Nomination of Brett H. Ludwig to the United States District Court for the Eastern District of Wisconsin
Questions for the Record
Submitted June 24, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. 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 lower courts to depart from Supreme Court precedent. A lower court must follow Supreme Court precedent, unless the Supreme Court has overruled that precedent.

   b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

   District Court judges generally preside alone and do not issue concurring or dissenting opinions (unless, for example, they are sitting by designation of the Court of Appeals.) As a general matter, a district court judge should not question Supreme Court precedent. In limited circumstances, a district court judge may identify issues or questions arising from the application of precedent to a set of facts, flagging issues or questions for the higher courts. But a district court must always faithfully follow precedent.

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

   A district court's decisions are not precedential and do not bind the court itself or other courts. *See Camreta v. Green*, 563 U.S. 692, 707 n.7 (2011). A district court may also reconsider its own prior rulings in a given case, consistent with Federal Rules of Civil Procedure 59 and 60.

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

   As a sitting Bankruptcy Court Judge and pending nominee for the District Court, it would be inappropriate for me to comment on the circumstances in which the Supreme Court should overturn its own precedent. That is a decision resting exclusively within the province of the Supreme Court, utilizing a number of factors, as the Supreme Court has discussed. *See e.g., Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter

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

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

As a sitting Bankruptcy Court Judge and pending nominee to the District Judge, I consider all Supreme Court decisions, including *Roe v. Wade,* to be binding precedent. Without regard to adjectives or superlatives, *Roe v. Wade* is a long-standing precedent and, if I am confirmed, I will faithfully apply it and all Supreme Court precedents.

b. Is it settled law?

Yes.

3. 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.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

As a sitting Bankruptcy Court Judge and pending nominee to the District Court, it would be improper for me to comment on whether I agree or disagree with a Supreme Court opinion, including the dissenting opinion of an individual Supreme Court justice. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges. If I am confirmed, I will faithfully apply the majority opinion in *Heller*.

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

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

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

If confirmed, I will faithfully apply *Heller*. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

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

In *Citizens United*, the Supreme Court held that the First Amendment protected a closely-held corporation's political speech. That decision is controlling precedent, and, if confirmed, I will faithfully apply it. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

Please refer to my response to Question 5.a.

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

In *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 707-708, 719 (2014), the Supreme Court concluded that closely-held corporations are persons and can enforce religious rights under the Religious Freedom Restoration Act, but specifically

withheld ruling on the corporation's First Amendment claim. If confirmed, I will faithfully apply *Hobby Lobby*. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

   As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

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

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

   Please refer to my answer to question 7 above. In addition, federal civil rights statutes, including but not limited to 42 U.S.C. § 1981, prohibit discrimination on the basis of race in nongovernmental commercial transactions. If confirmed, I will faithfully apply *Loving* and any applicable federal civil rights statutes and precedents. As for the application of those precedents and statutes to a florist raising his or her own First Amendment freedom of religion claims, it would be improper for me, as a sitting Bankruptcy Court judge and pending nominee to the District Court to comment on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

9. 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.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece

… one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

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

No.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

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

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

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

This is an issue that is the subject of pending and impending litigation in federal courts. It is also the subject of ongoing political activity. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5 of the Code of Conduct for United States Judges.

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

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

13. 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.

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

I received these questions on June 24, 2020. I reviewed them and prepared draft responses, which I sent to attorneys at the Office of Legal Policy at the Department of Justice. After I reviewed comments that I received, I prepared a final draft of my answers and authorized personnel at the Department of Justice to file the final version.

Nomination of Brett Harry Ludwig
to the United States District Court for the
Eastern District of Wisconsin
Questions for the Record
Submitted June 24, 2020

QUESTIONS FROM SENATOR WHITEHOUSE

1. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

   I am not a member of the American Constitution Society, the Federalist Society, or the American Bar Association. If confirmed, I commit to considering each and every organization I am asked to join carefully and to applying the standards and considerations set forth in Canon 4 of the Code of Conduct for United States Judges, the comments to Canon 4, and any Advisory Opinions adopted by the Judicial Conference.

2. 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?

      I was not previously aware of this article, but I have now read it and listened to the recording.

   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.

      As a sitting Bankruptcy Court judge and District Court nominee, it would be inappropriate for me to comment on this issue. *See* Canons 2(A), 3(A)(1), and 5(C) of the Code of Conduct for 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 refer to my response to Question 2.b.

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.

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?

Please refer to my response to Question 2.b.

3. 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?

      Yes. A judge, like a sports umpire or referee, must apply the law to the situations presented, without bias or favoritism to any party and without attempting to sway the outcome of the contest.

   b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

      I believe a judge should always be mindful of the practical consequences of a particular ruling. But that mindfulness should not override application of the rule of law to the facts presented.

4. 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?

   No. Under Rule 56, summary judgment should be granted only when no reasonable finder of fact could find against the moving party. This is an objective standard. The Supreme Court and Seventh Circuit treat summary judgment as an objective test. *See Celotex v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986) If I am confirmed, I will faithfully follow those precedents.

5. 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?

      I believe a judge should always be mindful of the individual circumstances of the parties who appear before the court and empathetic in his or her treatment of litigants and attorneys who appear before the court. But that empathy should not override application of the rule of law to the facts presented.

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

I believe that judges, like all human beings, are products of their personal life experiences. But a judge should not let his or her personal life experience override application of the rule of law to the facts presented.

6. 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.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

As a general matter, a district court judge should not question binding Supreme Court or Court of Appeals precedent. In limited circumstances, a district court judge may identify issues or questions arising from the application of precedent to a set of facts, flagging issues or questions for the higher courts. But a district court must always faithfully follow precedent.

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

A judge should not publish an opinion proclaiming his or her personal policy preferences or political beliefs.

9. The Seventh Amendment ensures the right to a jury "in suits at common law."
   a. What role does the jury play in our constitutional system?

   The right to a civil trial by jury is constitutionally enshrined in the Seventh Amendment. It is a central part of our judicial system.

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

   Judges should be concerned with Constitutional provisions in general, including the Seventh Amendment. Challenges to the enforceability of arbitration clauses are the subject of impending or pending litigation in federal courts. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

   c. 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 refer to my response to Question 9.b.

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

Congressional fact-finding is relevant if it is material to a case or controversy pending before the court, including cases or controversies relating to legislation expanding or limiting individual rights. *See,* e.g. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 210-13 (1997). As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

11. 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.
        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
        iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
        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.

        If confirmed, I commit to considering each and every seminar that I attend carefully and to applying the standards and considerations set forth in the Code of Conduct for United States Judges as well as Advisory Opinion 116.

    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 refer to my response to Question 11.b.

12. In your view, what is the evidentiary significance of Congress's failure to enact a proposed amendment to a previously enacted statute for how you would interpret the previously enacted statute? In general, what significance do you attach to evidence of Congress's failure to enact any piece of proposed legislation?

    A court must interpret the statutory text actually passed by Congress and signed into law by the President. Congress's failure to enact other legislation is generally not relevant to interpreting the statutory text that was actually enacted. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

Questions for the Record for Brett H. Ludwig
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

   a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

   No.

   b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

   No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

   a. Do you agree that training on implicit bias is important for judges to have?

   Yes.

   b. Have you ever taken such training?

   Yes. As a lawyer in private practice, my law firm provided diversity training that discussed, among other things, implicit bias. Also, as a sitting Bankruptcy Judge, I have attended training sessions provided by the Federal Judicial Center that included discussions of implicit bias.

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

   Yes.

Nomination of Brett H. Ludwig
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QUESTIONS FROM SENATOR BOOKER

1. You previously gave a presentation on the advantages and disadvantages of arbitration.[1] In that presentation, you said that arbitration was perhaps faster than litigation, but conceded that there is "no clear winner" in cost for arbitration versus litigation.[2]

    a. During your presentation did you argue in favor of forced arbitration agreements?

    No, I did not argue in favor of forced arbitration agreements during this presentation. The presentation addressed arbitration provisions in reinsurance contracts. The reinsurance industry largely relies on arbitration proceedings to resolve disputes, and parties to reinsurance contracts frequently negotiate the terms by which disputes will be arbitrated. My co-panelist and I discussed typical language used in reinsurance arbitration clauses, whether arbitration is truly superior to litigation for the resolution of reinsurance disputes, and offered suggestions for language to include in drafting arbitration clauses. We did not discuss forced arbitration.

    b. Do you believe forced arbitration agreements have benefits for consumers or employees?

    My arbitration experience is limited to commercial disputes. I do not have an opinion on the merits of including arbitration clauses in consumer or employment agreements. If I am confirmed, I will follow all Supreme Court and Seventh Circuit precedents concerning the Federal Arbitration Act and the enforceability of arbitration agreements. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

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

I am reluctant to adopt labels like "originalist" or "textualist" because they mean different things to different people. But I think of myself as a textualist in that I believe the interpretation of any law – the Constitution, the United States Code or federal regulations – should start with the law's text. I also understand that the Supreme Court has interpreted both the Constitution and statutes by reference to their original public meaning. If I am confirmed, I will follow all binding precedents of the Supreme Court and the Seventh Circuit concerning constitutional and statutory interpretation, including those that rely on

[1] Presenter, *Arbitration v. Litigation*, Brokers & Reinsurance Markets Association Committee Rendezvous, Clearwater, Florida (April 27, 2014); *see also* SJQ Attachments to 12(d) at 492.
[2] *Id.*

the original public meaning of constitutional or statutory texts, to ascertain their meaning.

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

Please refer to my response to Question 2.

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

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

      Yes. If binding precedents of the Supreme Court or Seventh Circuit indicate a context in which a judge should consult legislative history in a particular case, then I certainly would do so.

   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?

      It is incumbent upon a district judge to evaluate all arguments presented by the parties, including arguments about legislative history. If a party relies on legislative history and the precedents of the Supreme Court or the Seventh Circuit direct me to consult that legislative history to ascertain the meaning of the law at issue, then I will do so.

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

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

   a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[3] Was that decision guided by the principle of judicial restraint?

      If I am confirmed, I will faithfully apply and follow *Heller*, which is binding Supreme Court precedent. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 5(C) of the Code of Conduct for United States Judges.

[3] 554 U.S. 570 (2008).

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[4] Was that decision guided by the principle of judicial restraint?

If I am confirmed, I will faithfully apply and follow *Citizens United*, which is binding Supreme Court precedent. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 5(C) of the Code of Conduct for United States Judges.

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

If I am confirmed, I will faithfully apply and follow *Shelby County*, which is binding Supreme Court precedent. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 5(C) of the Code of Conduct for United States Judges.

6. 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.[6] 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.[7]

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

I have not studied this issue. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

I have not studied this issue. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

c. Do you agree with the statement that voter ID laws are the twenty-first-century

[4] 558 U.S. 310 (2010).
[5] 570 U.S. 529 (2013).
[6] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[7] *Id.*

equivalent of poll taxes?

As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

7. 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.[8] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[9] 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.[10] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[11]

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

      I have not studied this issue, but I believe there is implicit racial bias in our criminal justice system.

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

      I have not studied this issue, but I understand that persons of color are disproportionately represented in our jails and prisons.

   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.

      No. I have not studied this issue.

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

      I have not studied this issue and am not familiar with the cited report.

   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

[8] 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.
[9] *Id.*
[10] 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.
[11] *Id.*
[12] 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.

mandatory minimum sentences.[13] Why do you think that is the case?

I have not studied this issue and am not familiar with the cited study.

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

Federal judges have an important role in addressing racial bias in our criminal justice system. The judicial oath requires a judge to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent upon" the judge. 28 U.S.C. §453. A federal judge should strive always to treat all people, including those involved with our criminal justice system, with dignity and respect and should apply the law fairly and uniformly to all.

8. 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.[14] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[15]

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

I have not studied the issue and am not familiar with the referenced study.

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

I have not studied the issue and am not familiar with the referenced study.

9. 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.

10. 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.

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

[14] 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.

[15] *Id.*

11. Do you believe that *Brown v. Board of Education*[16] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. *Brown* was correctly decided.

12. Do you believe that *Plessy v. Ferguson*[17] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. *Plessy* was not correctly decided.

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

No.

14. 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."[18] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Recusal and disqualification are governed by 28 U.S.C. §455. I do not believe that a judge's race or ethnicity is a basis for recusal or disqualification. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

15. 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."[19] 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 in the United States. *See Zadvydas v. Davis*, 633 U.S. 678, 693 (2001). If I am confirmed, I will apply the holding in *Zadvydas* and all other Supreme Court and Seventh Circuit precedents. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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[16] 347 U.S. 483 (1954).
[17] 163 U.S. 537 (1896).
[18] 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.
[19] 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 June 24, 2020
For the Nomination of:

Brett H. Ludwig, to be United States District Judge for the Eastern District of Wisconsin

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?**

    As a general matter, I would follow the procedure and consider the factors outlined in 18 U.S.C. §3553. I would consult the sentencing guidelines, perform the required guideline calculation, comply with any applicable sentencing statutes, determine whether any departures are warranted and then apply the factors set forth in 18 U.S.C. §3553(a) to determine the appropriate sentence. I would consider the factual record in its entirety and be mindful of the statutory mandate to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" the federal sentencing statute. *See* 18 U.S.C. §3553. I would also follow all applicable precedents of the Supreme Court and the Seventh Circuit.

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

    Please refer to my response to Question 1.a.

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

    The Sentencing Guidelines are advisory and not mandatory. In determining whether to depart from the Sentencing Guidelines, a district court judge should be guided by 18 U.S.C. §3553(a), the policies adopted by the Sentencing Commission, and applicable Supreme Court and Circuit Court precedent.

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

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

        Congress has established mandatory minimum sentences for certain federal crimes. If confirmed, I will faithfully follow all applicable statutes and precedent. As a sitting Bankruptcy Court judge and pending nominee

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

to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 5(C) of the Code of Conduct for United States Judges.

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

Please refer to my response to Question 1.d.i.

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

Please refer to my response to Question 1.d.i.

iii. 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.[1] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

   If confirmed and faced with these circumstances, I will carefully consider the law and facts of each case, as well as my ethical obligations, and render judgment accordingly.

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

   Please refer to my response to Question 1.d.i.

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

   Please refer to my response to Question 1.d.i.

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

Yes.

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[1] *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.

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

    I have not studied this issue, but I understand that persons of color are disproportionately represented in our jails and prisons. I believe that a judge should be aware of these disparities and should strive to treat everyone equally and fairly.

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

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

    Yes.

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

    Yes.

Senator Josh Hawley
Questions for the Record

Brett H. Ludwig
Nominee, U.S. District Court for the Eastern District of Wisconsin

1. **In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set out the precedent of judicial deference that federal courts must afford to administrative actions.**

    a. **Please explain your understanding of the Supreme Court's holding in *Chevron.***

    I understand the Supreme Court in *Chevron* to have held that, in appropriate circumstances, courts should defer to an administrative agency's interpretation of a statute that Congress has entrusted the agency to administer.

    b. **Please describe how you would determine whether a statute enacted by Congress is ambiguous.**

    The Supreme Court has explained that the "ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

    c. **In your view, is it relevant to the *Chevron* analysis whether the agency that took the regulatory action in question recognized that the statute is ambiguous?**

    Yes. As a general matter, if an issue of statutory ambiguity arises, an agency's (or any other party's) previous admission or recognition that the statute was ambiguous would be relevant.

2. **What is your view of the scope of the First Amendment's right to free exercise of religion?**

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." If confirmed, I will enforce both the establishment and free exercise clauses of the First Amendment, consistent with Supreme Court and Seventh Circuit precedent.

a. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

The Supreme Court has interpreted the right to free exercise of religion broadly and to encompass more than just the freedom to worship. *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). If I am confirmed I will enforce the First Amendment's Free Exercise Clause and all applicable Supreme Court and Seventh Circuit precedents. As a sitting Bankruptcy Judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), and 3(A)(6) of the Code of Conduct for United States Judges.

b. What standard would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

The Supreme Court has held that a governmental action that requires a person to choose between accepting punitive or disciplinary action or "engag[ing] in conduct that seriously violates [that person's] religious beliefs" substantially burdens that person's religious exercise. *See Holt v. Hobbs*, 574 U.S. 352, 360 (2015). If I am confirmed, I will follow the applicable standards set forth in the Supreme Court's holding in *Holt* and all other applicable Supreme Court and Seventh Circuit precedent.

c. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

The Supreme Court has stated that it is generally inappropriate for a federal court to question the sincerity of a religiously held belief. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 683, 724 (2014); *Employment Division v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.").

d. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

I understand that the Religious Freedom Restoration Act (RFRA) requires the government to exempt a party from laws or regulations that "substantially burden a person's exercise of religion" unless "application of the burden…is in furtherance of a compelling governmental interest" and "is the least restrictive

means of furthering" that interest. RFRA applies "to all Federal law, and the implementation of that law, whether statutory or otherwise," including laws enacted after RFRA's enactment date, "unless such law explicitly excludes such application." 42 U.S.C. §2000bb-3

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

The majority decision in *Heller* held that the Second Amendment precluded the District of Columbia from banning the possession of a handgun in the home by persons not otherwise disqualified from exercising their Second Amendment rights. The majority decision also held that the District of Columbia's prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense violated the Second Amendment.

4. **Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?**

Whether there is a flat constitutional or legal bar to the entry of nationwide or universal injunctions is an issue pending or impending before courts and, therefore, under Canon 3A(6) of the Code of Conduct for United States Judges, I cannot comment on that particular issue. As a general matter, the basic principles of equity require a district court to narrowly tailor any equitable relief ordered. As a sitting Bankruptcy Court judge and pending nominee to the District Court, it would be improper for me to comment otherwise on this issue. *See* Canons 2(A), 3(A)(1), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

I agree with the statement. It accurately summarizes my understanding of how a federal judge should exercise the judicial power in interpreting a statute.

6. **Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes Jr. wrote that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."**

a. What do you believe Justice Holmes meant by that statement, and do you agree with it?

I understand Justice Holmes to have been expressing his disagreement with the majority opinion, which, in his view, improperly imported the majority's political views into the Constitution, specifically into the due process clause of the 14th Amendment.

b. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

It is generally inappropriate for a federal judicial nominee to comment on whether particular Supreme Court cases were correctly decided (or overturned). *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). The Supreme Court's approach in *Lochner* has long been repudiated, *see West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and I would not use it.