

**Nomination of William Joseph Nardini to the U.S. Court of Appeals for the Second Circuit**  
**Questions for the Record**  
**Submitted October 2, 2019**

**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 a lower court to depart from Supreme Court precedent. The Supreme Court has held that it has the “prerogative alone to overrule one of its precedents.” *State Oil v. Khan*, 522 U.S. 3, 20 (1997).

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

A lower court judge must always faithfully apply Supreme Court precedents, though there may be infrequent occasions in which a lower court judge may respectfully point out inconsistencies or confusion among Supreme Court precedents, or identify issues that may warrant further review.

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

A panel of a circuit court may overturn circuit precedent on a question of federal law only based on intervening decisions of the Supreme Court or of the circuit court sitting *en banc*. See, e.g., *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016).

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

Only the Supreme Court has authority to determine whether to overturn its own precedents, and it has discussed the factors that it considers in that regard in many opinions. See, e.g., *Gamble v. United States*, 139 S. Ct. 1660, 1669 (2019); *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). Those factors include whether the prior decision has proved “unworkable,” “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). As a nominee to an inferior court, it would be inappropriate for me to express any personal view about when the Supreme Court should make such a determination.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as “super-stare decisis.” One text

book on the law of judicial precedent, co-authored by Justice 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”? “superprecedent”?**

All decisions of the Supreme Court are binding precedent for lower court judges.

**b. Is it settled law?**

All Supreme Court decisions, including *Roe v. Wade*, are settled law that must be faithfully applied by lower court judges.

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?**

All Supreme Court decisions, including *Obergefell*, are settled law that must be faithfully applied by lower court judges.

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 judicial nominee, it would not be appropriate for me to express a personal view on a particular Supreme Court opinion. If confirmed, I would faithfully apply the Supreme Court’s decision in *Heller* and all other Supreme Court and Second Circuit decisions.

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

In *Heller*, the Supreme Court stated that “the right secured by the Second Amendment is not unlimited,” and 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.” 554 U.S. 570, 626-27 (2008). Because there is pending litigation regarding the constitutionality of specific gun regulations, it would be inappropriate for me to offer any comment beyond what the Supreme Court has stated. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a judicial nominee, it would not be appropriate for me to express a personal view on the relationship between *Heller* and prior case law. If confirmed, I would faithfully apply the Supreme Court’s decision in *Heller* and all other Supreme Court and Second Circuit decisions.

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?**

The Supreme Court has stated that “First Amendment protection extends to corporations.” *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). If confirmed, I would faithfully apply the Supreme Court’s and the Second Circuit’s decisions regarding the constitutional rights guaranteed by the First Amendment. As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation, such as the scope of any rights beyond what the Supreme Court and the Second Circuit have held. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

**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, 719 (2014), the Supreme Court held that non-profit corporations and for-profit closely held corporations are protected by the Religious Freedom Restoration Act. The Supreme Court did not address the question of the applicability of the Free Exercise Clause of the First Amendment to

corporations. That question is likely to arise in future litigation, and as a judicial nominee it would not be appropriate for me to comment on that issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

6. 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"?**

The Supreme Court and the Second Circuit have issued many opinions regarding administrative law. If confirmed, I would faithfully apply those precedents. As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

When the text of a statute is ambiguous, the Supreme Court has held that it is appropriate to consider legislative history to discern the meaning of the statutory language. *See, e.g., Matal v. Tam*, 127 S. Ct. 1744, 1756 (2017).

9. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I reviewed the questions, conducted research as necessary, drafted the answers, requested feedback from attorneys at the Office of Legal Policy at the U.S. Department of Justice, made additional edits as I deemed appropriate, and then authorized the Department to file these responses. The answers are mine alone.

**Written Questions for William Nardini**  
**Submitted by Senator Patrick Leahy**  
**October 2, 2019**

1. In response to Senator Cruz’s question regarding your judicial philosophy you stated that “the way to have the greatest fidelity” to the Constitution is “to look at the original public meaning of an enactment.”

- (a) **In an instance where the original public understanding of a Constitutional provision was sharply divided or contested, how would you go about choosing which understanding should govern your interpretation of the Constitution?**

The Supreme Court has looked at text, structure, and history when interpreting constitutional provisions. If confirmed, I would carefully consider all arguments presented by the parties, and follow Supreme Court and Second Circuit precedent regarding factors to be considered when interpreting a constitutional text.

- (b) **Are Supreme Court decisions that may be contrary to original public understanding acts of infidelity to the Constitution?**

If confirmed, I would faithfully apply all precedents of the Supreme Court and the Second Circuit, regardless of whether they relied on the original public meaning of constitutional provisions. As a judicial nominee, it would not be appropriate for me to offer any personal views about decisions of the Supreme Court.

2. **Chief Justice Roberts wrote in *King v. Burwell* that**

**“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”**

**Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

The Supreme Court has long held that the interpretation of a statutory text requires consideration of its context, including the structure of the overall statute. In the passage quoted above, Chief Justice Roberts quoted *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), which in turn quoted *Davis v. Michigan Dep’t of Treasury*, 489

U.S. 803, 809 (1989). If confirmed, I would adhere to the Supreme Court's instructions on this and other questions of statutory interpretation.

3. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

**(a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?**

As a judicial nominee, it would not be appropriate for me to comment upon political matters. *See* Code of Judicial Conduct, Canon 5.

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

Please see my response to Question 3(a).

4. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and will not be questioned.*" (Emphasis added.)

**(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?**

Article III of the Constitution confers the judicial power upon the courts, to resolve specified cases or controversies. If a court were presented with a case or controversy involving a national security decision, the court would be obliged to consider the applicable law and facts in reaching a decision.

5. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

**(a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?**

Consistent with the Article III of the Constitution, a court would be required to carefully evaluate the applicable law and facts in reaching a decision about how to resolve a case or controversy that would be presented to it.

6. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

- (a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

Article I of the Constitution provides Congress with war powers, for example, to declare war, raise and support armies, and provide and maintain a navy. Article II of the Constitution provides that the President shall be the commander in chief of the military. The Supreme Court has explained that the “proper exercise” of Congress’s war powers must be respected. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). The Supreme Court has reviewed the constitutionality of Presidential action in wartime. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As a judicial nominee, it would not be appropriate for me to comment further, to avoid expressing views on matters that could arise in litigation. *See* Code of Judicial Conduct, Canon 3(6)(A).

Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

- (b) In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

As a judicial nominee, it would be inappropriate for me to comment upon a hypothetical scenario that could be the subject of litigation. *See* Code of Judicial Conduct, Canon 3(A)(6).

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

The Supreme Court has recognized that the Constitution creates a system of checks and balances among the legislative, executive, and judicial branches. Lower courts participate in that carefully calibrated system by exercising the judicial power outlined in Article III, which grants authority to resolve specified cases or controversies, subject to the precedents of the Supreme Court.

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

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



The Supreme Court has held that the Fourteenth Amendment applies to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996).

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

As a judicial nominee, it would be inappropriate for me to comment on anyone’s characterization of a federal statute. If confirmed, I would faithfully apply all precedents of the Supreme Court and the Second Circuit, including those regarding the Voting Rights Act.

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

Article I, section 9 of the Constitution states: “No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.” As a judicial nominee, it would be inappropriate for me to express a view on matters involving pending or impending litigation. *See* Code of Judicial Conduct, Canon 3(A)(6).

11. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

**(a) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

Supreme Court and Second Circuit precedent establish the standards by which factual findings may be reviewed. For example, an appellate court must review a district court’s factual findings in a civil case for clear error. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); Fed. R. Civ. P. 52(a)(6). The Supreme Court has addressed the question of the weight to be accorded to Congressional fact finding in numerous cases. If confirmed, I would faithfully apply these and all other applicable precedents of the Supreme Court and Second Circuit.

**12. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?**

The Supreme Court has held that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

With respect to the Fourteenth Amendment, the Supreme Court has held that Congress’s enforcement power includes “[l]egislation which deters or remedies constitutional violations,” but does not include “the power to determine what constitutes a constitutional violation.” *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997). The Supreme Court has further explained that, “for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

The Supreme Court has explained that “[t]he Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command.” *Shelby County v. Holder*, 570 U.S. 529, 553 (2013).

13. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

**(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?**

The Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), is binding precedent upon all lower court judges. If confirmed I would faithfully apply *Lawrence* and all other precedents of the Supreme Court and Second Circuit.

14. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

**(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

It is never appropriate for a lower court to depart from Supreme Court precedent. The Supreme Court has held that it has the “prerogative alone to overrule one of its precedents.” *State Oil v. Khan*, 522 U.S. 3, 20 (1997). Similarly, the Second Circuit has held that a three-judge panel is bound by circuit precedent on a question of federal law unless there has been an intervening decision of the Supreme Court or of the Second Circuit sitting *en*

*banc. See, e.g., Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016).

The Supreme Court has held that in a consideration of whether to overrule precedent, *stare decisis* requires a showing of some “special justification” beyond a belief that “the precedent was wrongly decided,” and that “*stare decisis* carries enhanced force when a decision . . . interprets a statute.” *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)).

15. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

- (a) **How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I’m interested in specific examples, not just a statement that you’ll follow applicable law.**

If confirmed, I would conscientiously review the standards for judicial recusal, consult with colleagues as necessary, and ensure that I complied with all governing law. With specific regard to my own circumstances, under 28 U.S.C. § 455(b)(3), a judge must disqualify himself from any case in which he has served in governmental employment and in such capacity participated as counsel. I have served as the Chief of the Criminal Division of the U.S. Attorney’s Office for the District of Connecticut for the past six years. Accordingly, I anticipate recusing myself from any criminal case in which I directly participated or had supervisory authority during my time in the U.S. Attorney’s Office.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

- (b) **Can you discuss the importance of the courts’ responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

As the Supreme Court recognized in the *Carolene Products* footnote, the U.S. Constitution creates a governmental structure built on democratic participation by citizens. In a system of checks and balances, the courts play an essential role in ensuring the protection of individual rights, including for example rights enumerated in the First Amendment that enable those democratic processes, such as the freedom of speech, the freedom of the press, the freedom to peaceably assemble, and the freedom to petition for redress of grievances.

17. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

**(a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Yes. The Constitution creates a system of checks and balances among the three coordinate branches of government.

- 18. Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims he has an "absolute right" to pardon himself. Do you agree?**

I have not studied the question of the scope of the pardon power. Moreover, as a judicial nominee, it would be inappropriate for me to comment on a matter that could be the subject of litigation, or is a subject of political debate. *See* Code of Judicial Conduct, Canons 3(A)(6), 5.

- 19. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Supreme Court has held that the Commerce Clause authorizes Congress to regulate three categories of activity: "the use of the channels of interstate commerce"; (2) 'the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities'; and (3) 'those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.'" *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)); *see also United States v. Le*, 902 F.3d 104, 118 (2d Cir. 2018).

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Supreme Court has held that Congress's power to "enforce" the Fourteenth Amendment includes

“[l]egislation which deters or remedies constitutional violations,” but does not include “the power to determine what constitutes a constitutional violation.” *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997). The Supreme Court has further explained that, “for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

20. In *Trump v. Hawaii*, the Supreme Court allowed President Trump’s Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President’s reason for the ban was animus towards Muslims. Chief Justice Roberts’ opinion stated that “the Executive’s evaluation of the underlying facts is entitled to appropriate weight” on issues of foreign affairs and national security.

- (a) **What do you believe is the “appropriate weight” that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

As a judicial nominee, it would be inappropriate for me to comment because this is a matter that is the subject of pending or impending litigation. *See* Code of Judicial Conduct, Canon 3(A)(6).

21. **How would you describe the meaning and extent of the “undue burden” standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The “undue burden” standard articulated in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 878 (1992), provides that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” The Supreme Court has addressed the “undue burden” standard in subsequent cases. *See, e.g., Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Gonzales v. Carhart*, 550 U.S. 124 (2007). If confirmed, I would faithfully apply these and all other precedents of the Supreme Court and the Second Circuit.

22. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly

violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

**(a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

As a judicial nominee, it would be inappropriate for me to comment because this is a matter that is the subject of pending or impending litigation. *See* Code of Judicial Conduct, Canon 3(A)(6).

23. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

**a. In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

As a judicial nominee, it would be inappropriate for me to comment because this is a matter that is the subject of pending or impending litigation. *See* Code of Judicial Conduct, Canon 3(A)(6).

24. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

**a. With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?**

As a judicial nominee, it would be inappropriate for me to comment because this is a matter that is the subject of pending or impending litigation. *See* Code of

Judicial Conduct, Canon 3(A)(6).

25. During Justice Kavanaugh's confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting "revenge on behalf of the Clintons" and warned that "what goes around comes around." The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

- a. Do you agree that the Constitution contemplates an independent judiciary?  
Can you discuss the importance of judges being free from political influence?**

Article III of the Constitution creates an independent judiciary as a coordinate branch of government, providing that judges "shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Judges appointed pursuant to Article III are obliged to take an oath of office which requires them to "administer justice without respect to persons," to act "faithfully and impartially," and to do so "under the Constitution and laws of the United States." 28 U.S.C. § 453. This oath requires a judge to serve without bias – political or otherwise – and to decide cases based solely on the law and the facts.

**Nomination of William Joseph Nardini  
to the United States Court of Appeals for the Second Circuit  
Questions for the Record  
Submitted October 2, 2019  
QUESTIONS FROM SENATOR WHITEHOUSE**

1. You have twice been a panelist at Federalist Society events at Yale Law School.

- a. Please describe your level of involvement in the Federalist Society.

As noted on my Senate Judiciary Committee Questionnaire, I was invited to speak on two panels sponsored by the Federalist Society at Yale Law School. One of the panels was on prosecutorial discretion, and the other was on Fourth Amendment issues regarding the search and seizure of computer evidence.

- b. Have you had contacts with representatives of the Federalist Society, in either official or unofficial capacity, in preparation for your confirmation hearing? Please specify.

Not to my knowledge. I am unaware of whether any of the individuals with whom I have had contact at the White House Counsel's Office or the Office of Legal Policy at the U.S. Department of Justice are members of the Federalist Society.

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?

Yes.

- 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?

As a judicial nominee, it would not be appropriate for me to express a view on political issues. *See* Code of Conduct for United States Judges, Canon 5.

- 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?

The Constitution vests authority in the President to nominate, and by and with the advice and consent of the Senate to appoint, judges. U.S. Const., art. II, § 2. As a judicial nominee, it would not be appropriate for me to express a view on political issues



regarding the judicial selection process. *See* Code of Conduct for United States Judges, Canon 5.

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I am aware that the website of the Judicial Crisis Network posted statements from various individuals supporting my judicial nomination. I am not aware of the circumstances leading to those statements.

- 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?

As a judicial nominee, it would not be appropriate for me to express a view on political issues. *See* Code of Conduct for United States Judges, Canon 5.

- 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?

I agree with the point of the metaphor that a federal judge’s role is strictly to apply the law to the facts of the case, without favor or preference to any party.

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

In general, a judge should not consider the practical consequences when considering how to rule in a case. In limited circumstances, however, Supreme Court and Circuit precedent, and applicable statutory provisions, might require a judge to engage in such consideration, for example, when deciding whether a party would suffer irreparable harm if a stay or preliminary injunction were not issued.

- 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?

Rule 56 requires a court to grant summary judgment if there is no “genuine dispute as to any material fact,” and the Supreme Court has held that whether there is a “genuine dispute” depends on whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Supreme Court has held that the “reasonable jury” standard is objective, not subjective. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993).

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?

A judge's decision must be governed exclusively by the law and the facts, and cannot be affected by sympathy for one party or another. That obligation is embodied in the judge's oath to "administer justice without respect to persons." 28 U.S.C. § 453. Empathy can play an important role, however, in reminding a judge of the importance of being respectful to litigants; of giving all parties a full and fair hearing; and of working hard to ensure that the parties receive a ruling that is based on the law and not on an individual judge's personal preferences.

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

Different judges may have developed expertise in particular areas of the law over their years of practice, which will assist them in more readily evaluating cases that arise in those areas. Judges should always strive to attain a full understanding of the factual and legal issues that arise in any case that comes before them, to ensure that each litigant obtains a decision that is grounded in the law and facts.

6. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court's decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act's individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, "came after weeks of negotiations and trade-offs among the justices."

- a. In your view, what is the role of negotiating with other judges when deliberating on a case?

In any collegial court, such as the Second Circuit, judges should discuss their thoughts with their colleagues on the panel before deciding how to vote on any given case. Through the free and open exchange of ideas, judges can learn from their colleagues and gain insight into the proper resolution of a case. Informed by such an honest discussion, I would conscientiously determine what I believed to be the outcome dictated by the law and the facts.

- b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague's, in another?

If confirmed as a judge, I would vote to resolve each case on its own individual merits. I would not condition my vote in one case, or one issue in a case, on my own vote, or that of a colleague, in another case.

- c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

I think it is non-negotiable for a judge to faithfully apply binding precedent of the Supreme Court and the applicable Circuit, regardless of what the judge's personal views might be.

- 7. 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.

- 8. 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 jury plays a key role in our system, both in criminal and civil cases. When a jury sits at trial, it is called upon to apply the law, as given by the trial judge, to the facts as they find them, based on evidence presented by the parties in the course of the trial. In civil cases, the Seventh Amendment embodies that right as a constitutional matter.

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

As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. See Code of Conduct for United States Judges, Canon 3(A)(6).

- 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 8(b).

- 9. What do you believe is the proper role of an appellate court with respect to fact-finding?

With rare exceptions, the law provides that appellate courts are limited to reviewing only the factual record that is brought before them, and may review factual findings only under established standards of review.

- 10. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Please see my response to Question 9.

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

The Supreme Court has addressed the question of deference to congressional fact-finding in numerous opinions. If confirmed, I would faithfully apply those precedents.

12. 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 would ensure that my actions fully comply with my ethical obligations under the Code of Judicial Conduct, as well as any applicable law. Before attending any educational seminar I would consider the totality of the circumstances regarding the seminar, on a case-by-case basis; consider the Code of Judicial Conduct and any applicable advisory opinions; and consult as appropriate with ethics experts at the Administrative Office of the United States Courts.

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 12(b).

### Questions for William Nardini, Nominee to the Second Circuit Court of Appeals

In 2009, as an Assistant U.S. Attorney, you argued in an appeal that the 100 to 1 disparity between powder and crack cocaine in federal sentencing did not violate the Equal Protection Clause of the Constitution, despite the fact that 79 percent of people sentenced for crack cocaine offenses that year were African American.

- Will you commit to reviewing whether racial bias contributed to sentences imposed by district courts?

The Supreme Court has repeatedly identified race as a factor that is constitutionally impermissible in the sentencing process. *See, e.g., Buck v. Davis*, 137 S. Ct. 759, 775 (2017). If presented with a claim that racial bias had infected a sentencing, I would carefully scrutinize the record to determine whether there was any basis for determining that such a violation had been committed.

- What have you learned about our criminal justice system during your time as a prosecutor, and what principles will guide your review of lower court decisions if you are confirmed?

As a prosecutor, I have learned that every criminal case has an impact on real people – defendants, victims, witnesses, investigators, and community members – each of whom is entitled to respect and adherence to the law. Every act of prosecutorial discretion, from the charging decision to advocacy taken at the time of sentencing, must be an individualized decision that takes into account the specific facts of each case.

If confirmed as an appellate judge, I would recognize the importance of every individual case. Moreover, I would comply with precedents requiring an appellate court to apply different standards of review in different situations, for example when reviewing a district court's legal interpretations de novo, its evidentiary rulings for abuse of discretion, or its factual findings for clear error. These and other standards of review recognize the role that is filled by an appellate panel in our federal criminal justice system, which is different from the role of a trial judge, or a jury, or a litigant. Having regularly participated in every phase of criminal proceedings in a district court, and litigated appeals involving the review of such proceedings before the Second Circuit, I have an appreciation for the differences between those two stages of litigation, and the distinct roles played by judges in each court.

**Nomination of William Joseph Nardini, to be United States Circuit Judge  
for the Second Circuit  
Questions for the Record  
Submitted October 2, 2019**

**QUESTIONS FROM SENATOR COONS**

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

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

Yes. In a long line of cases regarding the incorporation of rights under the Fourteenth Amendment, the Supreme Court has considered whether the right in question is expressly listed in the Constitution. *See, e.g., Timbs v. Indiana*, 139 S. Ct. 682 (2019) (Eighth Amendment Excessive Fines Clause); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment right to bear arms). If confirmed, I would faithfully apply these, and all other, Supreme Court precedents.

- 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. In deciding whether a right is fundamental and protected under the Fourteenth Amendment, the Supreme Court has examined whether the right is fundamental to our scheme of ordered liberty or whether it is deeply rooted in our Nation's history and tradition. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). If confirmed, I would faithfully apply these, and all other, Supreme Court precedents.

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

Yes. If confirmed, I would faithfully discharge my duty to apply precedents of the Supreme Court or the Second Circuit. *See State Oil v. Khan*, 522 U.S. 3, 20 (1997); *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016). It is always helpful to consider precedents of other courts when considering any issue of first impression, to benefit from the reasoned opinions of other learned jurists. Such decisions are only persuasive, not binding, authority. *See, e.g., United States v. Sheehan*, 838 F.3d 109, 126 n.13 (2d Cir. 2016).

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Yes. If confirmed, I would be bound to consider the applicability of any prior

precedent of the Supreme Court and the Second Circuit, and to determine its applicability to the issue presented in the case.

- e. Would you consider whether the right is central to “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. If confirmed, I would faithfully discharge my duty to apply these, and all other, precedents of the Supreme Court and the Second Circuit.

- f. What other factors would you consider?

I would consider any other factors that the Supreme Court or the Second Circuit have held are relevant to the question at issue in the particular case.

- 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 Fourteenth Amendment applies to both race-based and gender-based classifications. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

- 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 Fourteenth Amendment protects against gender discrimination, and if confirmed I would faithfully apply its precedents in this regard. It would not be appropriate for me to address arguments that the Supreme Court has rejected.

- 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?

As a judicial nominee, it would not be appropriate for me to comment on why the Supreme Court did or did not rule in certain ways in the past. I note, however, that the Supreme Court addressed the question of gender equality in educational opportunities in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that under the Fourteenth Amendment, gay and lesbian couples have the right to marry “on the same terms as accorded to couples of the opposite sex.” If confirmed, I would faithfully discharge my duty to apply all Supreme Court and Second Circuit precedents, including *Obergefell*.

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

The Fourteenth Amendment guarantees that no State may “deny to any person within its jurisdiction the equal protection of the laws.” That constitutional protection extends to all persons. As a judicial nominee, it would not be appropriate for me to address more particular issues that are the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canon 3(A)(6).

3. Do you agree that there is a constitutional right to privacy that protects a woman’s right to use contraceptives?

The Supreme Court held that there is such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully discharge my duty to apply these, and all other, precedents of the Supreme Court and the Second Circuit.

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

The Supreme Court held that there is such a right in *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I would faithfully discharge my duty to apply this, and all other, precedents of the Supreme Court and the Second Circuit.

- 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?

The Supreme Court held that there is such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully discharge my duty to apply this, and all other, precedents of the Supreme Court and the Second Circuit.

- 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.

Please see my responses to Questions 3(a)-(c).

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

The Supreme Court has addressed this question in various cases. If confirmed, I would faithfully discharge my duty to apply these, and all other, precedents of the Supreme Court and the Second Circuit regarding when, and how, such consideration is appropriate.

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

The law may provide for different roles of sociology, scientific evidence, and data in different sorts of cases. Fact-finding is generally a task of district courts, subject to different standards of review by appellate courts depending on the context. District courts, in turn, are subject to various rules concerning the admissibility of such evidence; for example, the Federal Rules of Evidence govern proceedings set forth in Fed. R. Evid. 1101. If confirmed, I would faithfully discharge my duty to apply all applicable law, including all precedents of the Supreme Court and the Second Circuit.

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, I would faithfully discharge my duty to apply all Supreme Court and Second Circuit precedents, including *Obergefell*. To the extent that the question relates to issues that may be the subject of pending or impending litigation, it would be inappropriate for me as a judicial nominee to make any further comment. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

Please see my response to Question 5(a).

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 understand that there is scholarly debate about the original meaning of the Fourteenth Amendment, and whether *Brown* is consistent with an originalist analysis. Regardless of academic discussions, as I stated during the confirmation hearing, I believe that *Brown* was correctly decided and righted the historic wrong of *Plessy v. Ferguson*. If confirmed, I would faithfully apply *Brown* and all other binding precedents of the Supreme Court and the Second Circuit regarding the Fourteenth Amendment, regardless of whether they are viewed as “originalist.”

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘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 Sept. 30, 2019).

I recognize that courts need to engage in careful research and analysis when interpreting provisions of the Constitution, and that requires a study of text, structure, and history. If confirmed, I would faithfully apply all precedents of the Supreme Court and Second Circuit regarding constitutional 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?

The Supreme Court and the Second Circuit have issued numerous decisions regarding different constitutional provisions. In some of these, the Supreme Court has carefully considered the original public meaning of the constitutional text, and found that to be dispositive. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). If confirmed, I would be obliged to follow all Supreme Court and Second Circuit precedents, regardless of whether they rely on the original public meaning of the constitutional text.

- 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, I would refer to all sources that the Supreme Court and the Second Circuit have identified as relevant for discerning the contours of a constitutional provision.

**Questions for the Record for William Joseph Nardini**  
**From Senator Mazie 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?**

I agree that a judge should decide every case free from any bias, explicit or implicit, and should take steps to ensure that decision-making is based exclusively on the facts and the applicable law, and “without respect to persons” as required by the oath of office. 28 U.S.C. § 453.

- b. Have you ever taken such training?**

At the United States Attorney’s Office, I participated in office-wide implicit bias training in October 2017.

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

If confirmed, I will consult with the Administrative Office of the United States Courts and my colleagues to determine what sort of training is available and recommended for federal judges. I look forward to taking advantage of training opportunities.

3. You previously spent four years in Italy as a U.S. Department of Justice Attaché in Rome. You also served as a visiting scholar with the Italian Constitutional Court.

- a. How has this cross-cultural legal experience shaped your work as a lawyer?**

My knowledge of Italian language and law has enabled me to better understand the differences between various national legal systems. During my service as the Department of Justice Attaché in Rome from 2010-2014, this knowledge helped me to represent the United States in our bilateral relationship with Italy. For example, the extradition treaty (like most modern extradition treaties) requires a showing of dual criminality – that is, a

showing that the conduct for which extradition is sought would constitute a crime punishable by more than a year in prison under the law of both the requesting and the requested state. Familiarity with foreign law facilitated my ability to discern when dual criminality existed. In two instances, I was able to use my language and knowledge of foreign law to successfully argue on behalf of the United States before the Italian Supreme Court of Cassation, in connection with U.S. extradition requests to the Italian government.

**b. How might it inform your experience as a judge, should you be confirmed?**

My familiarity with international criminal law would assist me if cases arose in that particular subject area. Further, my experience working in a diplomatic setting, engaging in frequent discussions about new legal issues, should be helpful when serving as a judge on a collegial court.

4. In 2015, you moderated a panel on the Voting Rights Act that addressed voter suppression and racial discrimination in voting. According to press about the event, you acknowledged that “problems with access to voting persist, including cases where voters have had to wait eight hours in line to cast their ballots.”

**a. Can you talk more about this event and what your role was on the panel?**

I served as the moderator at a panel discussion on voting rights sponsored by the University of Connecticut School of Law and the U.S. Attorney’s Office for the District of Connecticut, held on November 24, 2015. Speakers included a professor from the University of Connecticut; the Deputy Assistant Attorney General of the Civil Rights Division of the U.S. Department of Justice; and the Deputy Chief of the Financial Fraud and Public Corruption Unit of the U.S. Attorney’s Office. My own remarks were brief and introductory. My comments regarding waiting lines related to the November 2015 elections in New Haven, Connecticut, in which some citizens reportedly had to wait for hours to vote because of poor logistics at certain polling stations.

**b. Do you believe that voter suppression and challenges to accessing the ballot box remain serious issues in our country that need to be addressed?**

The right to vote is a bedrock of American democracy, embodied in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the U.S. Constitution, as well as numerous statutes. If confirmed, I would faithfully apply all Supreme Court and Second Circuit precedents that safeguard the right to vote.

**Nomination of William Nardini**  
**United States Court of Appeals for the Second Circuit**  
**Questions for the Record**  
**Submitted October 2, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. Earlier this year, Attorney General William Barr tasked your boss, the U.S. Attorney for the District of Connecticut, John Durham, with examining the federal government’s investigation into connections between the Trump campaign and Russian during the 2016 election.<sup>1</sup> You are currently the Chief of the Office’s Criminal Division.<sup>2</sup>

a. Have you been involved in any way in this inquiry? If so, please explain.

No.

b. Have you learned any nonpublic information about this inquiry? If so, please explain.

No.

c. The Trump Administration has reportedly made requests to a number of foreign governments for assistance in this inquiry, including, for example, a private meeting in Italy last week involving Attorney General Barr, Mr. Durham, and senior Italian government officials.<sup>3</sup> Beyond what has been publicly reported, are you aware of any travels, interactions, or communications relating to this inquiry involving President Trump, Attorney General Barr, Mr. Durham, or any other federal officials and foreign governments (including but not limited to Australia, Italy, Ukraine, and the United Kingdom)?

Please see my response to Question 1(b).

2. In an appeal you handled in the 2008-2009 period, *United States v. Samas*, the defendant argued that the 100-to-1 federal sentencing disparity in place at the time between powder and crack cocaine violated the Equal Protection Clause because there was no rational basis for the disparity in sentencing.<sup>4</sup> You opposed this claim, and the Second Circuit sided with you in upholding the sentencing disparity.<sup>5</sup> Soon thereafter, the Fair Sentencing Act of 2010 reduced this stark disparity from 100-to-1 to 18-to-1.<sup>6</sup>

a. Do you believe that the 100-to-1 sentencing disparity between crack and powder cocaine in place at the time was consistent with the Equal Protection Clause?

In *Samas*, the Second Circuit held that the 100-1 disparity between sentences for powder and crack cocaine did not violate “the equal protection component of the Fifth Amendment’s Due Process Clause.” *United States v. Samas*, 561 F.3d 108, 110 (2d Cir. 2009). This holding was based on numerous binding precedents of the Second Circuit that predated the filing of the *Samas* brief. *See id.* (collecting cases).

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<sup>1</sup> E.g., Adam Goldman, Charlie Savage & Michael S. Schmidt, *Barr Assigns U.S. Attorney in Connecticut To Review Origins of Russia Inquiry*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html>.

<sup>2</sup> SJQ at 2.

<sup>3</sup> E.g., Devlin Barrett, Shane Harris & Matt Zapposky, *Barr Personally Asked Foreign Officials To Aid Inquiry into CIA, FBI Activities in 2016*, WASH. POST (Sept. 30, 2019), [https://www.washingtonpost.com/national-security/attorney-general-barr-personally-asked-foreign-officials-to-aid-inquiry-into-cia-fbi-activities-in-2016/2019/09/30/d50cd5c4-e3a5-11e9-b403-f738899982d2\\_story.html](https://www.washingtonpost.com/national-security/attorney-general-barr-personally-asked-foreign-officials-to-aid-inquiry-into-cia-fbi-activities-in-2016/2019/09/30/d50cd5c4-e3a5-11e9-b403-f738899982d2_story.html); see also, e.g., Mark Mazzetti & Katie Benner, *Trump Pressed Australian Leader To Help Barr Investigate Mueller Inquiry's Origins*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/us/politics/trump-australia-barr-mueller.html>.

<sup>4</sup> 561 F.3d 108 (2d Cir. 2009).

<sup>5</sup> *Id.* at 110.

<sup>6</sup> Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 U.S.C. and 28 U.S.C.).

- b. Do you believe that an 18-to-1 sentencing disparity between crack and powder cocaine is consistent with the Equal Protection Clause?

As a judicial nominee, it would not be appropriate for me to express a view on issues that are likely to be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- c. Would a 1-to-1 sentencing ratio for crack and powder cocaine be consistent with the Equal Protection Clause?

Please see my response to Question 2(b).

- d. Are you aware of scientific research showing a lack of physiological and psychoactive differences between crack and powder cocaine? One widely cited example is a study concluding that “[t]he physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base).”<sup>7</sup> The effects are similar, the study explained, because “the behavioral activity of cocaine resides primarily in the parent compound.”<sup>8</sup>

I am generally aware of research regarding the nature of crack and powder cocaine. In *Kimbrough v. United States*, 552 U.S. 85, 98 (2007), the Supreme Court discussed similar observations by the United States Sentencing Commission.

- e. Are you aware of empirical research showing severe racial sentencing disparities for offenses involving crack cocaine? For example, 79 percent of the defendants sentenced in 2009 (the year the *Samas* appeal was decided) for federal crack cocaine offenses were black, while 10 percent were white and 10 percent were Hispanic.<sup>9</sup>

Yes. In *Kimbrough v. United States*, 552 U.S. 85, 98 (2007), the Supreme Court discussed similar statistics as reported by the United States Sentencing Commission for the year 2002.

- f. Given the research showing the lack of appreciable chemical differences and the severe racial sentencing disparities, do you believe a 100-to-1 or 18-to-1 sentencing disparity between crack and powder cocaine is empirically justified?

Please see my response to Question 2(b).

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

Most provisions of the Constitution have previously been construed by the Supreme Court or the Second Circuit. If confirmed, I would be bound to apply those precedents faithfully, regardless of whether they were viewed as “originalist” in methodology. In the event that a case presented an interpretive question of first impression regarding a constitutional provision, which was not governed by precedent, I would attempt to ascertain the original public meaning of that provision. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004).

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



If confirmed, I would faithfully comply with the Supreme Court’s instruction that “in statutory interpretation disputes, a court’s proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.” *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If “that examination yields a clear answer, judges must stop.” *Id.* Reference to other canons of statutory construction, such as the rule of lenity, is permissible only if the text of the statute is ambiguous. If confirmed, I would faithfully apply the Supreme Court’s precedents outlining the steps required for statutory interpretation.

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 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?

When the text of a statute is ambiguous, the Supreme Court has held that it is appropriate to consider legislative history to discern the meaning of the statutory language. *See, e.g., Matal v. Tam*, 127 S. Ct. 1744, 1756 (2017). The Second Circuit has confirmed that if the plain text of a statute “alone fails to resolve the question, we test the competing interpretations against both the statutory structure . . . and the legislative history” of the statutory provision in question. *Marblegate Asset Mgmt. v. Education Mgmt. Finance Corp.*, 846 F.3d 1, 6 (2d Cir. 2017). If confirmed, I would consider legislative history consistent with these and other precedents of the Supreme Court and Second Circuit.

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn’t it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 5(a).

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<sup>7</sup> Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 275 J. AM. MED. ASS’N. 1580, 1580 (1996), <https://www.ncbi.nlm.nih.gov/pubmed/8918856>.

<sup>8</sup> *Id.* at 1582.

<sup>9</sup> Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. News & World Rep. (Aug. 3, 2010), <https://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing>.

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?

Judges are required by oath to faithfully and impartially discharge their duties under the Constitution and laws of the United States. 28 U.S.C. § 453. I understand judicial restraint to mean that a judge is required to respect the jurisdictional and other limits that the law places on a court's authority, including Article III's limitation of the judicial power to cases and controversies, and to decide all cases based solely on the law and not on the judge's personal preferences.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>10</sup> Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it would not be appropriate for me to express a personal view on the Supreme Court's decisions. If confirmed, I would faithfully apply all precedents of the Supreme Court and the Second Circuit.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>11</sup> Was that decision guided by the principle of judicial restraint?

Please see my response to Question 6(a).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>12</sup> Was that decision guided by the principle of judicial restraint?

Please see my response to Question 6(a).

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.<sup>13</sup> 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.<sup>14</sup>

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

As a judicial nominee it would not be appropriate for me to comment on political issues. See Code of Conduct for United States Judges, Canon 5.

- 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).

- 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.<sup>15</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>16</sup> These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more

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<sup>10</sup> 554 U.S. 570 (2008).

<sup>11</sup> 558 U.S. 310 (2010).

<sup>12</sup> 570 U.S. 529 (2013).

<sup>13</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>14</sup> *Id.*

<sup>15</sup> 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>.

<sup>16</sup> *Id.*

likely than whites to be incarcerated in state prisons.<sup>17</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>18</sup>

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

I believe that implicit racial bias can exist everywhere, including the criminal justice system.

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

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.

In October 2017, I participated in an office-wide training sponsored by the U.S. Attorney's Office on implicit bias.

- 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.<sup>19</sup> Why do you think that is the case?

As a judicial nominee it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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.<sup>20</sup> Why do you think that is the case?

Please see my response to Question 8(d).

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

Federal district judges are assigned the responsibility of imposing sentences upon those convicted of criminal offenses. Every judge is required, by oath, to administer justice "without respect to persons." 28 U.S.C. § 453. Consistent with that oath, every judge – whether a trial or appellate judge – has an obligation to conscientiously apply the law to the facts of every case, and ensure that personal views, sympathies, or biases do not enter into the judge's decisions.

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.<sup>21</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>22</sup>

- 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.

As a judicial nominee it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

- 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.

As a judicial nominee it would not be appropriate for me to comment on matters that could be the subject of litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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<sup>17</sup> 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>.

<sup>18</sup> *Id.*

<sup>19</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>20</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>21</sup> 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>.

<sup>22</sup> *Id.*

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.

I believe that every institution, including the judiciary, benefits from a diversity of backgrounds and viewpoints.

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*<sup>23</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. As I stated during my confirmation hearing, *Brown v. Board of Education* holds a unique place in the history of American jurisprudence. When the Supreme Court held that the separate-but-equal doctrine violated the Equal Protection Clause of the Fourteenth Amendment, and overruled *Plessy v. Ferguson*, it corrected a historic wrong.

13. Do you believe that *Plessy v. Ferguson*<sup>24</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Please see my answer to Question 12.

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?

No.

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."<sup>25</sup> Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

As a judicial nominee, it would not be appropriate for me to comment on political matters. See Code of Conduct for United States Judges, Canon 5.

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."<sup>26</sup> 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 aliens present in

the United States, regardless of whether their presence is lawful. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I would faithfully apply *Zadvydas* and all other Supreme Court precedents.

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<sup>23</sup> 347 U.S. 483 (1954).

<sup>24</sup> 163 U.S. 537 (1896).

<sup>25</sup> 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>.

<sup>26</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted October 2, 2019**  
**For the Nomination of**

**William Joseph Nardini, to be United States Circuit Judge for the Second Circuit**

1. 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?**

Judges play a critical role in ensuring the fairness of our justice system. All judges take an oath to administer law “without respect to persons,” 28 U.S.C. § 453, which requires that they decide cases based solely on the facts and the law, without reference to their sympathies or personal preferences.

- b. **If confirmed, what steps will you take to help ensure that our justice system is a fair and equitable one?**

If confirmed, I would accord all parties a full and fair opportunity to be heard, so that they can present all appropriate arguments to the court. I would carefully review the record and research applicable law, to ensure that any decision I reached was based on the facts and the law, and not on any personal views I might have.

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

The U.S. Sentencing Commission publishes an annual Sourcebook with useful data regarding federal sentencing statistics. The latest edition, covering 2018, includes demographic information regarding offenders in various offense categories and sentencing categories, including race, gender, age, education, and citizenship. These statistics show racial disparities in different offense categories, for example a disproportionately higher number of firearms sentencings (51.7%) involving African American defendants compared to their share of the U.S. population, and a disproportionately higher number of child pornography sentencings (79.3%) involving white defendants compared to their share of the U.S. population.



**Senator Ben Sasse**  
**Senate Judiciary Committee Hearing: “Nominations”**  
**September 25, 2019**  
**Questions for the Record**

For William Nardini:

1. Does a legal text—such as the Constitution, a statute, or a rule—have a fixed, static meaning?

Federal appeals court judges are obliged to apply the meaning of a legal text which has been established by binding precedent of the Supreme Court or a prior panel of their appeals court. *See, e.g., Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016). When interpreting a constitutional provision, the Supreme Court has stated that it is “guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’” *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

2. How should a judge determine if a legal text is ambiguous?

The Supreme Court has held that “[t]he plainness or 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). A statute is “ambiguous” if it gives rise to “competing, plausible interpretations.” *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007).

3. When is it appropriate for a judge to consider legislative history?

When the text of a statute is ambiguous, the Supreme Court has held that it is appropriate to consider legislative history to discern the meaning of the statutory language. *See, e.g., Matal v. Tam*, 127 S. Ct. 1744, 1756 (2017). “In statutory interpretation disputes, a court’s proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.” *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). If “that examination yields a clear answer, judges must stop.” *Id.* Consideration of legislative history may not “be used to ‘muddy’ the meaning of ‘clear statutory language.’” *Id.* (quoting *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011)).

4. Under what circumstances is it appropriate for a judge to consider legislative intent, and if such circumstances exist, how does a judge go about determining it?

Legislative intent is relevant insofar as it has been expressed through the constitutional process of enacting statutory text. As Judge Easterbrook has explained, “the text is law and legislative intent a clue to the meaning of the text, rather than the text being a clue to legislative intent.” *Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 916 F.2d 1154, 1158 (7th Cir. 1990). *See also Ace Partners,*

*LLC v. Town of East Hartford*, 883 F.3d 190, 201 (2d Cir. 2018) (explaining that court’s task “is not to speculate about legislative intent with respect to language *not* included” in statute, but rather to “construe the statutory text in effect . . .”). If confirmed, I would faithfully apply all Supreme Court and Second Circuit decisions explaining the applicable canons of statutory construction.

5. When well-established historical practice with respect to a particular legal text and a judge’s best understanding of the original public meaning of that text conflict, does the original public meaning of the text control, or are there circumstances under which well-established historical practice should override the original public meaning of that text?

The Supreme Court has looked to the original public meaning of a text when interpreting constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). When attempting to discern the proper meaning of a text, the Supreme Court and the Second Circuit have considered well-established historical practice, including long-standing precedent. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc).

6. If a federal court of appeals concludes that one of its own precedents conflicts with the best understanding of the original public meaning of a provision of the Constitution, are there factors that might legitimately persuade that court to consider preserving its existing precedent? If so, what might a list of those factors include? For the purposes of this question, please assume that there is no Supreme Court precedent on point.

The Supreme Court has explained that the doctrine of *stare decisis* requires that, “even in constitutional cases, a departure from precedent ‘demands special justification.’” *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). Such a departure requires “something more than ambiguous historical evidence” when it would require overruling “a number of major decisions,” and the strength of the *stare decisis* doctrine “grows in proportion to [the] antiquity” of those prior decisions. *Id.* (internal quotation marks omitted). Among the factors that the Supreme Court has directed courts to consider, in connection with *stare decisis*, are whether the prior decision has proved “unworkable,” “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

7. If a federal court of appeals concludes that a Supreme Court precedent conflicts with the best understanding of the original public meaning of a provision of the Constitution, is that court of appeals bound to apply that Supreme Court precedent to the full extent of its logic beyond the Supreme Court’s original holding, or should that court of appeals attempt to limit the reach of that Supreme Court precedent?

A federal court of appeals must always faithfully apply all Supreme Court precedent, regardless of whether it agrees. The Supreme Court has held that it has the “prerogative alone to overrule one of its precedents.” *State Oil v. Khan*, 522 U.S. 3, 20 (1997). The Second Circuit has held that a federal appeals court is required to apply both the holding of a Supreme Court precedent, as well as those portions of the Supreme Court’s rationale

that were necessary to its holding. *See, e.g., Gingras v. Think Finance, Inc.*, 922 F.3d 112, 122 (2019). The Second Circuit has further held that it is “obligated to accord great deference to Supreme Court *dicta*, absent a change in the legal landscape.” *United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) (internal quotation marks omitted).

8. Do federal courts derive legitimacy by reflecting contemporary values and social mores in their decisions?

Federal courts derive their legitimacy by deciding cases and controversies, in accordance with Article III of the Constitution, based on the Constitution and laws of the United States, based on facts developed in the record.

9. How should judges determine what constitute contemporary values and social mores?

I am not aware of how judges could determine contemporary values and social mores. By contrast, in very limited circumstances, for example in obscenity cases, a judge may be called upon to instruct a jury to consider the material at issue from the perspective of the “average person, applying contemporary community standards.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574-75 (2002) (Thomas J.) (plurality op.) (quoting Child Online Protection Act, 47 U.S.C. § 231(e)(6)); *Miller v. California*, 413 U.S. 15 (1973).

10. In federal jurisprudence, which are preferable: rules or standards?

Court decisions should be as clear as possible, to ensure that legal decisions are readily understandable by the public, and capable of application by lower courts. This approach is consistent with the concerns that, the Supreme Court has held, must be evaluated when considering a void-for-vagueness challenge under the Due Process Clause: “providing notice and preventing arbitrary enforcement.” *United States v. Watkins*, 2019 WL 4865828, at \*5 (2d Cir. Oct. 3, 2019) (quoting *Beckles v. United States*, 137 S. Ct. 886, 894 (2017)).