Nomination of Christy Criswell Wiegand to the United States District Court for the Western District of Pennsylvania
Questions for the Record
Submitted June 24, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. On your Questionnaire for the Committee, you noted that during your time as an associate at Arnold & Porter, you "did pro bono legal research, under the direction of partners of the firm, on behalf of a non-profit public interest organization."

   What was the name of the non-profit public interest organization for which you did this pro bono work? Please detail the nature of your firm's work for the organization.

   I was a junior associate at Arnold & Porter for slightly less than two years after graduating from Cornell Law School, from the fall of 2000 through the summer of 2002. At some point during my time at Arnold & Porter, a senior partner at the firm requested assistance from multiple associates relating to his pro bono representation of a non-profit public interest organization. Numerous associates, including me, conducted legal research and drafted factual summaries of past judicial opinions rendered by federal judicial nominees. I recall assisting on that project for approximately several weeks. I did not have any contact with the client, and I did not have an understanding of the scope of the firm's work for that client, apart from the discrete assignments with which I was tasked by the partner. It was my understanding that the pro bono non-profit client requested that the firm keep the client's name confidential.

2. On the Financial Statement portion of your Questionnaire for the Committee, you disclosed that you have extensive holdings of individual stocks. Federal law requires judges to disqualify themselves if they have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." (28 U.S. Code § 455 (b)(4))

   If confirmed, do you plan to continue owning an extensive portfolio of individual stocks?

   If confirmed as a United States District Judge, I will carefully review and address any real or potential conflicts of interest, including potential financial conflicts of interest relating to ownership of individual stocks. I will fully comply with 28 U.S.C. § 455, including sub-section (b)(4). I will also fully comply with Canon 3 of the Code of Judicial Conduct for United States Judges, including sub-section (C)(1)(c) relating to disqualification due to particular financial interests. I will also fully comply with all other applicable ethical rules, statutory provisions, or precedent governing such issues. My financial holdings do include a number of individual stocks. I am currently reviewing my holdings, including individual stocks, with the intent of reducing individual stock holdings and streamlining my financial holdings, including through divestiture, in light of the conflict of interest rules that would apply to me as a United States District Judge if I am fortunate enough to be confirmed.

3. 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.

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

   No. A district court judge is required to faithfully apply all Supreme Court precedent.

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

   A district court is bound by the precedent of the Supreme Court and the applicable Court of Appeals. Although a district court itself does not create precedent, consistent with rule-of-law principles, a district court should render similar decisions when presented with similar facts, absent an opinion explaining the reasons for doing so.

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

   The decision whether, and under what circumstances, to overturn its own precedent is for the Supreme Court alone to make. The Supreme Court has identified factors that it considers in determining whether to overturn its own precedent. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478-79 (2018). As a district court nominee, it would not be appropriate for me to opine on when the Supreme Court should overturn its own precedent. If confirmed as a United States District Judge, I will faithfully apply all Supreme Court and Third Circuit precedent.

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

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

All Supreme Court precedent, including *Roe v. Wade*, is binding on lower courts. For a district court judge, it does not matter how a Supreme Court decision is labeled, because each Supreme Court decision must be followed faithfully.

b. Is it settled law?

Yes. *Roe v. Wade* is binding Supreme Court precedent. If confirmed as a United States District Judge, I will fully and faithfully apply Supreme Court precedent, including *Roe v. Wade.*

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

Yes. *Obergefell* is binding Supreme Court precedent. If confirmed as a United States District Judge, I will fully and faithfully apply Supreme Court precedent, including *Obergefell*.

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

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

Heller is binding Supreme Court precedent, and if confirmed as a United States District Judge, I will fully and faithfully apply Supreme Court precedent, including *Heller*. As a district court nominee, it would not be appropriate for me to opine on the correctness of a Supreme Court decision, including its majority or dissenting opinions.

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

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

c. Did *Heller*, in finding an individual right to bear arms, depart from decades

of Supreme Court precedent?

The Supreme Court in *Heller* stated that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." *Id*. at 625. As a nominee to a lower court, I am bound by the Supreme Court's own reading of its precedent.

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

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

   In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court noted that it had "recognized that the First Amendment protection extends to corporations[,]" *id*. at 342, and then held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at *365*. As a district court nominee, it would not be appropriate for me to opine on whether a corporation's First Amendment rights are equal to individuals' First Amendment rights. If confirmed, I will fully and faithfully apply Supreme Court precedent regarding the First Amendment.

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

   First Amendment protection of individual speech is an important topic, and one that the Supreme Court and Third Circuit have written about in numerous judicial opinions. As a judicial nominee, it would not be appropriate for me to opine on the relationship between individual and corporate speech. If confirmed, I will fully and faithfully apply Supreme Court and Third Circuit precedent if called upon to analyze this issue.

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

   In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that a closely held for-profit corporation has rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., but the Court also noted certain limits to its holding. For example, the Supreme Court did not determine in *Hobby Lobby* whether the Free Exercise Clause of the First Amendment applies to other types of corporations. Because there may be litigation implicating this unanswered question, as a federal judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting further.

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

   The Supreme Court has recognized numerous times and in a variety of circumstances that the Fourteenth Amendment to the Constitution guarantees equal protection of the law. In addition, the Court has reaffirmed in a wide array of cases that the First Amendment to the Constitution protects the free exercise of religion. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (quoting *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2607 ("[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths")). The Supreme Court has also recognized that actors in the economy and in society may not deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. *See Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 n.5 (1968) (*per curiam*); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572 (1995). Because the intersection of these important constitutional liberties may be the subject of pending or impending litigation, as a federal judicial nominee, Canon 3(A)(6) of the Code of Conduct for United States Judges, which applies to judicial nominees, prohibits me from commenting further.

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

   The Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) that state laws prohibiting interracial marriage violate the Equal Protection Clause. Please also see my response to Question 8.

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

    The Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) that state laws prohibiting interracial marriage violate the Equal Protection Clause. In addition, federal civil rights statutes, including but not limited to 42 U.S.C. § 1981 prohibit discrimination on the basis of race in non-governmental, commercial transactions. Please also see my response to Question 8.

11. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

    No.

12. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the

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

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

I do not recall being asked any questions about my views on administrative law.

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

No.

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

During my twenty years practicing law, including a number of years defending and enforcing federal civil statutes as an Assistant United States Attorney, various aspects of administrative law have been relevant to cases that I handled. Nevertheless, I do not hold any specific "views on administrative law." If confirmed as a United States District Judge, I will faithfully apply all Supreme Court and Third Circuit precedent in the area of administrative law, including *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny.

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

I am aware that there are scientists who believe that human activity contributes to or causes climate change. If confirmed as a United States District Judge, I would faithfully apply Supreme Court and Third Circuit precedent in any case involving climate change. Beyond that, it would not be appropriate for me as a judicial nominee to offer my personal views on this topic.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. The Court has also made clear that the inquiry must begin with the text, stating "time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."

Arlington Central School Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 296 (2006) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent relating to the consideration of legislative history to construe a statute.

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

No.

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

I received these questions on Wednesday, June 24, 2020. I read the questions, conducted some limited research, and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making my final revisions on Monday, June 29, 2020. Each answer herein is my own.

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to the United States District Court for the
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QUESTIONS FROM SENATOR WHITEHOUSE

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

   If confirmed as a United States District Judge, I will abide by the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States. If the draft of Advisory Opinion #117 is ultimately published by the Judicial Conference's Committee on Codes of Conduct, I will consider Advisory Opinion #117 along with any subsequent advisory opinions from the Committee on Codes of Conduct Committee relating to judges' involvement in law-related organizations.

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?

      As requested, I read the story and listened to the recording.

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

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

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

I have not studied this issue. Furthermore, this issue concerns a political matter relating to the process of nominating and confirming judges. Therefore, I cannot comment further pursuant to Canon 5 of the Code of Conduct of United States Judges.

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

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

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

Apart from reading the Washington Post story and listening to the recording cited in this question, I am not familiar with Mr. Leo's beliefs. If confirmed, I will decide each case fairly and impartially, in accordance with Supreme Court and Third Circuit precedent, and will faithfully uphold the judicial oath of office set forth in 28 U.S.C. § 453.

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

Yes, I generally agree that this metaphor is appropriate, because the role of a district judge is to neutrally apply the law made by Congress or established by Supreme Court and circuit precedent, to ensure a fair and impartial outcome in each case.

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

A judge should not consider the practical consequences of a particular ruling unless directed to do so by controlling authority. For example, if a judge is considering a request for a preliminary injunction under Federal Rule of Civil Procedure 65, the judge should consider certain practical consequences of the decision, such as whether the plaintiff is likely to suffer irreparable harm if the injunction is not granted.

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?

The Supreme Court has held that the standard for determining whether a "genuine issue" exists for trial is an objective one. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (explaining that "the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard" and that "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

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?

        Empathy is a wonderful quality, but it does not alter a judge's responsibility to follow the law when deciding cases. However, a judge can show empathy in circumstances where the law gives the judge discretion, such as in setting court deadlines in order to avoid unduly burdening the parties, counsel, witnesses, victims, or jurors.

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

        Each judge brings his or her own life experience to the bench, and a judge may draw upon personal experience to, for example, treat each person who appears before the court with dignity and respect. However, a judge's personal preferences and viewpoints have no place in the judge's decision-making. A judge's decisions must be based on the law alone.

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

    No.

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

    A district court judge is required to faithfully apply all binding Supreme Court precedent, as well as all binding precedent from the relevant Court of Appeals. There may be rare instances in which a district court may mention a gap in in the law or circuit conflicts on an issue before the court, while adhering to its understanding of controlling precedent, in order to facilitate subsequent Supreme Court or Court of Appeals review. *See e.g.*, *Eberhart v. U.S.*, 546 U.S. 12, 19-20 (2005).

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

    A judge's personal preferences and viewpoints have no place in the judge's decision-making. A judge's decisions must be based on the law alone, and the judge's opinions should reflect the obligation to make fair and impartial decisions, in accordance with the law.

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 jury plays a critical role in our constitutional system in both criminal and civil cases. Defendants in criminal cases have a fundamental right to a trial by jury, guaranteed by the Sixth Amendment to the Constitution, and incorporated against the states through the Fourteenth Amendment. *See Williams v. Florida*, 399 U.S. 78 (1970). Litigants in civil cases in the federal system have a right to trial by jury guaranteed by the Seventh Amendment.

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

I have not encountered this issue in my practice. If confirmed, I would faithfully adhere to Supreme Court and Third Circuit precedent in resolving questions involving the relationship between the Seventh Amendment and the enforceability of mandatory pre-dispute arbitration clauses.

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).

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

This issue often arises in the context of legislation enacted pursuant to an enforcement clause of a constitutional amendment, and the Supreme Court has generated a body of precedent with respect to several pieces of individual-rights legislation. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (Americans with Disabilities Act); *Nev. Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003) (Family and Medical Leave Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act); and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Voting Rights Act). If confirmed, I will faithfully apply Supreme Court and Third Circuit precedent, including precedent in this area.

11. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.
    a. Have you read Advisory Opinion #116?

    Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

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

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

Please see my response to Question 11(b)(i).

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

The Supreme Court has stated that when interpreting the meaning of a statutory provision, "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp. v. LTV Corp*., 496 U.S. 633, 650 (1997) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). According to the Supreme Court, subsequent legislative history "is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Id.* If confirmed, I will fully and faithfully apply Supreme Court and Third Circuit precedent.

Questions for the Record for Christy Criswell Wiegand
From Senator Mazie K. Hirono

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

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

   No, I have not.

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

   No, I have not.

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

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

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

   b. Have you ever taken such training?

   I have not received such training, but would welcome it.

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

   I look forward to reviewing the training that is available through the Federal Judicial Center and the Administrative Office of United States Courts, including what training is available regarding implicit bias. If confirmed, I will seek training from those sources, and I commit to receiving training on implicit bias and other topics that are recommended by the Federal Judicial Center and the Administrative Office of the United States Courts.

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QUESTIONS FROM SENATOR BOOKER

1. In your Senate Judiciary Committee Questionnaire, you noted that you have been a member of the Duquesne Club since 2004.[1] According to news reports, the Duquesne Club did not admit women and African Americans until 1980.[2]

    a. Were you aware that the club had a history of precluding women and African Americans from being members?

    I joined the Duquesne Club in 2004, when I was approximately twenty-nine years old. The Duquesne Club is an historic social club in downtown Pittsburgh that offers social, dining, fitness, and hotel facilities and services. At the time I joined, I was generally aware that the Duquesne Club had been admitting women and African American members for approximately twenty-five years prior to my joining. I would not have joined the Duquesne Club had it precluded women, such as myself, or African Americans from joining. During the time I have been a member, I am aware that the Duquesne Club has a diverse membership including, but certainly not limited to, female members and African American members.

    b. As a member of the Duquesne Club, what efforts have you undertaken to promote diversity among its membership?

    Although I joined the Duquesne Club in 2004 and remain a member, I am not a particularly active member. I use the Duquesne Club infrequently, approximately several times per year, for meals. During the time of my membership, I have not been involved with any committees or with the recruiting of new members. However, I am aware that during the time of my membership, the Duquesne Club has had, and continues to welcome, a diverse membership, including, but certainly not limited to, female members, such as myself, and African American members.

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

    I generally do not tend to label myself because the term "originalist" can mean different things to different people. If confirmed as a United States District Judge, my duty will be to faithfully apply Supreme Court and Third Circuit precedent. The Supreme Court has analyzed constitutional provisions by looking to the original public meaning of those provisions in appropriate cases. For example, in *District of*

[1] SJQ at p. 5.
[2] Joyce Gannon, *Duquesne Club's Longtime Manager Stepping Down*, PITTSBURGH POST-GAZETTE (May 24, 2002), http://old.post-gazette.com/businessnews/20020524rex0524bnp5.asp.

Columbia v. Heller, 554 U.S. 570 (2008), Justice Scalia's majority opinion and Justice Stevens' dissenting opinion were based on their respective understandings of the original public meaning of the Second Amendment.

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

   I generally do not tend to label myself because the term "textualist" can mean different things to different people. The Supreme Court has held 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, my duty will be to faithfully apply Supreme Court and Third Circuit precedent to determine the meaning of any statutory term.

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

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

      If confirmed, my duty will be to faithfully apply Supreme Court and Third Circuit precedent to determine the meaning of a statute. I recognize that the Supreme Court has held that when a statute is ambiguous, it is permissible for a court to consider legislative history.

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

      If confirmed, I will carefully consider the arguments presented by the parties, including regarding legislative history, and my duty will be to apply Supreme Court and Third Circuit precedent to the facts and issues presented in each case.

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

   Yes, I believe that judicial restraint is an important value for both appellate and district judges to possess. In my view, a judge exercises judicial restraint by following the law and setting aside personal preferences in making decisions.

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

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

The Supreme Court's decision in *Heller* is binding precedent for all lower courts. If confirmed as a United States District Judge, I will faithfully apply *Heller* and all Supreme Court and Third Circuit precedent. To the extent that this question calls for my views on the appropriateness of the principles applied in *Heller*, it is generally not appropriate for me to opine on the correctness of Supreme Court decisions as a judicial nominee.

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

The Supreme Court's decision in *Citizens United* is binding precedent for all lower courts. If confirmed as a United States District Judge, I will faithfully apply *Citizens United* and all Supreme Court and Third Circuit precedent. To the extent that this question calls for my views on the correctness of *Citizens United*, it is generally not appropriate for me to opine on the correctness of Supreme Court decisions as a judicial nominee.

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

The Supreme Court's decision in *Shelby County* is binding precedent for all lower courts. If confirmed as a United States District Judge, I will faithfully apply *Shelby County* and all Supreme Court and Third Circuit precedent. To the extent that this question calls for my views on the correctness of *Shelby County*, it is generally not appropriate for me to opine on the correctness of Supreme Court decisions as a judicial nominee.

6. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[6] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[7]

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, I believe it would be inappropriate to further respond on my personal view of the issue, pursuant to Canon 3(A)(6) of the Code of Conduct for United

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

States Judges, which states that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges. The commentary to Canon 1 of the Code of Conduct for United States Judges states that the Code of Conduct applies to nominees for judicial office.

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

Please see my response to Question 6(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 6(a).

7. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[8] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[9] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[10] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[11]

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

I have not studied this issue, but I am generally aware of the concept of implicit bias, including implicit racial bias. I acknowledge that participants in the criminal justice system may have acted with implicit bias on the basis of race. There should be no place for racial bias in our criminal justice system. It is the duty of a judge to treat every litigant equally and with dignity and respect. As an Assistant United States Attorney, I have worked to ensure that there was not bias in the cases that I have handled, and if confirmed, I will strive to be conscious of the potential for implicit racial bias and exclude it from the courtroom.

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

I have not studied this issue, but generally yes. As an Assistant United States Attorney, I have worked to ensure that there was not bias in the cases that I have handled, and if confirmed, I will treat every litigant equally and with dignity and respect.

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[8] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[9] *Id.*
[10] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[11] *Id.*

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

I have not studied this issue.

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

I have not studied this report and have no basis to opine on why this may be occurring. I understand that this is an important topic, and I would welcome additional information from the Sentencing Commission to deepen my understanding.

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 am not familiar with this study and have no basis to opine on why this may be occurring. I recognize that this is an important topic, and I would welcome additional information.

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

Federal appellate and district judges should be mindful of the potential for implicit bias so that they can ensure, consistent with the judicial oath, that they are administering justice without respect to persons. As an Assistant United States Attorney for sixteen years, I have strived to ensure the fair and impartial administration of justice for all Americans. If confirmed, I will treat each person who comes into my courtroom equally, and with dignity and respect.

8. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[14] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[15]

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

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

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

[15] *Id.*

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

I have not studied this issue or reached any conclusion about the link between incarceration and crime rates.

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

I have not studied this issue or reached any conclusion about the link between incarceration and crime rates.

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

Yes.

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

Yes.

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

Yes, as I testified in my June 17, 2020 Senate Judiciary Committee hearing, *Brown v. Board of Education* was correctly decided. In its landmark decision in *Brown*, the Supreme Court overturned the terrible and false doctrine of separate but equal.

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

No, *Plessy v. Ferguson* was not correctly decided. In *Brown v. Board of Education*, the Supreme Court unanimously overturned *Plessy*.

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

My responses are my own.

14. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute

[16] 347 U.S. 483 (1954).
[17] 163 U.S. 537 (1896).

conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[18] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

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

15. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[19] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court 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." If confirmed, I will faithfully adhere to Supreme Court and Third Circuit precedent, including *Zadvydas*.

[18] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[19] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted June 24, 2020
For the Nomination of:

Christy Criswell Wiegand, to be United States District Judge for the Western District of Pennsylvania

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

    a. **What is the process you would follow before you sentenced a defendant?**

    I understand from participating in numerous sentencing hearings in federal court as an Assistant United States Attorney that imposing sentence is one of the most important and serious duties of a United States District Judge. If confirmed, I will make an individualized assessment for each defendant, in order to craft a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a). To do so, I will carefully review the Presentence Investigation Report, the recommendation of the United States Probation Office, the sentencing memoranda and evidence submitted by the parties, letters submitted on behalf of the defendant, any victim impact statements, and any allocution of the defendant. I will consider the arguments of counsel, including by acknowledging and responding to "any properly presented sentencing argument which has colorable legal merit and a factual basis." *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (en banc). In applying the advisory Sentencing Guidelines, I will follow the three steps set forth in *Gall v. United States*, 552 U.S. 38 (2007). First, I will calculate the advisory guideline range; second, I will formally rule on any departure or variance motions and state how those rulings affect the guideline range; and finally, I will consider the statutory factors in 18 U.S.C. § 3553(a), in order to arrive at a fair and just sentence for each defendant.

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

    If confirmed, I will follow the steps outlined in my answer to Question 1(a). I will also bring my experience from participating in numerous sentencing hearings in federal court in the Western District of Pennsylvania. In addition, I will review pertinent guidance from the U.S. Sentencing Commission to ensure a fair and proportional sentence for each defendant.

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

    The Sentencing Guidelines are advisory, but must be carefully considered in each case. A "departure" from the Sentencing Guidelines is distinct from a "variance"

based upon the factors set forth in 18 U.S.C. § 3553(a). The Guidelines set forth potential grounds for departure, including, for example, for a defendant's substantial assistance to authorities. Generally, a departure from the Sentencing Guidelines is appropriate in an "atypical case" where particular facts or circumstances place the case outside the "heartland" of the types of cases that informed the Guidelines. *See* U.S.S.G. § 5K2.0(a)(2).

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

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

   Congress has established mandatory minimum sentences for certain federal crimes. If confirmed, I will faithfully adhere to all applicable statutory mandatory minimum sentences and Supreme Court and Third Circuit precedent in imposing a sentence. As a judicial nominee, I must respectfully refrain from further responding to this question, which appears to ask for my personal views on a matter of policy reserved for Congress.

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

   Please see my response to Question 1(d)(i).

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

   Please see my response to Question 1(d)(i).

   iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf.
[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html.

If confirmed I would evaluate each case individually, and would carefully considered the law and my ethical obligations if confronted with the circumstances in this question. As a judicial nominee, I do not believe it is appropriate for me to commit to taking any specific course of action in rendering a decision or imposing a sentence, other than to apply the law as set forth by Congress and to adhere to Supreme Court and Third Circuit precedent, and draft opinions on a case-by-case basis.

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

   Generally, charging decisions are entrusted to the executive branch. Please also see my response to Question 1(d)(iv)(1).

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

   Please also see my responses to Questions 1(d)(iv)(1) and (2).

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

   If confirmed, I will consider the full range of sentencing options permitted by statute and consistent with the Sentencing Guidelines, including alternatives to incarceration in appropriate circumstances.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

      Yes.

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

      I am aware of statistics, including from the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men, and that sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I commit to treating each person who comes before me equally, and with dignity and respect.

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

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

    Yes.

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

    If confirmed, I plan to make hiring decisions on a case-by-case basis. In doing so, I will seek out opportunities to hire and promote qualified female and minority candidates.

Senator Josh Hawley
Questions for the Record

Christy Criswell Wiegand
Nominee, U.S. District Court for the Western District of Pennsylvania

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

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

      In *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that the Environmental Protection Agency's definition of the ambiguous statutory term "source" was a permissible construction of the Clean Air Act. *Id.* at 866. In its opinion, the Court set forth a two-step framework for reviewing an agency's interpretation of a statute that it is charged with administering. First, a court must examine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has so spoken, then the court is required to enforce the "unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is silent or ambiguous with respect to the specific issue, then the court is required to defer to the agency's permissible construction of the statute. *Id.* at 843.

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

      I would first determine whether there is controlling Supreme Court or Third Circuit precedent regarding the particular statutory provision at issue. I would then examine the text of the statute. If the words of the provision are plain and unambiguous, my analysis would be complete. 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 the statute's language is not plain on its face, I would consider the structure of the statute, as well as similar statutory language, and employ applicable canons of construction. If, after using all of the tools of statutory construction, it is not possible to determine the meaning of the statute, then the statute is ambiguous. In all cases, I would ensure that my decision comports with Supreme Court and Third Circuit precedent.

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

It is permissible for a court to consider the agency's reasoning at step two of the *Chevron* analysis. It is the duty of the court, however, to say what the law is.

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

The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court has held that scope of the Free Exercise Clause is broad and that its protections are triggered "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). If confirmed as a United States District Judge, I will fully and faithfully apply Supreme Court and Third Circuit precedent, including in the area of the First Amendment's protection of free exercise of religion.

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

The Supreme Court has made clear that the First Amendment right to free exercise of religion includes, but is not limited to, freedom of worship and the right to hold personal religious beliefs. The "exercise of religion" also includes the right to religious observance and practice, including the freedom to undertake (or abstain from taking) actions in accordance with sincerely-held religious beliefs. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972) (holding that compulsory school attendance until age 16 violated an Amish family's free exercise of religion). The Supreme Court has also held that free exercise of religion includes, for example, the right of a religious organization to compete for a publicly available benefit without the organization having to disavow its religious character. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that a law burdening religious practice that is not neutral or not of general application is subject to strict scrutiny, which means that it must be narrowly tailored to advance a compelling government interest. *Id.* at 531-32.

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

Under the Supreme Court's jurisprudence, protection for free exercise of religion attaches to religious beliefs that are sincerely held. The Supreme Court has repeatedly affirmed that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). They must simply be "sincerely held." *Frazee v. Illinois Dept. of Emp't Sec.*, 489 U.S. 829, 834 (1989). The Court's "narrow function. . . is to determine" whether the party's asserted religious belief reflects "an honest conviction." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 716 (1981).

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

Through the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, Congress has provided additional accommodations to the religious needs of Americans beyond those required by the First Amendment to the federal Constitution. RFRA prohibits the federal government from substantially burdening free exercise of religion unless it shows that doing so furthers a compelling government interest and is the least restrictive means of furthering that interest. With respect to the relationship between RFRA and other federal laws, such as those in areas like employment and education, RFRA, by its terms, protects against substantial burdens on religion that arise from generally applicable laws that do not exhibit animus or discriminatory intent. *Id.* at 2000bb-1(a). For example, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that RFRA applies to closely held for-profit companies, and that such companies may receive a religious accommodation from the Affordable Care Act's mandate for employers to provide female employees with access to contraception, based on the company's sincerely held religious beliefs.

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

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment to the Constitution protects an individual's right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, including self-defense within the home.

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

If confirmed as United States District Judge and presented with a request for injunctive relief, I would look to Federal Rule of Civil Procedure 65 and Supreme Court and Third Circuit precedent to resolve the matter. Among the factors courts examine when considering requests for injunctive relief are the moving party's likelihood of success on the merits, and whether irreparable harm would occur if injunctive relief is not granted. Under Article III of the Constitution, judicial power is limited to cases and controversies. Injunctive relief must be narrowly tailored to provide complete relief to the specific parties before the court. In January 2020, Justice Gorsuch observed that "[u]niversal injunctions have little basis in traditional equitable practice" and that "[t]heir use has proliferated only in very recent years." *Dept. of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, N., concurring) (citations omitted). Whether it is ever appropriate to issue a nationwide injunction, and if so, under what circumstances, are current subjects of litigation, on which the Supreme Court has not issued a decision. As a judicial nominee, I must therefore respectfully refrain from commenting further on this topic.

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

   While I am not familiar with the origin of the statement cited in this question, I generally agree with it as the Supreme Court has reaffirmed multiple times, in various contexts, that when a court is interpreting a statutory term, "words generally should be interpreted as taking their ordinary. . . meaning . . . at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (internal quotations omitted) (unanimous Supreme Court decision interpreting the term "contracts of employment" in the Federal Arbitration Act). In the context of the False Claims Act, the Supreme Court has noted that "[b]ecause the statute does not define 'report,' we look first to the word's ordinary meaning," and cited to dictionary meanings of the word at the time of the statute's enactment. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407-08 (2011). Similarly, in interpreting the term "confidential" under the Freedom of Information Act, the Supreme Court stated ". . . as usual, we ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted FOIA in 1966." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent, including in the area of statutory interpretation.

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

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

In *Lochner v. New York*, 198 U.S. 45 (1905), which has since been overruled, the Supreme Court struck down a New York law that set maximum hours for bakery employees. Using a Fourteenth Amendment substantive due process analysis, the Court held that "[t]here is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law. . . ." *Id.* at 58. I believe Justice Holmes' statement was meant to convey his view that the justices who joined the majority opinion in *Lochner* were inserting their personal beliefs and policy preferences into their interpretation of the statute.

I agree with the implication in Justice Holmes' statement that a judge must apply the Constitution and the law as written and not insert his or her own personal beliefs or policy preferences into the decision-making process. The proper role of a judge is to apply the law, as it is written, fairly and impartially, to the facts of each case or controversy before the court. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Third Circuit precedent, and decide each case based on the law, regardless of my personal views.

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

The Supreme Court has held that *Lochner* was not correctly decided. As a general matter, it would not be appropriate for me as a lower court judicial nominee to express my views on whether a particular Supreme Court decision is correctly decided. If confirmed as a United States District Judge, I will faithfully apply Supreme Court and Third Circuit precedent, and decide each case based on the law.