

Nomination of Michael H. Park to the U.S. Court of Appeals for the Second Circuit
Questions for the Record
February 20, 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?

A lower court may not depart from binding Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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?

Occasionally, it may be appropriate for a lower court judge to identify inconsistencies or confusion created by the Supreme Court's precedents, or to call the Supreme Court's attention to issues that may warrant its review. Nonetheless, in such cases, the lower court judge remains bound to apply existing Supreme Court precedent.

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

A federal circuit court of appeals decision on questions of federal law is generally binding on that court, and it may be disregarded or overturned only if there is intervening contrary authority in the form of a federal statute, a decision of the court of appeals sitting *en banc*, or a decision of the Supreme Court.

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

The decision to overturn Supreme Court precedent rests with the Supreme Court alone. Beyond that, as a nominee to an inferior court, it would be inappropriate to opine on when and if it is appropriate for the Supreme Court to overturn its own precedent.

2. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2009. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network

that extends to all levels of the legal community.”

a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?

I did not draft the quoted language, I have never discussed it with any officer or employee of the Federalist Society, and I do not know what the Federalist Society means by it.

b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?

Please see my response to Question 2(a) above.

c. What “traditional values” does the Federalist society seek to place a premium on?

Please see my response to Question 2(a) above.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court, including the Second Circuit?

I have not discussed my nomination to the Second Circuit, or any possible nomination to any other federal court, with any officer or employee of the Federalist Society.

3. In 2018, you filed an amicus brief on behalf of the Project on Fair Representation before the United States District Court for the Southern District of New York in *State of New York v. Department of Commerce*, in support of the Commerce Department’s decision to add a citizenship question to the decennial census. Your brief argued that “[r]einstating the citizenship question to the decennial census will provide States with the most reliable and usable data regarding the number of eligible voters. The Department’s decision is rational for that reason alone.” (Brief of Amicus Curiae in Support of Defendant, *State of New York v. Department of Commerce*, Case No. 1:18-cv-02921-JMF (S.D.N.Y Jun. 6, 2016), Dkt. No. 167, at p. 2).

However, John Gore, the then-Acting Assistant Attorney General for the Civil Rights Division, was deposed in a lawsuit about the inclusion of the citizenship question on the 2020 Census. In his deposition, Mr. Gore was asked the following: “You agree, right, Mr. Gore, that [citizenship] data collected through the census questionnaire is not necessary for DOJ’s VRA enforcement efforts?” Mr. Gore responded: “I do agree with that. Yes.” (Gore Dep. Tr. at 300, *New York Immigration Coalition v. United States Dept. of Commerce*)

a. Please identify the evidence supporting your argument that citizenship data collected through the census questionnaire is the “most reliable and usable data” regarding the number of eligible voters.

In this amicus brief, the Project on Fair Representation explained the importance of having reliable citizenship data and took the position that collecting it through the Census would

yield more reliable and usable data than the current method of collecting it through the American Community Survey (“ACS”). In support of this position, the brief cited judicial opinions, academic studies, and legal briefs, including an amicus brief filed by various states, including New York, in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). In that brief, these states criticized the ACS citizenship data as inadequate and insufficiently reliable. They contended that no existing source of data “provides information about the population of potential voters as robust, detailed, or useful as the total-population enumeration provided by the Census to the States.”

b. Please describe your role in the preparation of the amicus brief submitted by the Project for Fair Representation in this case.

My role was to be part of a team of attorneys who prepared and filed the amicus brief on behalf of the Project for Fair Representation.

4. You currently represent Students for Fair Admissions in a lawsuit against the University of North Carolina (UNC) alleging that the university’s admissions policies are unconstitutional. In a motion for summary judgment, you argued that UNC’s admissions policies amount to a “massive racial preference” that “cynically focuses on diversity at the most superficial level.” You also argued that it is “unnecessary for UNC to use race to achieve student body diversity” because it has “workable racial neutral-alternatives available to it” that it has “failed to fully consider or implement.” (Brief in Support of Plaintiff’s Motion for Summary Judgement, *Students for Fair Admissions v. University of North Carolina*, 2019 WL 294285 (M.D.N.C. Jan. 18, 2019)). **What role did you play in selecting which arguments would be included in the brief?**

I was not involved in selecting which arguments would be included in this brief.

5. In 2012, you filed a brief with the Supreme Court in *Fisher v. University of Texas at Austin*, where you argued that the admissions program at the University of Texas’s flagship campus was racially discriminatory and should be struck down. You wrote that “[a]sking a student of a particular race to represent that race in class discussions would be an objectionable invitation to stereotyping and very poor pedagogy. Moreover, through the Internet, professors and students can instantly access any diverse viewpoint relevant to any class, regardless of the racial or ethnic identifications of course classmates.”

In 2016, the Supreme Court disagreed with your position and held in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), that universities “may institute a race-conscious admissions program as a means of obtaining “the educational benefits that flow from student body diversity.”

a. What role did you play in selecting which arguments would be included in the brief?

My role was to be part of a team of attorneys who drafted this amicus brief and selected which arguments to include.

b. Are there any circumstances where race can be considered as a factor in university admissions — for example, to ensure equality of opportunity, diversity, or to redress past discrimination?

Yes, the Supreme Court has held that race can be considered as a factor in university admissions to achieve “the educational benefits that flow from student body diversity,” provided that “its use of the classification is necessary . . . to the accomplishment of its purpose.” *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

c. Do states have a compelling interest in promoting diversity to remedy past discrimination?

The Supreme Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but it has “stressed that a government wishing to use race must provide ‘a strong basis in evidence for its conclusion that remedial action [is] necessary.’” *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 317 (2013) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 504 (1989)).

6. In 2018, you represented the state of Kansas in a lawsuit stemming from the state’s decision to discontinue Planned Parenthood’s eligibility to receive Medicaid funds. This decision was in part a response to a series of fraudulent YouTube videos which suggested that Planned Parenthood was illegally selling fetal tissue and altering abortion procedures. You argued that Planned Parenthood should not be allowed to challenge the state’s Medicaid funding decision in a federal court. (Petition for Writ of Certiorari, *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, 2018 WL 1446274 (Mar. 21, 2018)).

a. What role did you play in selecting which arguments would be included in the brief?

My role was to be part of a team of attorneys who drafted this brief and selected which arguments to include.

b. Should Medicaid recipients be able to sue in court to enforce federal Medicaid standards?

As a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

7. In 2017, your name appeared as counsel of record for Scott Lloyd, Director of the Office of Refugee Resettlement and Stephen Wagner, Acting Assistant Secretary for the Administration for Children and Families, in the case *Garza v. Hagan*, 874 F.3d 735 (D.C. Cir. 2017). At issue in *Garza* was whether the Department of Health and Human Services could refuse to let an undocumented teenager in government custody exercise her constitutional right to an abortion.

a. Please describe your role in representing Scott Lloyd and Stephen Wagner in this case.

My role in that case was to be part of a team of attorneys who represented Mr. Lloyd and Mr. Wagner in their individual capacities. The plaintiffs sued Mr. Lloyd and Mr. Wagner not only in their official capacities, but also sought damages against them in their individual capacities. The plaintiffs eventually dropped the individual capacity claims against Mr. Lloyd and Mr. Wagner, at which point my firm's involvement in the case ended.

b. Did you author any legal briefs on behalf of Mr. Lloyd and Mr. Wagner? If so, what arguments did you make?

I was part of a team of attorneys who drafted legal briefs on behalf of Mr. Lloyd and Mr. Wagner in their individual capacities. They joined in the arguments advanced by the government and also argued that they had not “intentionally and unlawfully” violated the plaintiffs’ “clearly established rights” under the Constitution. The briefs also made arguments, based on binding Supreme Court precedent, that unlawfully present immigrants detained at the border received different levels of constitutional protection than citizens.

c. Is the constitutional right identified in *Roe v. Wade* dependent on citizenship or lawful permanent residency in the United States?

As a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

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

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

Roe v. Wade has survived legal challenges and is binding on all lower courts. For a lower court judge, it does not matter how a binding Supreme Court precedent is labeled, because each one must be followed faithfully.

b. Is it settled law?

Yes.

9. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes.

10. 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 offer an opinion concerning the merits of Justice Stevens' dissent in *District of Columbia v. Heller*. If confirmed, I would faithfully follow the Supreme Court's decision in *Heller* and all other Supreme Court precedent.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited," 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). Beyond that, it would be inappropriate to answer this question as litigation concerning the constitutionality of gun regulations is currently pending in federal courts, including in the Supreme Court.

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

As judicial nominee, it would not be appropriate for me to offer an opinion concerning the merits of *Heller* or whether it departed from previous Supreme Court precedent. If confirmed, I would faithfully follow the Supreme Court's decision in *Heller* and all other Supreme Court precedent.

11. 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 held that “First Amendment protection extends to corporations.” *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 342 (2010). If confirmed, I would faithfully follow the Supreme Court’s decision in *Citizens United* and all other Supreme Court precedent. Beyond that, it would be inappropriate to answer this question as litigation is currently pending or impending concerning the scope of corporations’ First Amendment rights.

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

Please see my response to Question 11(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I would faithfully follow the Supreme Court’s decision in *Hobby Lobby* and all other Supreme Court precedent. Beyond that, as a judicial nominee, it would be inappropriate to answer this question as litigation is currently pending or impending concerning the existence and scope of corporations’ religious freedom rights.

12. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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, not that I recall.

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, not that I recall.

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

Administrative law is a very broad area, and it would be difficult to answer this question cogently. If confirmed, I would faithfully follow Supreme Court and Second Circuit precedent in the field.

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

The Supreme Court has stated that considering legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017).

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

No.

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

I drafted answers to each question. I then solicited feedback from individuals from the Office of Legal Policy at the U.S. Department of Justice. I then finalized my answers, and authorized the Department of Justice to file these responses. My answers to each question are my own.

Senator Dick Durbin
Written Questions for Michael Park
February 20, 2019

For questions with subparts, please answer each subpart separately.

Questions for Michael Park

1. You note in your questionnaire that in 2011 you represented Deutsche Bank and several subsidiaries in a civil mortgage fraud lawsuit brought by the U.S. Attorney's Office for the Southern District of New York. The government sought over \$1 billion from Deutsche Bank under the False Claims Act for alleged false statements made to the Department of Housing and Urban Development regarding mortgage originations.

You moved to dismiss the case on behalf of your client, prompting the government to file an amended complaint. Eventually the case settled with your clients agreeing to pay \$202 million in damages.

a. How did you come to represent Deutsche Bank in this matter?

I was not involved in any communications regarding Deutsche Bank's selection of outside counsel, but it is my understanding that in-house counsel at Deutsche Bank chose to retain Dechert LLP for this matter. I believe that I was brought onto the Dechert team because I had previous experience with the False Claims Act and working on cases involving the U.S. Attorney's Office for the Southern District of New York.

b. What was the work you performed for Deutsche Bank?

My role was to be part of the team that drafted motions to dismiss and engaged in discussions with the government about settlement.

c. Will you commit, if you are confirmed, to recuse yourself from any matter involving Deutsche Bank or its subsidiaries that comes before the Second Circuit?

If confirmed, I would evaluate potential recusal questions by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any other applicable laws, rules, or practices. Beyond that, it would not be appropriate to commit in advance to a particular resolution of such questions.

2. You note in your questionnaire that you worked in the Justice Department's Office of Legal Counsel from 2006 to 2008. You say that you worked on a variety of legal matters including "constitutional questions, national security issues, and congressional investigations."

a. What constitutional questions did you work on while you were at OLC?

I do not have a list of matters on which I worked at the Office of Legal Counsel, and I did not retain documents from my tenure in the office. Generally speaking, a substantial portion of my time in the Office of Legal Counsel involved drafting comments on pending legislation and reviewing proposed executive orders for form and legality. I also conducted legal research on a variety of matters to assist in the provision of informal legal advice.

b. Did you work on issues involving affirmative action?

I do not recall working on any issues involving affirmative action at the Office of Legal Counsel.

c. What national security issues did you work on while you were OLC?

To the best of my recollection, the national security issues I worked on at the Office of Legal Counsel were classified matters that have not since become public, and it would be inappropriate for me to identify them in response to this question.

d. Will you provide the Committee with a list of any memoranda that you authored or contributed to while you were at OLC?

To the extent that my contributions to memoranda that I worked on at the Office of Legal Counsel are not public, such information is confidential and it would not be consistent with my obligations to former clients under the Code of Professional Conduct to disclose them.

3. You say in your questionnaire that you have been a member of the Federalist Society since 2009.

a. Why did you join the Federalist Society?

I joined the Federalist Society in 2009 for business development purposes and because I was interested in the events it sponsored, including panel discussions and debates.

b. Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist? For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

As a judicial nominee, it would be inappropriate under Canon 5 of the Code of Conduct for United States Judges to answer this question, which relates to political matters.

c. Please list each year that you have attended the Federalist Society's annual convention.

I attended portions of the annual convention most years from 2008 to 2018. I did not attend in 2016 and one or two other years during this period but do not recall specifically which other years I did not attend.

4.

a. Do you believe that judges should be “originalist” and adhere to the original public meaning of constitutional provisions when applying those provisions today?

Lower court judges are bound to follow precedents of the Supreme Court, and in almost all cases involving constitutional interpretation, there is relevant Supreme Court precedent. In the event that no such guidance is available, lower court judges may consider the original public meaning of the constitutional text. *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Crawford v. Washington*, 541 U.S. 36 (2004).

b. If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today? To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

...no Person holding any Office of Profit or Trust under [the United States], 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 under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending litigation.

5.

a. Is waterboarding torture?

Yes, waterboarding constitutes torture when it is intentionally used “to inflict severe physical or mental pain or suffering.” 18 U.S.C. § 2340(1).

b. Is waterboarding cruel, inhuman and degrading treatment?

No person in the custody or under the control of the United States government may be subjected to any interrogation technique not authorized in the Army Field Manual. *See* 42 U.S.C. § 2000dd-2(a)(2). Waterboarding is not authorized in the Army Field Manual.

c. Is waterboarding illegal under U.S. law?

Please see my answers to questions 5(a) and 5(b) above.

6. Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?

I have no basis on which to answer this question. In any event, as a judicial nominee, it would be inappropriate under Canon 5 of the Code of Conduct for United States Judges to comment on political matters.

7.

a. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.

I have no knowledge of any such donations, nor am I aware of the Judicial Crisis Network supporting my nomination. Beyond that, it would be inappropriate under Canon 5 of the Code of Conduct for United States Judges to answer this question, which relates to political matters.

b. If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?

If confirmed, I would strictly follow the requirements in the recusal statute (28 U.S.C. § 455), Canon 3 of the Code of Conduct for United States Judges, and any other relevant guidance. Beyond that, it would be inappropriate under Canon 5 of the Code of Conduct for United States Judges to answer this question, which relates to political matters.

c. Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?

Please see my responses to questions 7(a) and 7(b) above.

8.

a. Do you interpret the Constitution to authorize a president to pardon himself?

I have not had occasion to study this question.

b. What answer does an originalist view of the Constitution provide to this question?

I have not had occasion to study this question.

**Nomination of Michael H. Park to the
United States Court of Appeals for the Second Circuit Questions for the Record
Submitted February 20, 2019
QUESTIONS FROM SENATOR WHITEHOUSE**

1. The law firm you work for, Consovoy McCarthy Park, has been described as “the go- to legal shop for conservative ideologues looking to fight everything from voting rights to affirmative action to abortion, particularly at the Supreme Court.”¹ Your work there, and the fact that lent your name to the firm, suggest that you may share that ideology.

a. Other than words of support from others, can you point to anything in your experience, background, or record to allay the concern that you might have been nominated to promote ideology rather than do justice? Please specify.

While I cannot speak to the reasons for my nomination by the President, in addition to bipartisan support I have received from former colleagues and bar associations, there are several items I would note in response to this question.

First, my professional experience is far broader and much more diverse than the handful of cases I have been asked about at my hearing and in these questions for the record. For example, one of my most significant matters over the past two years has been a Fair Housing Act case, in which my firm represents the plaintiff, a real estate developer who has been prevented from building affordable housing in a wealthy New York City suburb. The majority of my litigation experience has been in commercial and securities cases. In addition, I have been active in pro bono work throughout my career. One matter I am proud of is the immigration case described in my Senate Judiciary Questionnaire. I have also had the privilege of serving in the government for four years. I have deep respect for public service and appreciate the fundamental difference between advocating for client interests and doing justice impartially.

Aside from my professional work, I have been actively involved in community service. Operation Exodus is a non-profit program in New York City that offers after-school tutoring and mentoring for mostly Hispanic kids in Washington Heights, Inwood, and the Bronx. I have been involved with this program for many years as a mentor, director, and adviser.

b. If confirmed, what specific steps would you take to ensure that your personal ideological views do not affect your jurisprudence? How will you assess whether you are able to successfully do so?

I fully understand that the role of a judge is to “administer justice without respect to persons” and to follow the law faithfully and impartially. If confirmed, I would take an oath pledging to do this.

¹ <https://www.motherjones.com/politics/2018/10/trump-appeals-court-nominee-is-working-to-end-affirmative-action-at-harvard/>

2. You mentioned several times in your confirmation hearing that a lawyer does not always personally agree with the positions of his client. Yet you decided to join Consovoy McCarthy Park as a name partner knowing that the firm was engaged primarily in conservative impact litigation.

a. To what extent did Consovoy McCarthy's client list influence your decision to join it as a name partner?

I joined the firm primarily for the opportunity to work with friends in an entrepreneurial environment. At the time I joined the firm in 2015, it had relatively few clients, which was more of a concern from a business perspective than an attraction.

b. Did you join Consovoy McCarthy Park in part because you wanted to work on anti-affirmative action litigation?

At the time I joined the firm in 2015, it had been working on two cases representing Students for Fair Admissions in challenges to the admissions policies at Harvard College and the University of North Carolina-Chapel Hill. I welcomed the opportunity to be involved in these matters. In particular, the Harvard case involves allegations of discrimination against Asian Americans in the college admissions process.

c. While at Consovoy McCarthy Park, have you undertaken representation of any clients whose positions did not align with your own personal beliefs? Please specify.

Yes, I have represented clients, including at my current firm, with whose positions I did not fully agree. Beyond that, it would be inappropriate under the Rules of Professional Conduct and the duty of loyalty I owe to all of my clients to specify further.

3. Every lawyer listed on Consovoy McCarthy Park's website who is listed as having completed a federal judicial clerkship has clerked for a judge or Justice known for having strong conservative views. Your firm seems to attract lawyers with a clear ideological bent.

a. How can the American people be confident that you will be an impartial judge when you've spent years surrounded exclusively by conservative lawyers advocating for conservative ideological causes?

Please see my responses to Questions 1(a) and 1(b) above.

b. Have you made any efforts to surround yourself professionally with those with whom you may disagree? Please specify.

Lawyers at the firm disagree on a wide array of issues, and we often debate the merits of different perspectives. The firm does not have a litmus test for hiring, and we welcome lawyers with different backgrounds and perspectives.

4. You have been an active member in the Federalist Society, serving on the Executive Committee for the Corporations, Securities, and Antitrust Practice Group.

a. Do you think it is appropriate for judges to actively maintain membership in a group with a stated ideological agenda?

If confirmed, I would evaluate my memberships and affiliations, including with the Federalist Society, in light of the recusal statute (28 U.S.C. § 455), Canon 3 of the Code of Conduct for United States Judges, and any other applicable laws, rules, or practices.

b. If confirmed, do you plan to remain an active participant in the Federalist Society?

Please see my response to Question 4(a) above.

c. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

No.

5. In our exchange at your confirmation hearing you mentioned you had the “bipartisan” support of “numerous groups and former colleagues.” Please identify which groups or colleagues you feel have lent you bipartisan support.

I have received letters of support from organizations and individuals from a range of political backgrounds. Those include: The National Asian Pacific American Bar Association (NAPABA); the Asian American Bar Association of New York (AABANY); the Korean American Lawyers Association of Greater New York (KALAGNY); the Korean American Association of Greater New York (KAAGNY); former partners at Dechert LLP; and, former co-clerks.

6. 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?

The metaphor illustrates the principle that the role of a judge is to apply the law fairly and not to favor one side or the other.

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

A judge’s duty is to follow the law, and it is generally the duty of the political branches to address the practical consequences. That said, there are certain contexts in which the law requires courts to consider the practical consequences of a ruling, such as in deciding

whether to grant a preliminary injunction or when a particular interpretation of a statute would lead to absurd results.

c. 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 judge to make a subjective determination?

Determining whether there is a genuine dispute as to any material fact requires consideration of the parties’ factual assertions based on the evidentiary record before the court. Such a decision requires judgment and reason, but it should not be subjective in the sense that judges should refrain from injecting their personal views or feelings into the determination.

7. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

a. What role, if any, should empathy play in a judge’s decision-making process?

Empathy is an essential human attribute and one that should motivate judges to be fair, careful, and thorough. But judges’ decisions should be based on law and facts, and not on personal feelings.

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

Although judges’ life experiences may influence their personal views, judges’ personal views should not affect their duty to administer justice impartially.

c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Judges’ decisions should be based on law and facts, and not on personal feelings, life experiences, or the identities of the parties appearing before them.

8. 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.

9. The Seventh Amendment ensures the right to a jury “in suits at common law.”

a. What role does the jury play in our constitutional system?

The Seventh Amendment right to a jury trial in “suits at common law” is an important feature of the American justice system that protects the rights of civil litigants to have facts decided by a jury of one’s peers.

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 be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

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 9(b) above.

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

Appellate courts generally decide cases on the record presented from a trial court and so do not typically engage in fact-finding.

11. Do you believe fact finding, if done by appellate courts, undermines the adversarial process?

It is difficult to answer this hypothetical question in abstract. It may be necessary in certain situations for an appellate court to engage in some “fact-finding,” such as confirming that it has jurisdiction over a case. That said, fact-finding is generally conducted by trial courts.

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

If confirmed, I would faithfully follow Supreme Court and Second Circuit precedent regarding the level of deference afforded to congressional fact-finding in legislation expanding or limiting individual rights.

13. When, if ever, is it appropriate for appellate courts to disregard congressional findings of fact?

Please see my response to Question 12 above.

14. In *Shelby County v. Holder* and *Citizens United v. FEC*, Congress, relying on evidence it had examined, legislated to address what it believed to be a serious problem requiring a national solution. In each case, the Court deemed Congress’s facts irrelevant and concluded that Congress

had, at least in part, acted unconstitutionally. Was it appropriate for the Supreme Court to deem congressional fact finding irrelevant?

As a judicial nominee, it would be inappropriate to opine on the propriety of the Supreme Court's reasoning in a particular case that I would be bound to follow. If confirmed, I would faithfully follow Supreme Court precedent.

a. In *Shelby County* the Court's holding hinged largely on its understanding of the facts, but it ignored the very facts that had prompted Congress to reauthorize the VRA in the first place. Was it appropriate for the Court to ignore congressional findings of fact with regards to voting discrimination?

Please see my response to Question 14 above.

b. *Citizens United* gave virtually no weight to Congress's findings documenting the pernicious role of money in our elections. The majority rejected the argument that Congress has a "compelling constitutional basis" to guard against corruption and the appearance of corruption in local and national elections. Instead, the Court summarily concluded "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." In so concluding, the Court entirely ignored the Senate Committee report's findings to the contrary. Was it appropriate for the Court to ignore congressional finding of fact regarding corruption and the appearance of corruption?

Please see my response to Question 14 above.

c. Throughout the Court's analysis in *Citizens United v. FEC*, it reached factual conclusions with citation to only an amicus brief or without any citation at all. Is it appropriate for appellate courts to disregard the record below when reaching factual conclusions?

Please see my response to Question 14 above.

d. In *McCutcheon v. FEC*, the Court ignored congressional fact finding and expertise in holding campaign limits unconstitutional. Was it appropriate for the Court to ignore congressional expertise and congressional findings of fact in regards to corruption and the appearance of corruption?

Please see my response to Question 14 above.

Senate Judiciary Committee
Questions for the Record
February 6, 2019
Senator Amy Klobuchar

Questions for Mr. Park, nominee to be U.S. Circuit Judge for the Second Circuit

In January 2017, you filed an amicus brief on behalf of the Chamber of Commerce arguing that the Federal Trade Commission (FTC) lacked authority to bring an action against a company that failed to protect its customers' medical information from cyber-attack.

- In your view, does the FTC have authority under Section 5 of the Federal Trade Commission Act to take action to protect the security and privacy of patients' medical information by holding businesses accountable when they fail to safeguard consumer data adequately?

In this amicus brief, the Chamber of Commerce argued that a business does not engage in unfair competition when it is the victim of a cyber-attack, and that 15 U.S.C. § 45(a) therefore does not grant the FTC authority over the prevention of such attacks. The Eleventh Circuit did not reach this issue, holding instead that the court lacked jurisdiction because the FTC had not yet taken final agency action against the petitioner. *See LabMD, Inc. v. FTC*, 776 F.3d 1275, 1277 (11th Cir. 2015). Beyond that, as a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to offer my personal view on the matter, which is the subject of pending or impending litigation.

**Nomination of Michael H. Park, to be United States Circuit Judge for the Second Circuit
Questions for the Record Submitted February 20, 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?

If confirmed, I would apply the factors articulated in Supreme Court precedent regarding whether a right is fundamental and protected under the Fourteenth Amendment. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

If confirmed, I would faithfully follow Supreme Court precedent regarding the consideration given to whether a right is expressly enumerated in the Constitution.

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?

If confirmed, I would faithfully follow Supreme Court precedent regarding the consideration given to whether a right is deeply rooted in this nation's history and tradition. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997).

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?

If confirmed, I would faithfully follow Supreme Court and Second Circuit precedent. In the absence of such precedent, I would look to decisions of other courts of appeals as persuasive authority.

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

Yes.

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

If confirmed, I would faithfully follow Supreme Court precedent, including *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

f. What other factors would you consider?

If confirmed, I would consider any other relevant factors under Supreme Court or Second Circuit precedent.

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

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

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

If confirmed, I would faithfully follow Supreme Court precedent in the areas of gender discrimination, including *United States v. Virginia*. As a judicial nominee, it would be inappropriate to offer personal views on binding Supreme Court decisions or on the development of law regarding gender discrimination.

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?

Please see my response to Question 2(a) above.

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

The Supreme Court has held that the Fourteenth Amendment protects the right of same-sex couples to marry "on the same terms as accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). If confirmed, I would faithfully follow Supreme Court precedent, 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?

As a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

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

Yes. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes. *See Roe v. Wade*, 410 U.S. 113 (1973).

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Yes. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

- 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.

Not applicable.

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?

If confirmed, I would faithfully follow Supreme Court and Second Circuit precedent regarding when it is appropriate to consider such evidence.

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

If confirmed, I would faithfully follow Supreme Court and Second Circuit precedent regarding when it is appropriate to consider such evidence.

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 follow Supreme Court precedent, including *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

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

Please see my answer to question 5(a) above.

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?

The Supreme Court held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that segregated public schools are inconsistent with the Fourteenth Amendment’s guarantee of equal protection of the laws. If confirmed, I would faithfully follow Supreme Court precedent, including *Brown*.

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 Feb. 14, 2019).

I am unfamiliar with this article, but scholarly debate about the merits of originalism has little relevance to lower court judges, who are bound by Supreme Court precedent. If confirmed, I would faithfully follow Supreme Court precedent, including in cases involving the Free Speech, Equal Protection, and Due Process Clauses of the Constitution.

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?

Precedent of the Supreme Court is binding on all lower courts, whether it has considered the original public meaning of a constitutional provision or not. If confirmed, I would faithfully follow the Supreme Court's precedent, including its interpretive approach.

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

Please see my answer to question 6(c) above.

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

Please see my answer to question 6(c) above.

7. At the Senate Judiciary Committee hearing on your nomination, you could not name a time when you defended the constitutionality of a race-conscious admissions policy. With the opportunity to reflect on this question since the hearing, please provide a list of the cases in which you took a position on a race-conscious admissions policy and state whether you supported or opposed the constitutionality of the policy.

Fisher v. Univ. of Texas at Austin (S. Ct.). My client supported a challenge to a race-conscious policy.

Students for Fair Admissions v. President & Fellows of Harvard College (D. Mass.). My client is challenging a race-conscious policy.

Students for Fair Admissions v. Univ. of North Carolina (M.D.N.C.). My client is challenging a race-conscious policy.

8. You filed an amicus brief in the Seventh Circuit in support of the Department of Justice's policy to defund "sanctuary cities" in *City of Chicago v. Sessions*. Can the federal government force state and local law enforcement to enforce federal immigration law?

As a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to opine on whether the federal government can force state and local law enforcement to enforce federal immigration law, which is a matter of pending or impending litigation.

9. Your name appears on the docket in *Garza v. Hargan*.

a. Please describe your role in this case.

My role in that case was to be part of a team of attorneys who represented Mr. Lloyd and Mr. Wagner in their individual capacities. The plaintiffs sued Mr. Lloyd and Mr. Wagner not only in their official capacities, but also sought damages against them in their individual capacities. The plaintiffs eventually dropped the individual capacity claims

against Mr. Lloyd and Mr. Wagner, at which point my firm's involvement in the case ended.

b. Do you agree that undocumented immigrants residing in the United States are protected by the Constitution?

The Supreme Court has held that undocumented immigrants residing in the United States are entitled to due process under the Fourteenth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

Questions for the Record for Michael H. Park
From Senator Mazie K. Hirono

1. You represent Students for Fair Admissions in lawsuits challenging the diversity policies of Harvard and the University of North Carolina. The Washington Post reported that the lawsuit and Students for Fair Admissions was organized by Edward Blum, “a conservative legal activist who has spent most of two decades on a quest to end affirmative action in all arenas.” According to the Post, when Mr. Blum’s efforts to challenge diversity policies failed in *Fisher v. University of Texas*, he decided, as he put it, that he “needed Asian plaintiffs.”

a. Are you aware that Mr. Blum publicly made this statement that he “needed Asian plaintiffs”?

I am not familiar with the article or context of the quotation referenced. The plaintiff in the Harvard and University of North Carolina-Chapel Hill lawsuits is Students for Fair Admissions, which is a membership association of over 20,000 students, parents, and other concerned citizens who oppose racial preferences in college admissions. Beyond that, it would be inappropriate under the Rules of Professional Conduct for me to comment on reports about my clients.

b. Do you support Mr. Blum’s “quest”—as The Washington Post described it—to end affirmative action?

Please see my response to Question 1(a) above.

2. You represented the state of Kansas in its defense of its decision to terminate Planned Parenthood’s eligibility to receive Medicaid funds. One of the bases for Kansas’ decision was a series of YouTube videos which deceptively suggested that Planned Parenthood was illegally selling fetal tissue and altering abortion procedures.

These videos had been edited to suggest that Planned Parenthood was trying to sell fetal tissue, when that simply wasn’t the case. In fact, the only charges that came out of the whole ordeal were against the right-wing activists who filmed the video. Yet, Kansas continued to pursue its decision to defund Planned Parenthood, taking the case all the way to the Supreme Court.

Why did you defend the state’s efforts to continue in its push to defund Planned Parenthood even after it learned that its factual basis for doing so was false?

I represented the State of Kansas in a case that presented the question whether there is an implied private right of action under the Medicaid Act to challenge a state’s determination that a provider is not “qualified” under state regulations. Beyond that, it would be inappropriate under the Rules of Professional Conduct to discuss my personal views about this representation.

Nomination of Michael H. Park
United States Court of Appeals for the Second Circuit Questions for the Record
Submitted February 20, 2019

1. In private practice, you have advocated on behalf of an array of conservative causes. The positions you took had troubling implications in many areas, from civil rights to workers' rights, from women's rights to immigrants' rights, from tribal rights to consumers' rights, from health care to affordable housing, from education to the environment.

At your hearing, my colleague Senator Whitehouse said, "There does come a point where the persistence, animation, focus of advocacy suggests that something more is going on than just, 'I'm echoing the views of my clients as they come at random through the door, the way lawyers do'—but in fact there is a purpose in your life that you want to achieve certain things through the law." You did not take the opportunity to respond to this statement.

a. Are you willing to acknowledge that you have advocated extensively on behalf of highly conservative causes during your years as a law firm partner? Please explain your answer.

My professional experience is far broader and much more diverse than the handful of cases I have been asked about at my hearing and in these questions for the record. For example, one of my most significant matters over the past two years has been a Fair Housing Act case, in which my firm represents the plaintiff, a real estate developer who has been prevented from building affordable housing in a wealthy New York City suburb. The majority of my litigation experience has been in commercial and securities cases. In addition, I have been active in pro bono work throughout my career. One matter I am proud of is the immigration case described in my Senate Judiciary Questionnaire. I have also had the privilege of serving in the government for four years. I have deep respect for public service and appreciate the fundamental difference between advocating for client interests and doing justice impartially.

b. Your record of advocacy for highly conservative causes is so extensive that it suggests, as Senator Whitehouse said, that you were not merely reflecting the views of a random selection of law firm clients. How do you respond to that statement?

Please see my response to Question 1(a) above.

c. Across your work as a law firm partner, have you had any personal reservations about representing the interests of so many clients with such a consistent ideological agenda?

Please see my response to Question 1(a) above. Beyond that, it would be inappropriate under the Rules of Professional Conduct to discuss my personal views about my work for clients.

2. You filed an amicus brief in support of the Trump Administration's attempt to add a

citizenship question to the 2020 Census.

Census experts and senior Census Bureau staff agree that a last-minute, untested citizenship question could create a chilling effect and present a major barrier to participation in the 2020 Census. Many vulnerable communities do not trust the federal government's commitment to maintaining the confidentiality of Census data and are fearful that their responses could be used for law enforcement, including immigration enforcement, purposes. A citizenship question would exacerbate their concerns.

A federal district court recently issued an exceptionally thorough and thoughtful ruling that blocked the Commerce Department from adding the citizenship question to the Census. The case is now pending before the Supreme Court.

a. If this case were to return to the Second Circuit somehow, on remand or in any other form, would you recuse yourself?

Yes.

b. If any other legal challenge relating to the addition of a citizenship question to the Census comes before the Second Circuit, would you recuse yourself?

If confirmed, I would evaluate potential recusal questions by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any other applicable laws, rules, or practices. Beyond that, it would not be appropriate to commit in advance to a particular resolution of such questions.

c. If you cannot make a commitment to recuse yourself from cases involving the addition of a citizenship question to the Census, please explain why, if you're confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in such a case.

Please see my response to Question 2(b) above.

3. You have represented clients in several high-profile cases involving challenges to race-conscious admissions policies at the University of Texas, the University of North Carolina, and Harvard University.

a. Do you believe that the Supreme Court's landmark decisions upholding race-conscious admissions programs—such as *Regents of the University of California v. Bakke*¹ and *Grutter v. Bollinger*²—were correctly decided?

¹ 438 U.S. 265 (1978).

² 539 U.S. 306 (2003).

The Supreme Court's decisions in *Bakke* and *Grutter* are binding precedents on all lower courts. If confirmed, I would faithfully follow them. Beyond that, it would be inappropriate to opine on whether those cases, or any other decision of the Supreme Court that I would be bound to follow, were correctly decided.

b. You filed an amicus brief in support of the plaintiff in *Fisher v. University of Texas*, who was challenging a race-conscious admissions program at the University of Texas. When the case returned to the Supreme Court in 2016, the Court ruled the other way, upholding the school's race-conscious admissions program.³ Do you believe that the 2016 case, known as *Fisher II*, was correctly decided?

The Supreme Court's decision in *Fisher II* is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether that case, or any other decision of the Supreme Court that I would be bound to follow, was correctly decided.

c. Do you believe that *Bakke*, *Grutter*, and *Fisher II* are settled law?

Yes.

d. If confirmed, would you faithfully uphold both the letter and the spirit of these precedents?

If confirmed, I would faithfully follow *Bakke*, *Grutter*, and *Fisher II*, as well as all Supreme Court precedent.

e. Do you believe that having a diverse student body is a compelling government interest?

The Supreme Court has held that universities have a compelling interest in "the educational benefits that flow from student body diversity." *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

f. Please explain why, if you're confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case concerning race-conscious university admissions.

I fully understand that the role of a judge is to "administer justice without respect to persons" and to follow the law faithfully and impartially. If confirmed, I would take an oath pledging to do this. It would be my duty to set aside any personal views or prior advocacy and to decide each case impartially.

4. You represented the state of Kansas as part of its attempt to cut off Planned Parenthood's eligibility for Medicaid funding. The Tenth Circuit rebuffed your arguments, and the Supreme

³ 136 S. Ct. 2198 (2016).

Court ultimately declined to take up the case.

- a. Before the Supreme Court turned down this case, did you view this litigation as an effort to change the existing law concerning women's ability to access to reproductive health services?

The question presented in this case was whether there is an implied private right of action under the Medicaid Act to challenge a state's determination that a provider is not "qualified" under state regulations. Beyond that, it would be inappropriate under the Rules of Professional Conduct to discuss my personal views about this representation.

- b. Please explain why, if you're confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case concerning women's reproductive rights and access to health care.

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

5. In your Questionnaire responses, you wrote that, when you were an attorney-adviser in the Office of Legal Counsel at the Department of Justice from 2006 to 2008, you "provided advice to the Attorney General, the White House Counsel, and other Executive Branch clients on a variety of legal matters, including constitutional questions, national security issues, and congressional investigations."⁴ While you were at OLC, did you work in any way on any of the following issues? Please respond to each item below individually. If the answer is yes to any of these items, please describe your work.

- a. The Voting Rights Act Reauthorization and Amendments Act of 2006.

I do not recall working on any issues involving the Voting Rights Act Reauthorization and Amendments Act of 2006 at the Office of Legal Counsel.

- b. Policies relating to affirmative action and/or race-conscious university admissions.

I do not recall working on any issues involving affirmative action and/or race-conscious university admissions at the Office of Legal Counsel.

- c. Hate crimes legislation.

I do not recall working on any issues involving hate crimes legislation at the Office of Legal Counsel.

- d. The firing of U.S. Attorneys.

Yes. I was involved in responding to congressional oversight requests regarding the firing of U.S. Attorneys.

⁴ SJQ at 12.

e. The implementation of the Protection of Lawful Commerce in Arms Act of 2005.

I do not recall working on any issues involving the Protection of Lawful Commerce in Arms Act of 2005 at the Office of Legal Counsel.

f. The NICS Improvement Amendments Act of 2007.

I do not recall working on any issues involving NICS Improvement Amendments Act of 2007 at the Office of Legal Counsel.

g. Torture or any other interrogation techniques.

I do not recall working on any issues involving torture or any other interrogation techniques at the Office of Legal Counsel.

h. Habeas corpus, military commissions, the detention camp at Guantánamo Bay, rendition, or any other issues relating to the treatment of detainees.

I do not recall working on any issues involving habeas corpus, military commissions, the detention camp at Guantanamo Bay, rendition, or any other issues relating to the treatment of detainees at the Office of Legal Counsel.

i. Warrantless surveillance programs.

I do not recall working on any issues involving warrantless surveillance program at the Office of Legal Counsel.

j. The use of National Security Letters.

I do not recall working on any issues involving the use of National Security Letters at the Office of Legal Counsel.

k. The implementation of the USA PATRIOT Act of 2001.

Possibly. I worked on various matters involving federal statutes, and some of those matters may have involved statutes that interacted with the USA PATRIOT Act, but I do not specifically remember any such matter.

l. The implementation of the Detainee Treatment Act of 2005.

I do not recall working on any issues involving the Detainee Treatment Act of 2005 at the Office of Legal Counsel.

m. The FISA Amendments Act of 2008.

I do not recall working on any issues involving the FISA Amendments Act of 2008 at the Office of Legal Counsel.

n. Presidential signing statements.

Yes. A significant part of my job in the Office of Legal Counsel was to draft comments on pending legislation. Those drafts may have been used as the basis for statements to Congress regarding the Executive Branch's position on the legislation. I do not remember, however, drafting any specific presidential signing statements.

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

The Supreme Court has looked to the original public meaning and considered it relevant when interpreting constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). Whatever approach the Supreme Court has taken in a particular context, a lower-court judge is bound to follow it.

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

Justice Kagan recently stated that "we're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). The Supreme Court has repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If confirmed, I would faithfully apply Supreme Court precedent, including its approach to statutory interpretation.

8. 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 as a judge on the Second Circuit, would you be willing to consult and cite legislative history?

The Supreme Court has stated that considering legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). If confirmed, I would faithfully follow the Supreme Court's precedent, including its approach to statutory interpretation and the use of legislative history.

b. If you are confirmed to serve as a judge on the Second Circuit, 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 8(a) above.

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

Yes. I understand judicial restraint to refer to the theory that judges should try to limit the exercise of their authority, particularly in striking down acts of Congress.

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

The Supreme Court's decision in *Heller* is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether that case, or any other decision of the Supreme Court that I would be bound to follow, was guided by the principle of judicial restraint.

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

The Supreme Court's decision in *Citizens United* is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether that case, or any other decision of the Supreme Court that I would be bound to follow, was guided by the principle of judicial restraint.

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

The Supreme Court's decision in *Shelby County* is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether that case, or any other decision of the Supreme Court that I would be bound to follow, was guided by the principle of judicial restraint.

10. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.⁸ Notably, the same study

⁵ 554 U.S. 570 (2008).

⁶ 558 U.S. 310 (2010).

⁷ 570 U.S. 529 (2013).

⁸ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

found that whites are actually *more likely* than blacks to sell drugs.⁹ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹¹

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

Yes.

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.

No.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹² Why do you think that is the case?

I have not studied this issue.

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.¹³ Why do you think that is the case?

I have not studied this issue.

⁹ *Id.*

¹⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹¹ *Id.*

¹² U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

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

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

All judges should be mindful of the potential for bias—implicit and explicit—in their courthouses and in the cases before them. In terms of addressing racial bias in the criminal justice system, however, judges are not policy makers and can decide only cases or controversies before them.

11. From 1979 until the start of the Trump Administration, the Senate confirmed just three judicial nominees—out of more than 2,000—without positive blue slips from both of their home-state Senators.¹⁴ Even those three nominees, all from the 1980s, had the support of one home-state Senator.¹⁵ During this time, the Senate *never* confirmed a judicial nominee over the objections of *both* home-state Senators.¹⁶

a. Do you think the Administration meaningfully consulted with your home-state Senators about your nomination?

My understanding is that the White House Counsel’s Office has consulted with my home-state Senators about my potential nomination since the summer of 2017.

b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

The Senate’s constitutional role of providing “advice and consent” on judicial nominations is a political matter on which it would be inappropriate for a judicial nominee to opine under Canon 5 of the Code of Conduct for United States Judges.

12. 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.¹⁷ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁸

a. Do you believe there is a direct link between increases in a state’s incarcerated

¹⁴ BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), <http://www.crs.gov/Reports/pdf/R44975>.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ 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>.

¹⁸ *Id.*

population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue.

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

I have not studied this issue.

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

Yes.

14. Do you believe that *Brown v. Board of Education*¹⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown is a landmark decision of the Supreme Court and is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether *Brown*, or any other decision of the Supreme Court that I would be bound to follow, was correctly decided. *See, e.g.*, Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 64 (2010) ("I think that . . . it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.") (statement of Hon. Elena Kagan).

15. Do you believe that *Plessy v. Ferguson*²⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

In *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson* and struck down the doctrine of "separate but equal," noting that it "has no place" in American law. *Brown*, 347 U.S. 483, 494-95 (1955).

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

No, the responses to these questions, and to those asked during my hearing, are my own. Lawyers from the Office of Legal Policy in the Department of Justice provided general guidance on questions that have been asked of other nominees and on the Code of Conduct for United States Judges.

¹⁹ 347 U.S. 483 (1954).

²⁰ 163 U.S. 537 (1896).

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

The Supreme Court has held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Beyond that, as a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

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

Questions for the Record from Senator Kamala D. Harris
Submitted February 20, 2019
For the Nomination of

Michael Park, to be United States Circuit Judge for the Second Circuit

1. As a law firm partner, you have repeatedly challenged affirmative action policies in high-profile litigation. In 2012, you filed an amicus brief in *Fisher v. University of Texas*, which challenged the University of Texas’s race-conscious admissions policies. In 2018, you represented the Students for Fair Admissions in a lawsuit challenging Harvard’s affirmative action policies. Earlier this year, you represented the Students for Fair Admissions in another lawsuit challenging the University of North Carolina’s affirmative action policies.

a. **As a practical matter, do you believe that educational institutions are likely to achieve meaningful racial diversity without recognizing and taking account of race?**

This is a difficult question to answer in the abstract, and the practical implications may depend on the specific facts relating to the institution, its educational goals, its admissions policies, and the like. As a legal matter, in seeking to achieve “the educational benefits that flow from student body diversity,” universities are required to give “serious, good faith consideration of workable race-neutral alternatives.” *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

b. **Does the U.S. Constitution allow an educational institution to consider race if it implements a race-neutral alternative, and thereafter experiences a reduction in minority enrollment?**

The Supreme Court has held that race can be considered as a factor in university admissions to achieve “the educational benefits that flow from student body diversity,” provided that “its use of the classification is necessary . . . to the accomplishment of its purpose.” *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016). If confirmed, I would faithfully follow *Fisher* and all other Supreme Court precedent. Beyond that, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.