the jurisprudential basis for departing from prior decisional bases.

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 Supreme Court precedent falls exclusively to the Supreme Court. The Supreme Court has identified factors that it may consider when determining whether to overturn its own precedent. *See Janus v. Am. Fed'n of State, City and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018). As a district court nominee, it is generally not appropriate to express an opinion on the issue of when or how the Supreme Court ought to overturn its own precedent. If confirmed as a district court judge, I would faithfully apply all Supreme Court and Third Circuit precedent.

6. 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”?

All Supreme Court precedent, including *Roe v. Wade* and its progeny, is binding on all lower courts and must be fully and faithfully applied regardless of labels such as “super-precedent” or “super-stare decisis” used to describe it.

b. Is it settled law?

Yes. *Roe v. Wade* is binding Supreme Court precedent. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents, including *Roe*.

7. 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* is binding Supreme Court precedent. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents, including *Obergefell*.

8. 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?

Heller is binding precedent on lower courts and, if confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents, including *Heller*. As a district court nominee, it is generally not appropriate for me to opine on the correctness of Supreme Court decisions and its majority or dissenting opinions.

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

The Supreme Court in *Heller* stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents, including *Heller*.

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

Heller does not expressly overrule or abrogate any prior Supreme Court precedent, itself stating that “nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment” and that the question presented was “judicially unresolved.” *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

9. 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*, 558, U.S. 310 (2010), the Supreme Court identified several prior instances in which it had “recognized that the First Amendment protection extends to corporations[,]” *id.* at 342, and then held that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.” *Id.* at 365. 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. I will apply all binding precedents of the Supreme Court and the Third Circuit.

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

A number of Supreme Court and Third Circuit opinions cover the First Amendment protection of free speech. As a district court nominee, it would not be appropriate to state how I would decide a case or controversy involving a conflict between a corporation and an individual’s right to free speech. I would, however, look to all relevant Supreme Court and Third Circuit precedent before rendering a decision.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct 2751 (2014), the Supreme Court determined that a closely-held for-profit corporation has rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, but it also noted certain limits to its holding. The applicability of the Free Exercise Clause of the First Amendment to corporations was not resolved in this case. Because there may be litigation implicating this unanswered question, as a federal judicial nominee Canon 3(A)(6) of the Code of Conduct for United States Judges, prohibits me from commenting further, as it directs 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. The commentary to Canon 1 of the Code of Conduct for United States Judges states that the Code of Conduct for United States Judges applies to nominees for judicial office.

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

As observed by the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, ___ U.S. ___, 138 S. Ct 1719, 1727 (2018), the Supreme Court previously stated in *Obergefell v. Hodges*, 576 U.S. —, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), that “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. *Id.*, at —, 135 S.Ct., at 2607. Nevertheless, the Supreme Court has recognized, for example, that business owners and other actors in the economy and in society may not deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*); see also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”); *Masterpiece Cakeshop, Ltd.* 138 S. Ct at 1727 (internal quotations omitted).

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

The Supreme Court has long-held that interracial marriage is constitutionally protected from governmental interference by the Fourteenth Amendment. See *Loving v. Virginia*, 388 U.S. 1 (1967). Please see also my response to Question No. 10.

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

The Supreme Court has long-held that interracial marriage is constitutionally protected by the Fourteenth Amendment. See *Loving v. Virginia*, 388 U.S. 1 (1967). Please see also my response to Question No. 10.

13. 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.

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

I do not recall being asked any question 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.

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

I do not have any specific "views on administrative law." During my twenty-three years practicing law, I have had occasions when various aspects of administrative law were relevant to my legal advice or litigation. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents, including *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019).

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

I have not thoroughly studied this issue. As a general matter, I am aware that there are scientists who believe that human activity contributes to or causes climate change. If confirmed, I will apply all binding Supreme Court and Third Circuit precedents involving the environment and climate issues.

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

As I explained in my testimony to the Senate Judiciary Committee on January 8, 2020, judges may consider legislative history with interpreting ambiguous text of a statute. *See*

e.g., Yates v. United States, 135 S.Ct. 1074 (2015). If confirmed as a district court judge, I would consider the arguments presented by parties in briefing, and apply all binding Supreme Court and Third Circuit precedents.

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

No.

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

I received these questions on Thursday, January 16, 2020. I read the questions carefully, conducted some limited research and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making my final revisions. Each answer herein is my own.

**Nomination of William Scott Hardy
to the United States District Court for the Western District of Pennsylvania
Questions for the Record
Submitted January 15, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

As requested, I read the story and listened to the recording before responding to this request.

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

I have no personal knowledge of anonymous or opaque spending related to judicial nominations. If confirmed, I will faithfully decide all cases and controversies fairly and impartially and uphold the integrity and independence of the judiciary. To the extent that this question concerns a political matter relating to the process of nominating and confirming judges, I cannot comment further pursuant to Canon 5 of the Code of Conduct of United States Judges.

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

Please see my response to Question No. 1(b) above.

- 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.

No. I am not a member of the Federalist Society and do not know Mr. Leo.

- 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?

Other than reading the *Washington Post* story and listening to the recording cited in this Question, I am unfamiliar with Mr. Leo’s beliefs. If confirmed, I will administer justice fairly and impartially to all parties. I will faithfully apply 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?

While every metaphor has its limitations, I do agree with Chief Justice Roberts that the role of a judge is like that of a baseball umpire. A baseball umpire makes calls based upon the application of facts to established rules. Similarly, a District Court judge applies “rules” established by Congress or by the precedents of higher courts. Neither a baseball umpire nor a District Judge make those rules.

- 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 practical consequences unless directed to do so by controlling authority. An example would be when ruling on a motion for a preliminary injunction, a judge should consider practical consequences such as whether the movant is likely to suffer irreparable harm in the absence of preliminary relief, among other considerations, in accord with Fed. R. Civ. P. 65.

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?

The Supreme Court has held that summary judgment determinations are objective, not subjective. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (explaining that “the ‘genuine issue’” standard is ‘very close’ to the ‘reasonable’ jury directed verdict standard” and that “the inquiry under each is the same: 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”).

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 is an important human trait and may properly assist a judge in exercising his or her discretion in matters such as scheduling so as to avoid unduly burdening parties, witnesses, jurors, victims, or counsel. Similarly, a judge may empathize with unnecessary discomfort experienced by these participants in court processes and thus may take reasonable measures to alleviate such discomfort. However, a judge's substantive decisions should be based solely on the law.

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

A judge's personal preferences have no place in the judge's decision-making process because a judge must adhere to and apply the law. A judge's personal life experiences can aid a judge in effectively communicating with and relating to the various people that participate in court proceedings such as parties, witnesses, jurors, victims, counsel, etc.

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.

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?

Trial by jury is an important right preserved by the Constitution. 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). Although not incorporated against the states, the Seventh Amendment guarantees a trial by jury to litigants in civil cases.

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

The Constitution should always be a concern to judges. If confirmed, I will fulfill my duty to observe and apply the U.S. Constitution, federal statutes, and all binding

Supreme Court and Third Circuit precedent, including *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); and *Epic Systems Corporation v. Lewis*, __ U.S. __, 138 S. Ct. 1612 (2018). Because there is pending and impending litigation in the federal courts on this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs judges and judicial nominees to refrain from making 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.

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

Please see my response to Question 6 (b).

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

This issue arises often in the context of legislation enacted pursuant to one of the enforcement clauses of a constitutional amendment, and the Supreme Court has generated a body of precedent with respect to several pieces of individual-rights legislation. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (Americans with Disabilities Act); *Nev. Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721 (2013) (Family and Medical Leave Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act); and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Voting Rights Act of 1965). If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including precedent in this area.

8. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes.

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

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

I will abide by the Code of Conduct for United States Judges, and I will consider Advisory Opinion # 116 along with any subsequent advisory opinions from the Committee on the Codes of Conduct relating to participation in educational seminars if I am invited to attend any such seminar. Advisory Opinion # 116 states that “it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis.” The opinion also identifies nine specific factors relating to the sponsoring organization and three specific factors relating to the educational program itself for the judge to consider. In deciding whether to attend any particular educational seminar, I will carefully consider these factors.

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

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

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

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

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

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

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

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

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

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

**Nomination of William Scott Hardy, to be United States District Court Judge
for the Western District of Pennsylvania
Questions for the Record
Submitted January 15, 2020**

QUESTIONS FROM SENATOR COONS

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

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

Yes.

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

Yes. The Supreme Court has held in *Washington v. Glucksberg*, 521 U.S. 702 (1997), that whether a right is deeply rooted in the nation's history and tradition is an important consideration in determining whether a right is fundamental. Courts may discern whether a right is deeply rooted in history and tradition by consulting a variety of sources including statutes, historical records, and other legal texts.

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

Yes. If confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. The decisions of other courts of appeals can also be consulted as informative and persuasive authority.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes. The Supreme Court instructs lower courts to apply not only the specific result of a binding precedent but also the reasoning underlying its precedents. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996). The reasoning of decisions of other courts of appeals can also be consulted as informative and persuasive authority.

- 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*).

Both *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding precedent of the Supreme Court and if confirmed as a district court judge, I will fulfill my duty to observe and apply these precedents as well as all other binding Supreme Court precedent.

- f. What other factors would you consider?

If confirmed as a district court judge, I will consider each of the factors discussed in my responses to Question Nos. 1(a) – (e) above and will fulfill my duty to observe and apply these precedents as well as all other binding Supreme Court precedents.

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to both race and gender. See *United States v. Virginia*, 518 U.S. 515 (1996).

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to both race and gender. See *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *United States v. Virginia*.

- 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 undertaken an in-depth study of the jurisprudential history of Fourteenth Amendment cases and therefore am unable to offer an opinion as to why the Supreme Court had not rendered a ruling on this issue earlier than it did 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?

The Supreme Court has held that the Fourteenth Amendment guarantees gay and lesbian couples the same right to marry as heterosexual couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

This issue is currently the subject of litigation pending in federal and state courts. As a judicial nominee, I am not permitted to offer an opinion on this issue pursuant to Canon 3(A) (6) of the Code of Conduct for United States Judges. *See also* Canons 1 and 5 of the Code of Conduct for United States Judges. The commentary to Canon 1 of the Code of Conduct for United States Judges states that the Code of Conduct for United States Judges applies to nominees for judicial office.

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 recognized such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed as a district court judge, I will fulfill my duty to observe and apply these precedents as well as all other binding Supreme Court precedents.

- 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 recognized such a right in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed as a district court judge, I will fulfill my duty to observe and apply these precedents as well as all other binding Supreme Court precedents.

- 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 such a right that protects intimate relations between two consenting adults, regardless of their sexes or genders. *See Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed as a district court judge, I will fulfill my duty to observe and apply this precedent as well as all other binding Supreme Court precedents.

- 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.

All of the cases cited above are binding Supreme Court precedent that if confirmed I will be duty-bound to observe and apply.

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 as a district court judge, I will look to precedent of the Supreme Court and Third Circuit as to circumstances when it is appropriate to consider our changing understanding of society. Where such consideration is permissible and warranted, I would be guided by the applicable Federal Rules of Evidence, including those rules applicable to lay and expert evidence.

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

A court may permit the introduction of such evidence when it assists the trier of fact and otherwise complies with the requirements of Federal Rule of Evidence 702 and is determined to be reliable and otherwise in accord with *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), and its progeny.

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

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

If confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents, including *Obergefell*.

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

If confirmed as a district court judge, I will apply all precedents of the Supreme Court. To the extent these issues are currently the subject of litigation pending in federal and state courts, as a judicial nominee, I am not permitted to offer my opinions pursuant to Canon 3(A) (6) of the Code of Conduct for United States Judges. *See also* Canons 1 and 5 of the Code of Conduct for United States Judges. The commentary to Canon 1 of the Code of Conduct for United States Judges states that the Code of Conduct for United States Judges applies to nominees for judicial office.

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 studied whether the Supreme Court’s decision *Brown* is consistent with originalism. *Brown* is binding precedent of the Supreme Court and if confirmed I will fulfill my duty to observe and apply it and all precedents of the Supreme Court.

- 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 Jan. 13, 2020).

If confirmed as a district court judge, I would be duty-bound to observe and apply precedent of the Supreme Court and Third Circuit regardless of whether that precedent adheres to a particular philosophy or hermeneutic of interpretation.

- 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?

For a district court judge, the most important considerations for interpreting a constitutional provision would be its actual text and the precedential interpretations of that text made by the Supreme Court and Third Circuit. To the extent those considerations do not resolve the issue, then other considerations such as discerning the original public meaning of the text may be helpful when interpreting it.

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

Please see my response to Question 6 (c).

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

If confirmed as a district court judge and tasked with discerning the contours of a constitutional provision, I first would look to Supreme Court and Third Circuit precedents interpreting the text at issue. If such precedents and the actual text itself does not fully address the issue, I would consider other factors permitted by applicable precedents including such interpretations rendered by other circuit and district courts, sources evidencing the original public meaning of the text, and other factors presented by the litigants in the case at issue.

- 7. The Equal Employment Opportunity Commission plays a critical role in protecting American workers from discrimination based on race, sex, religion, and other characteristics. As an employment lawyer in private practice, you have at times been critical of the EEOC. However, if confirmed, you would preside over discrimination cases involving the agency. What is your view of the appropriate role of the EEOC?

During my twenty-three years practicing law, I have had the privilege of working with many outstanding professionals at the United States Equal Employment Opportunity Commission (“EEOC”) while handling legal matters for my clients. I have great respect for the work that EEOC personnel do in carrying out the EEOC’s important mission to enforce federal laws that prohibit employment discrimination based on race, sex, religion, and other characteristics.

The EEOC is a federal agency duly established by Congress pursuant to 42 U.S.C. § 2000e-4(a). The EEOC is statutorily responsible for enforcing specified federal statutes that make it illegal to discriminate against a job applicant or employee because of the person’s race, color, religion, sex, national origin, age, disability, or genetic information, or because the person complained about discrimination, filed a charge of discrimination, or participated in an employment investigation or lawsuit, as those terms have been interpreted by EEOC’s regulations and by

Supreme Court and other binding precedents. Accordingly, the EEOC has the authority to investigate charges of discrimination against employers who are covered by the applicable statutes, and to file lawsuits to protect the rights delineated in the statutes under its purview. The EEOC also provides the public with outreach, education, and technical assistance programs.

In my extensive interactions with EEOC personnel during my twenty-three years practicing law, I have endeavored always to be polite, courteous, civil, and professional with them. Moreover, I have written and spoken extensively on topics of compliance with the laws and regulations enforced by EEOC. In my role as legal counsel for employers, an important part of my job has been helping clients understand and comply with employment laws and address employment and workplace misconduct. For example, I have advised clients to fire, or take other serious action, against employees, including executives and other managers, who I believed had engaged in misconduct. I have provided this advice directly and forcefully, even when clients have not wanted to take such steps.

Additionally, on numerous occasions, EEOC personnel have approved of me personally providing compliance training to managers and employees as a term of settlement. I believe that the EEOC personnel with whom I have had dealings during the course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view.

One such former EEOC lawyer with whom I have had many professional dealings during her time as an EEOC lawyer sent a letter to the Senate Judiciary Committee strongly supporting my nomination, along with almost three dozen other lawyers that I have litigated against or worked with. The letter states their belief that I am “fair-minded, respectful, and of the highest integrity”, I seek “common ground and mutually beneficial solutions to problems”, and I will be “an outstanding jurist.” This letter is just one of multiple letters that attorneys, judges, and community leaders who know me well have sent to the Senate Judiciary Committee in support of my nomination.

If confirmed, every litigant appearing before me can be assured that I will treat every person involved in every case fairly, impartially, and with dignity and respect. I will faithfully observe and apply all binding Supreme Court and Third Circuit precedent, and I will uphold the oath of office to administer justice without respect to persons. *See* 28 U.S.C. § 453.

**Questions for William Scott Hardy
From Senator Mazie K. Hirono**

1. In response to a question from Sen. Grassley, you testified that when interpreting a statute “to the extent that the statutory text is clear and unambiguous the text is the law.” You went on to testify that “to the extent that [the statutory text in light of the structure and context] is unambiguous, that’s the beginning and the end of the analysis.” While many nominees express adherence to this so-called “textualist” approach to statutory construction, in practice we see many of same nominees bend and twist the words of statutes in unbelievable ways to advance their own policy goals.

You wrote a brief in the case *Pennsylvania Restaurant & Lodging Association v. Pittsburgh* in which you opposed the rights of workers. In that case, you wrote an amicus brief to the Pennsylvania Supreme Court asking it to strike down a Pittsburgh ordinance mandating paid sick leave. In your brief, you repeatedly argued that Pittsburgh lacked the authority to pass the ordinance because it was “not a ‘public health’ ordinance.” You called the city’s efforts to defend the ordinance as a “public health” ordinance “attenuated or farcical.”

- a. **Please explain how it is “attenuated” and “farcical” to describe an ordinance that grants employees paid sick leave—thereby encouraging those employees to stay home when sick to stop the spread of disease to their coworkers—a “public health” ordinance.**

The issue presented in the case referenced in Question 1.a. was whether the City of Pittsburgh had the statutory authority under the Pennsylvania Home Rule Charter and Optional Plan of Government Law (the “Home Rule Law”), 53 Pa.C.S. §2962(f), to enact an ordinance mandating employers to provide employees with paid sick days and to maintain certain employment records or whether such regulation of employers and businesses is reserved to the authority of the Pennsylvania General Assembly (i.e., the state legislature) to promulgate on a unified, state-wide basis rather than individually by each of Pennsylvania’s 2,560 separate municipalities.

My client in this case was the Restaurant Law Center and I filed an *amicus* brief on its behalf in its support of parties to the case who contended that such regulation of employers and businesses was reserved to the General Assembly to regulate on a unified, state-wide basis. The *amicus* brief reflected my client’s position in the case.

The *amicus* brief did not challenge or question the efficacy or prudence of the public policy goals underlying the City of Pittsburgh’s ordinance but merely argued that under Pennsylvania law the General Assembly is solely authorized to enact it on a state-wide basis rather than leaving it to each of Pennsylvania’s 2,560 separate municipalities to do so separately and each in their own way. The amicus brief reflected my client’s position in the case. A foundational principle in our legal system is that lawyers represent clients and we do not ascribe the position of a client to a lawyer.

The *amicus* brief I filed on behalf of my client sought to uphold two lower court rulings and to rebut contentions made by appellants’ that the City of Pittsburgh’s sick pay

ordinance is a “public health” ordinance within the meaning of the Pennsylvania Home Rule Law because the ordinance mandates workplace standards customarily governed by both federal and state labor and employment laws such as compensation, leave of absence, and employment record-keeping obligations. The principle argument made was that the plain text of the Home Rule Law does not authorize home rule municipalities, such as the City of Pittsburgh, to enact ordinances that impose “duties, responsibilities, or requirements” upon “businesses, occupations and employers.” Instead, the *amicus* brief argued on behalf of my client that the Home Rule Law reserves such legislation to the General Assembly. The *amicus* brief sought to make textual arguments to rebut contentions made by appellants that the City of Pittsburgh’s sick pay ordinance is a “public health” regulation within the meaning of the Pennsylvania Disease Prevention and Control Law (“DPCL”) and the Pennsylvania Home Rule Law because the ordinance mandates workplace standards customarily governed by both federal and state labor and employment laws such as compensation, leave of absence, and employment record-keeping obligations.

To cite one such example, the appellants argued that the DPCL authorized the enactment of the local ordinance at issue and my client’s *amicus* brief counter-argued that the DPCL was not applicable to the City of Pittsburgh in this particular case because the DPCL expressly limits municipalities’ authority to issue rules and regulations relating to “disease prevention and control” to those municipalities who “have boards or departments of health.” The brief advanced this argument because the City of Pittsburgh did not have its own board or department of health.

- b. In view of this case and other cases and publications in which you have opposed the rights of workers, what evidence can you point to that shows you would be able to set aside these views and treat fairly a labor union or other litigant coming before you to enforce employment laws, should you be confirmed as a judge?**

During the entire course of my twenty-three years practicing law, I have only represented clients and not causes. In our legal system, we do not ascribe the position of a client to a lawyer. As Chief Justice Roberts explained at his confirmation hearing: “It is a basic principle in our system that lawyers represent clients and you do not ascribe the position of a client to the lawyer. It’s a position that goes back to John Adams and the Revolution.”

Much of my practice has involved assisting employers to comply with the various laws enacted to protect the rights of workers, including those laws enforced by the National Labor Relations Board (“NLRB”), the Equal Employment Opportunity Commission (“EEOC”), and the Department of Labor (“DOL”). I have also written and spoken extensively to employer organizations in furtherance of legal compliance with these laws and regulations.

I have had extensive interactions with unions, union officials, union lawyers, and union workers, and I have endeavored always to be professional, respectful, and fair-minded with them, even when my clients and the unions and their members were in a dispute or otherwise disagreed on a given matter. As a child, I saw first-hand the value and importance of unions, particularly as the son of a union-represented firefighter and the

grandson of a union-represented police officer. In addition, one of my great uncles served briefly as the president of his local union representing his fellow operating engineers. I have uncles and cousins who work or worked as laborers and in the skilled trades who are or were members of unions, and for a time, my wife taught elementary school while a member of a union. Moreover, I have written and spoken extensively on topics of compliance with workplace laws and regulations, including those promulgated and enforced by the NLRB.

When representing employers in arbitrations and in negotiating collective bargaining agreements with its employees and their union representatives, I always sought common ground and mutual interests. I am honored that current and former union representatives and attorneys for SEIU Healthcare Pennsylvania, the state's largest union of nurses and health care workers, have signed letters of support for my nomination, which the Senate Judiciary Committee has received. The letter sent by current and former union representatives states, among things, that: "In the many matters we have each handled with Scott over the years, Scott has been professional and fair-minded, and he has put his intellect and energies into seeking common ground and mutual interests with our constituents. Scott has always been respectful even when his clients and our members were in a dispute or otherwise disagreed on a given matter."

Additionally, on many occasions I advised employer clients to address workplace misconduct, including discrimination, harassment, and retaliation; I advised clients to fire or take other serious action against executives or other employees who in my judgment engaged in such misconduct. I have been direct and forceful in telling clients to take such actions even when they were reluctant to do so. Also, on occasion, I have represented individual employees in court litigating claims against their employers for wages or to vindicate other workplace rights, and on occasion advised and counseled employees regarding their rights concerning discrimination or harassment in the workplace.

In my extensive interactions with EEOC personnel, I have endeavored always to be polite, courteous, civil, and professional with them. EEOC personnel have approved of me personally providing compliance training to managers and employees as a term of settlement. I believe that the EEOC personnel with whom I have had dealings during the course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view. One such former EEOC lawyer with whom I have had many professional dealings during her time as an EEOC lawyer sent a letter to the Senate Judiciary Committee strongly supporting my nomination, along with almost three dozen other lawyers that I have litigated against or worked with. The letter states their belief that I am "fair-minded, respectful, and of the highest integrity," I seek "common ground and mutually beneficial solutions to problems," and I will be "an outstanding jurist." This letter is just one of multiple letters that attorneys, judges, and community leaders who know me well have sent to the Senate Judiciary Committee in support of my nomination.

If confirmed, every litigant appearing before me can be assured that I will treat every person involved in every case fairly, impartially, and with dignity and respect. I will faithfully apply all binding Supreme Court and Third Circuit precedent, and I will uphold the oath of office to administer justice without respect to persons. *See* 28 U.S.C. § 453.

2. In a book you co-authored, you advised employment attorneys to “[b]e mindful that some [Equal Employment Opportunity Commission] personnel who perceive themselves as being disrespected by employers’ representatives are apt to use their agency’s broad investigative powers in rebuttal.” You went on to say that “it is not uncommon for EEOC personnel to disregard controlling legal principles and take irrational positions.”

Please provide examples from your personal experience of EEOC personnel “disregard[ing] controlling legal principles” or “tak[ing] irrational positions” due to perceived disrespect.

During my twenty-three years practicing law, I had the privilege of working with many outstanding professionals at the Equal Employment Opportunity Commission (“EEOC”) while handling legal matters for my clients. I have great respect for the work that EEOC personnel do in carrying out the EEOC’s important mission to enforce federal laws that prohibit employment discrimination based on race, sex, religion, and other characteristics.

The publication referenced in Question 2 contains a chapter that I co-authored thirteen years ago in 2007 with a senior partner at my then-law firm who had nearly forty years of legal experience at the time of publication. The observations made in the chapter at the time of publication were of the authors individually and collectively, and particularly from the extensive experiences of my co-author.

The observations quoted in Question 2 arose from those experiences, which included: (1) occasions where an EEOC investigator would use his or her authority to propound extensive and broad information requests with unreasonably short return deadlines, and (2) occasions where EEOC personnel would insist on settlement terms that, if agreed to and implemented, could have caused a client to violate some other federal law or regulation.

The chapter was written in our role as legal counsel for employers, and primarily for an audience of employers, to emphasize the importance of compliance with the laws enforced by government agencies such as EEOC. Likewise, the chapter expressed the value legal counsel can have in assisting employers to be compliant with those laws, and it exhorts employers that “[i]t is critically important to maintain a professional tone and protect . . . credibility in all interactions with EEOC personnel at all levels” and to “always be polite, courteous, civil, and professional” when dealing with such governmental personnel.

I have endeavored always to be polite, courteous, civil, and professional with EEOC officials. Moreover, I have written and spoken extensively on topics of compliance with the laws and regulations enforced by EEOC. In my role as legal counsel for employers, an important part of my job has been helping clients understand and comply with employment

laws and address employment and workplace misconduct. For example, I advised clients to fire, or take other serious action, against employees, including executives and other managers, who I believed had engaged in misconduct. I have provided this advice directly and forcefully, even when clients have not wanted to take such steps.

One such former EEOC lawyer with whom I have had many professional dealings during her time as an EEOC lawyer sent a letter to the Senate Judiciary Committee strongly supporting my nomination, along with almost three dozen other lawyers that I have litigated against or worked with. The letter states their belief that I am “fair-minded, respectful, and of the highest integrity,” I seek “common ground and mutually beneficial solutions to problems,” and I will be “an outstanding jurist.” This letter is just one of multiple letters that attorneys, judges, and community leaders who know me well have sent to the Senate Judiciary Committee in support of my nomination.

If confirmed, every litigant appearing before me can be assured that I will treat every person involved in every case fairly, impartially, and with dignity and respect. I will faithfully observe and apply all binding Supreme Court and Third Circuit precedent, and I will uphold the oath of office to administer justice without respect to persons. *See* 28 U.S.C. § 453.

3. In a 2007 article, you were highly critical of jury awards in employment disputes. You claimed that juries are “notorious for being generous with company money.” In another 2017 publication, you called jury verdicts in employment disputes “unwarranted” and claimed they are tainted by jurors’ own experiences “being treated unfairly by an employer at some point in their lives.”

Judges have a variety of ways to keep a case from ever reaching a jury, including by granting motions to dismiss or motions for summary judgment.

In view of your negative views about juries, what evidence can you point to that shows you would be able to set aside these views—should you be confirmed—enable plaintiffs to have full access to their constitutional right to a jury trial?

During the course of my twenty-three years practicing law, including those instances in which I represented clients in jury trials, I developed a deep and abiding respect for our judicial system, particularly the critically important role served by juries. The writings referenced in your question are contained in a publication that I co-authored thirteen years ago, in 2007, attempting to make the point that employers may be subjected to adverse verdicts for mishandling routine personnel matters based upon some jurors’ lack of experience with the duties of supervision. This point was written with the intent to admonish employers to be careful and prudent even when making routine personnel decisions, and warning them of consequences, but perhaps was not written as clearly as it could have been in order to make that point. Although perhaps inartfully stated, its larger point was to impress upon employers the necessity of being vigilant in complying with workplace laws, and the article goes on to exhort employers to invest in compliance education and counseling in furtherance of that objective.

If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedents pertaining to the right of having jury trials, as well as all applicable court rules such as the Federal Rules of Civil Procedure, notably Rule 12 (pertaining to motions to dismiss) and Rule 56 (pertaining to motions for summary judgment). Accordingly, if confirmed, I will abide by the limits these applicable rules provide for entering judgment as a matter of law, thus preserving applicable jury trial rights in accordance with extant law.

4. 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, I believe that training on implicit bias is important for judges to receive.

b. Have you ever taken such training?

Yes, I have received training on implicit bias in the workplace.

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

I am eager to review the training available through the Federal Judicial Center and Administrative Office of the United States Courts (including on implicit bias) and, if confirmed, will seek out training from those sources as appropriate. I commit to receiving training on implicit bias and other topics as recommended by the Federal Judicial Center and Administrative Office of the United States Courts.

Nomination of William Scott Hardy
United States District Court for the Western District of Pennsylvania
Questions for the Record
Submitted January 15, 2020

QUESTIONS FROM SENATOR BOOKER

1. In a book titled *Successful Strategies for Dealing with Government Agencies in Health Care, Labor, and Employment Law*, you were quite critical of the Equal Employment Opportunity Commission (EEOC).¹ You wrote, “Be mindful that some EEOC personnel who perceive themselves as being disrespected by employers’ representatives are apt to use their agency’s broad investigative powers in rebuttal. Moreover, it is not uncommon for EEOC personnel to disregard controlling legal principles and take irrational positions.”²

- a. What led you to this observation of the EEOC?

During my twenty-three years practicing law, I have had the privilege of working with many outstanding professionals at the Equal Employment Opportunity Commission (“EEOC”) while handling legal matters for my clients. I have great respect for the work that EEOC personnel do in carrying out the EEOC’s important mission to enforce federal laws that prohibit employment discrimination based on race, sex, religion, and other characteristics.

The publication referenced in Question 1 contains a chapter that I co-authored thirteen years ago in 2007 with a senior partner at my then-law firm who had nearly forty years of legal experience at the time of publication. The observations made in the chapter at the time of publication were of the authors individually and collectively, and particularly from the extensive experiences of my co-author.

The observation quoted in Question 1 arose from those experiences, which included: (1) occasions where an EEOC investigator would use his or her authority to propound extensive and broad information requests with unreasonably short return deadlines, and (2) occasions where EEOC personnel would insist on settlement terms that, if agreed to and implemented, would have caused a client to violate some other federal law or regulation.

The chapter was written in our role as legal counsel for employers, and primarily for an audience of employers, to emphasize the importance of compliance with the laws enforced by government agencies such as EEOC. Likewise, the chapter expressed the value legal counsel can have in assisting employers to be compliant with those laws, and it exhorts employers that “[i]t is critically important to maintain a professional tone and protect . . . credibility in all interactions with EEOC personnel at all levels” and to “always be polite, courteous, civil, and professional” when dealing with such governmental personnel.

In my role as legal counsel for employers, an important part of my job has been helping clients understand and comply with employment laws and address employment and workplace misconduct. For example, I have advised clients to fire, or take other serious action, against employees, including executives and other managers, who I believed had engaged in misconduct. I have provided this advice directly and forcefully, even when clients have not wanted to take such steps.

- b. If you are confirmed, why should EEOC lawyers arguing cases before you expect to have a fair and impartial judge, in light of your comments on the agency?

If confirmed, every litigant appearing before me can be assured that I will treat every person involved in every case fairly, impartially, and with dignity and respect. I will faithfully observe and apply all binding Supreme Court and Third Circuit precedent, and I will uphold the oath of office to administer justice without respect to persons. *See* 28 U.S.C. § 453.

During my twenty-three years practicing law, I have had the privilege of working with many outstanding professionals at the Equal Employment Opportunity Commission (“EEOC”) while handling legal matters for my clients. I have great respect for the work that EEOC personnel do in carrying out the EEOC’s important mission to enforce federal laws that prohibit employment discrimination based on race, sex, religion, and other characteristics.

In my extensive interactions with EEOC personnel, I have endeavored always to be polite, courteous, civil, and professional with them. Moreover, I have written and spoken extensively on topics of compliance with the laws and regulations enforced by EEOC. In my role as legal counsel for employers, an important part of my job has been helping clients understand and comply with employment laws and address employment and workplace misconduct. For example, I have advised clients to fire, or take other serious action, against employees, including executives and other managers, who I believed had engaged in misconduct. I have provided this advice directly and forcefully, even when clients have not wanted to take such steps.

Additionally, on numerous occasions, EEOC personnel have approved of me personally providing compliance training to managers and employees as a term of settlement. I believe that the EEOC personnel with whom I have had dealings during the course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view.

One such former EEOC lawyer with whom I have had many professional dealings during her time as an EEOC lawyer sent a letter to the Senate Judiciary Committee strongly supporting my nomination, along with almost three dozen other lawyers that I have litigated against or worked with. The letter states their belief that I am “fair-minded, respectful, and of the highest integrity,” I seek “common ground and mutually beneficial solutions to problems,” and I will be “an outstanding jurist.” This letter is just one of multiple letters that attorneys, judges, and community leaders who know me well have sent to the Senate Judiciary Committee in support of my nomination.

- c. Given the comments you have taken on the EEOC, would you recuse yourself from any cases involving the agency if you are confirmed?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself. *See* 28 U.S.C. § 455. If confirmed, I will determine whether to recuse myself from a case by reference to the standards 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.

2. In that same book, you criticized unions and also argued that the National Labor Relations Board (NLRB) improperly advocates on behalf of unions.³ You wrote, “The NLRB, for its part, serves as a pro-union advocate in these proceedings even though the public policy established by Congress in Section 7 of the [National Labor Relations Act] provides that employees have a legal right to join or *refrain from joining unions*.”⁴

- a. Do you stand by these comments?

I have great respect for the history and role of labor unions in the United States, and the federal agencies that enforce federal labor laws, such as the National Labor Relations Board (“NLRB”). On a personal level, that respect comes from having grown up in a union household in a blue-collar neighborhood in Pittsburgh filled with many other union households. My father, a career Pittsburgh firefighter, was a union member, as was my grandfather, also a career Pittsburgh police officer. One of my great uncles served briefly as the president of his local union representing his fellow operating engineers. I have uncles and cousins who work or worked as laborers and in the skilled trades who are or were members of unions, and for a time, my wife was a union member when she taught elementary school. Moreover, on a professional level, that respect comes from my interactions with labor unions and their attorneys in legal matters. In those interactions, I have endeavored always to be polite, courteous, civil, and professional with them. The vast majority of my labor union-related work has involved SEIU Healthcare Pennsylvania.

I believe that union representatives and lawyers with whom I have had dealings during the course of my law practice have come to know me as someone who, while advocating for my clients, has always been fair-minded and respectful of opposing points of view. I am honored that current and former union representatives and attorneys for SEIU Healthcare Pennsylvania, the state’s largest union of nurses and health care workers, have signed letters of support for my nomination, which the Senate Judiciary Committee has received. The letter sent by current and former union representatives states, among things, that: “In the many matters we have each handled with Scott over the years, Scott has been professional and fair-minded, and he has put his intellect and energies into seeking common ground and mutual interests with our constituents. Scott has always been respectful even when his clients and our members were in a dispute or otherwise disagreed on a given matter.”

The publication referenced in Question 2 contains a chapter that I co-authored thirteen years ago in 2007 with a senior partner at my then-law firm who had nearly forty years of legal experience at the time of publication. The observations made in the chapter at the time of publication were of the authors individually and collectively. The observations concerning the NLRB were drawn particularly from the extensive NLRB-related experiences of my co-author.

Looking back from the distance of time and with more professional experience, I would not write the comments referenced in Question 2 in the same way today. To clarify the statement the Senator references in the book, there are certain types of administrative proceedings in which the NLRB, through its Counsel for the General Counsel, does and can formally and permissibly advocate on behalf of a union party. The referenced comments do not clearly

explain this possibility.

b. How do you believe the NLRB improperly advocates on behalf of unions?

Please see my Response to Question No. 2(a). I do not believe the NLRB improperly advocates on behalf of unions.

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

I tend not to label myself because the term “originalist” may mean different things to different people. If confirmed as a district court judge, my duty and obligation would be to apply binding precedent rather than to apply any specific interpretive method. It is rare for a lower court to consider a constitutional case for which there is no applicable Supreme Court precedent. The Supreme Court has indicated that looking to the original public meaning of the terms in the Constitution is a method of analysis in some cases. 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 based on their respective understandings of the original public meaning of the Second Amendment.

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

As explained in my response to Question 3 above, I tend not to label myself because the term “textualist” may mean different things to different people. If confirmed as a district court judge, my duty and obligation would be to apply binding precedent on the meaning of any statutory term. In the absence of such binding precedent, and as I explained in my testimony to the Senate Judiciary Committee on January 8, 2020, the statutory text being interpreted is to be read in light of the structure and context of the entire statute, and in accord with established canons of construction.

5. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress’s intent. Most

¹ Scott Hardy with John E. Lyncheski, *Successful Strategies for Dealing with Government Agencies in Health Care, Labor, and Employment Law*, chapter in *Successful Strategies for Dealing with Government Agencies in Health Care Law*, Aspatore Books’ *Inside the Minds* series (2007).

² *Id.* at 33.

³ *Id.* at 35.

⁴ *Id.* (emphases in the original).

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?

If confirmed as a district court judge, I would consider the arguments presented by parties in briefing, and my duty and obligation would be to apply all binding Supreme Court and Third Circuit precedent. As I explained in my testimony to the Senate Judiciary Committee on January 8, 2020, the Supreme Court has held that judges may consider legislative history when interpreting the ambiguous text of a statute.

- 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?

If confirmed as a district court judge, I would consider the arguments presented by parties in briefing, and my duty and obligation would be to apply all binding Supreme Court and Third Circuit precedent, including appropriate consideration of legislative history as permitted by those precedents.

6. 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?

I view judicial restraint as the opposite of judicial activism as I explained my understanding of that term in my testimony to the Senate Judiciary Committee on January 8, 2020. I believe that judicial restraint is an important value of district court judges.

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

Heller is binding Supreme Court precedent, and if confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. To the extent this question calls for my views as to the correctness of *Heller*, it is generally inappropriate for federal judicial nominees to opine on the correctness of Supreme Court decisions.

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

Citizens United is binding Supreme Court precedent, and as a district court judge, I will apply it and all binding Supreme Court and Third Circuit precedent. To the extent this question calls for my views as to the correctness of *Citizens United*, it is generally inappropriate for

federal judicial nominees to opine on the correctness of Supreme Court decisions.

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

Shelby County is binding Supreme Court precedent, and as a district court judge, I will apply it and all binding Supreme Court and Third Circuit precedent. To the extent this question calls for my views as to the correctness of *Shelby County*, it is generally inappropriate for federal judicial nominees to opine on the correctness of Supreme Court decisions.

7. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁸ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁹

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, I respectfully refrain from further responding pursuant to canon 3(A)(6) of the Code of Conduct for United States Judges, which directs 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. The commentary to Canon 1 of the Code of Conduct for United States Judges states that the Code of Conduct for United States Judges applies to nominees for judicial office.

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

Please see my response to Question 7 (a).

⁵ 554 U.S. 570 (2008).

⁶ 558 U.S. 310 (2010).

⁷ 570 U.S. 529 (2013).

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

⁹ *Id.*

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 7 (a).

8. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹⁰ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹¹ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹² In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹³

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

I have not studied this issue in depth, but I have a general awareness of the concept of implicit bias, including implicit racial bias, and acknowledge that participants in the criminal justice system may have acted with implicit bias on the basis of race.

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

I have not studied this issue in depth, but generally yes.

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

I have not studied the issue in depth but I have familiarized myself with the concept of implicit social cognition generally and as it relates to decisions made by human resource professionals during the course of my twenty-three years practicing law. I have attended conferences from time to time at which this topic was discussed. Additionally, I have reviewed a limited amount of social psychology scholarship in this area, including: B. Keith Payne and Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?* to appear in B. Gawronski & B.K. Payne (Eds.) *Handbook of Implicit Social Cognition: Measurement, Theory, and Applications* (2010); Brian A. Nosek and Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, *Social Issues and Policy Review*, Vol. 6, No. 1 (2012); and Brian A. Nosek, Carlee Beth Hawkins, and Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, *Trends in Cognitive Sciences*, Vol. 15, No. 4 (April 2011).

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁴ Why do you think that is the case?

I have not studied this report and have no basis to opine as to why these observations may be occurring. Those concerning disparities are worthy of study, and I look forward to updates and explanations that the Sentencing Commission may provide as those would be very important to me.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹⁵ Why do you think that is the case?

I look forward to updates and explanations to learn more about the concerning disparities referenced in this study.

- 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?

Every judge has an affirmative obligation to fulfill the requirements of the judicial oath “to administer justice without respect to persons, and do equal right to the poor and to the rich.” As a district court judge, I would follow that oath and I would strive to ensure the correctness of the sentencing guidelines range and to ensure a meaningful and evidence-based evaluation of statutory factors that consider the individual circumstances of each defendant in accord with binding precedents of the Supreme Court and Third Circuit.

9. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁶ In the 10 states that saw

¹⁰ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

¹¹ *Id.*

¹² Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹³ *Id.*

¹⁴ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

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

¹⁶ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁷

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

I have not studied or reached any conclusion about the statistical correlation between incarceration and crime rates.

- 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 No. 9 (a).

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

Yes.

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

Yes.

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

Yes, *Brown v. Board of Education* was correctly decided. *Brown* overturned the abhorrent, false doctrine of separate but equal, and thereby reinforced the fundamental American principle of equal protection under law for all.

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

No, *Plessy v. Ferguson* was not correctly decided, and was overturned by the Supreme Court in *Brown v. Board of Education*.

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

My responses are my own.

15. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who

was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”²⁰ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself. *See* 28 U.S.C. § 455. If confirmed, I will determine whether to recuse myself from a case by reference to the standards in 28 U.S.C. § 455, Canon 3 of the Code of Conduct of United States Judges, and any other applicable rules, opinions or ethical guidance. I am not aware of an instance in which a judge was recused or disqualified based on his or her race or ethnicity.

16. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”²¹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.’ *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will apply all binding Supreme Court and Third Circuit precedent, including *Zadvydas*.

¹⁷ *Id.*

¹⁸ 347 U.S. 483 (1954).

¹⁹ 163 U.S. 537 (1896).

²⁰ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

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

Questions for the Record from Senator Kamala D. Harris
Submitted January 15, 2020
For the Nomination of: William Scott Hardy
United States District Judge for the Western 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?**

I understand the importance for a district court judge to make an individualized assessment based on the facts and arguments presented in order to fashion an appropriate sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a).

If confirmed, I will exercise my discretion in sentencing each defendant who appears before me with careful consideration in accord with the process set forth by the Supreme Court and the Third Circuit. In *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006), the Court set forth a three-part process for a district court to employ when imposing a sentence:

First, courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 404 (2005);

Second, in doing so, courts must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account other pre-*Booker* case law, which continues to have advisory force; and,

Third, courts must exercise discretion by considering the relevant §3553(a) factors setting the sentence they impose regardless of whether it varies from the sentence calculated under the Guidelines.

In doing so, I would adhere to all Supreme Court and Third Circuit precedent, including *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (*en banc*) and give arguments of counsel meaningful consideration by acknowledging and responding to "any properly presented sentencing argument which has colorable legal merit and a factual basis."

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

I would apply the law of the Supreme Court and Third Circuit, as set forth in my response to Question 1(a). Additionally, I would carefully study resources regarding sentencing published by the United States Sentencing Commission and examine statistics regarding sentences of the Western District of Pennsylvania and other districts.

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

The Sentencing Guidelines are discretionary although a district court judge must carefully consider the advisory guideline calculation in every case. These Guidelines provide circumstances when a departure from the established ranges is appropriate. See Federal Sentencing Guidelines, Chapter 5. If confirmed, I would follow the direction of the Sentencing Guidelines regarding departures and the guidance of the Supreme Court and Third Circuit.

- 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 certain mandatory minimum sentencing requirements for certain crimes, by statute, and if confirmed, I would fulfill my duty to adhere to and apply those statutes and binding Supreme Court and Third Circuit precedents regarding those statutes regardless of any personal views I have or may formulate on the subject. As a judicial nominee, I must respectfully refrain from responding further to this question which appears to ask for my personal views on a matter of policy reserved for Congress.

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

Please see my response to Question No. 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 No. 1(d)(i).

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

- 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?

As a judicial nominee, I do not believe it is appropriate for me to commit to taking any specific course of action in rendering a decision or imposing a sentence, other than to apply the law as set forth by Congress and to adhere to and apply binding Supreme Court and Third circuit precedent. However, if confirmed, I will make a determination of what commentary, if any, may be appropriate depending on the individual circumstances of the case and the defendant before me.

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

Generally, charging decisions are entrusted to the executive branch. Please see my response to Question No. 1(d)(iv)(1).

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

Please see my response to Question No. 1(d)(iv)(1).

- 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?**

If confirmed, I would consider all sentencing options permitted by statute and in accord with the Sentencing Guidelines, including alternatives to incarceration in appropriate situations.

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

2. 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. See also 28 U.S.C. § 453.

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.**

Yes, I am aware of statistics supplied by the United States Sentencing Commission indicating that the incarceration rate of black men is higher than that of white men, and that sentences imposed on black men are longer than sentences imposed on white men.

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 will make hiring decisions on a case-by-case basis. In doing so, I will be sensitive to the interest of diversity and will welcome opportunities to hire and promote qualified women and minority candidates.