Nomination of Stephen Alexander Vaden to the United States Court of International Trade
Questions for the Record
Submitted November 20, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. The Court of International Trade is a court of limited subject matter jurisdiction, governed largely by the Customs Courts Act of 1980. Its jurisdiction includes the "authority to decide any civil action against the United States, its officers, or its agencies arising out of any law pertaining to international trade," including tariffs and imports. (Pub. Law. No. 96-417 (96th Cong. 1980))

   a. **Have you worked on trade matters (excluding policy matters) during your legal career? If so, what were they?**

      In my current role as General Counsel of the Department of Agriculture, I have advised the Secretary of Agriculture and other senior Department officials on, among other trade-related items, (1) the importation of lemons from Argentina into the United States, (2) the sugar suspension negotiations with Mexico, (3) the efforts of American potato producers to gain access to the Mexican domestic market, (4) the legal effect of a withdrawal from NAFTA, (5) how the Commodity Credit Corporation can make trade mitigation payments to American producers without running afoul of the limits on direct support to farmers administered by the World Trade Organization, and (6) the advisability of the United States' filing a counterstatement with the World Trade Organization challenging India's calculation of its own domestic support payments to farmers.

   b. Are you admitted to practice before the Court of International Trade? If so, please specify whether you sought admission to practice before the Court of International Trade before or after you began discussions with the Trump Administration about filling a vacancy on that court.

      I am not admitted to practice before the Court of International Trade.

   c. Have you ever litigated any matters before the Court of International Trade? If so, please describe the matters.

      No.

2. Some judges on the Court of International Trade sit by designation on the circuit courts of appeals.

a. If confirmed, do you intend to try to sit by designation on courts of appeals? If so, how often?

If the Chief Justice of the United States assigned me to sit by designation, I would follow that order. *See* 28 U.S.C. § 293.

b. Was the possibility of sitting by designation brought up during your discussions with the Trump Administration about filling a vacancy on the Court of International Trade? If so, what were those discussions?

Although my primary interest in being nominated is serving on the court itself, I am aware of the possibility of sitting by designation; and that possibility has come up during the nomination process.

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 lower courts to depart from Supreme Court precedent. *See*, *e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. 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?

It may be appropriate, at times, for a circuit court judge to identify areas in which Supreme Court cases appear to be inconsistent or in conflict. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting, for a unanimous Court, that a circuit judge had aptly described an earlier case's inconsistencies with later jurisprudence). However, the Supreme Court has held, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Sherson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). As a trial court judge, I would follow all Supreme Court precedents.

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

Within the Federal Circuit, precedent governs future panels unless it has been superseded by contrary precedents of the Supreme Court or of the *en banc* Federal Circuit. *En banc* consideration to overturn a prior precedent is justified only in exceptional circumstances, such as when panel decisions conflict with one another, there is confusion or lack of clarity on the issue, or a panel decision has become unworkable. *See* Fed. R. App. P. 35.

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

The Supreme Court has the authority to overrule its own decisions. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). As a trial court nominee, it is not my place to comment on how the Supreme Court should decide its cases or apply the principle of *stare decisis*. I am aware that the Supreme Court generally is reluctant to overrule its prior decisions absent "special justification." *See Gamble v. U.S.*, 139 S. Ct. 1960, 1969 (2019); *see also Rodríguez de Quijas*, 490 U.S. at 484. My only role as a trial court judge would be to follow all Supreme Court precedents.

4. While you were in private practice, you filed several amicus briefs defending state laws that restricted voters' access to the ballot. Specifically, you defended restrictive voting laws in North Carolina, Ohio, and Virginia.

a. Have you ever worked on a matter in which you argued in favor of expanding voting access? If so, please note the matter(s) and the party or parties that you represented.

My work for the Laborers' International Union of North America protected the rights of union members to elect their own leadership free from the influence of organized crime. *Scopo v. LIUNA*, No. 11-CV-3991 CBA, 2013 WL 837293 (E.D.N.Y. Mar. 6, 2013) and *Rowan v. LIUNA*, No. 10-CV-3855-DRH-ETB, 2012 WL 3203046 (E.D.N.Y. Aug. 3, 2012) are two such representative cases where I defended the integrity of the Union's elections by defending the Union's decision to expel members with organized crime ties. Both of those cases are listed in response to question 17 of the public Senate Judicial Questionnaire.

b. For all voting-related litigation in which you have represented a client, please list that litigation and indicate the following:

i. Was the representation done on a pro bono basis?

No.

ii. If so, how did you come to represent that client pro bono?

Please see my answer to question 4(b)(i).

5. During your confirmation process to become General Counsel of the United States Department of Agriculture (USDA), several Senators raised concerns about your views on voting rights. In response to a Question for the Record asking if you believe voter fraud is a problem, you stated: "I believe that we must always be diligent against perceived or actual voter fraud to protect this precious right." (Questions for the Record

for Stephen Vaden from Senator Van Hollen, Senate Agriculture Committee (Nov. 9, 2017))

a. What specific evidence can you provide showing widespread voter fraud in the United States?

As a judicial nominee, it would not be appropriate for me to comment on issues that could come before the courts. *See* Canon 3, Code of Conduct for United States Judges.

b. What evidence do you have that restrictive measures, such as voter ID requirements, are effective at preventing voter fraud?

I am aware that certain state legislatures have passed voter ID measure with the goal of preventing voter fraud. Beyond this, as a judicial nominee, it would not be appropriate for me to comment on issues that could come before the courts or that involve political questions. *See* Canon 3(A)(6), Cannon 5, Code of Conduct for United States Judges.

a. **Is it lawful for state legislatures to limit voters' access to the ballot based only on "perceived" voter fraud – that is, without any evidence that widespread voter fraud actually exists?**

This is a matter which has been in litigation before the federal and state courts. I may not, consistent with the Code of Conduct for United States Judges, comment on it. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

6. You have reportedly committed to encouraging the Trump Administration and the state of North Dakota to reach a settlement agreement in *North Dakota v. United States*. The case concerns access issues – including North Dakota's authority to build roads – in national grasslands maintained by the Forest Service. According to press reports, you made this commitment to at least one Member of Congress who will vote on your confirmation to the Court of International Trade. (Press Release, *Hoeven: Senate Confirms William Barr as U.S. Attorney General* (Feb. 14, 2019))

North Dakota v. United States is still pending before the U.S. District Court for the District of North Dakota. (Case No. 1:12-cv-00125 (D. N.D. 2019))

a. Please detail your involvement in *North Dakota v. United States*.

The USDA Office of General Counsel, under my leadership, has provided in-house legal services for the *North Dakota v. United States* matter, including legal advice to the Department and review of documents and briefs filed by the Department of Justice.

b. Have you advised on, worked on, or contributed to this case in any way since your nomination to the Court of International Trade?

Since my nomination in October of 2019, the USDA Office of General Counsel, under my leadership, has been briefed on this lawsuit and kept USDA officials fully informed. Additionally, I have worked to ensure that the Department of Justice receives litigation support from USDA.

c. As General Counsel of USDA, have you recused yourself from working on *North Dakota v. United States* while your nomination to the Court of International Trade is pending? If not, why not?

No, I have not. The USDA handles matters, including legal matters, that affect every State of the union on a daily basis. There is no basis under the law for my recusal in my current position. If this matter were to come before me as a judge, I would be required to recuse myself under the standard established in 28 U.S.C. § 455.

d. If you have not already recused yourself, will you commit to immediately recusing yourself from this case and related matters?

See my response to question 6(c).

7. According to the Partnership for Public Services' Best Places to Work Report, the employee satisfaction score for USDA's Office of the General Counsel dropped by 18.2 points between 2017 and 2018. This was one of the largest score changes for the time period, and your office's overall score placed it at number 405 out of the 415 agency offices that were ranked. (Partnership for Public Service, "Best Places to Work Agency Rankings" (2017-2018))

Please explain why you believe employee satisfaction has dropped so drastically during your tenure as General Counsel.

I made the decision to change employees' work hours to be present and available to respond to client inquiries until at least 4 pm. I also moved to require attorneys to adhere to the Department's agency-wide rule limiting telework to no more than one day per week. Previously attorneys were able to leave each day at 2:30 pm and not respond to messages or phone calls until the next day. I believe it is important that the Department's attorneys follow the same rules applicable to all other Departmental employees.

8. During your confirmation hearing, you stated that you agree with the standard laid out by Greg Katsas, who is now a judge on the D.C. Circuit, regarding issues he worked on while in the Executive Branch. Katsas stated that the governing statute required him to recuse himself from "any case in which, while in the Executive Branch, [he] had participated as a counsel or advisor or expressed an opinion on the merits." You also stated: "If a matter came before me in which I had directly participated as Agency counsel, I would absolutely be required to recuse myself."

I also asked you to detail your work on tariffs as General Counsel at USDA and as a member of the Board of Directors of the Commodity Credit Corporation. You affirmed that you have advised Secretary Perdue and other senior officials at the Department on implementation of and mitigation of the effects of tariffs. Specifically, you advised the Department on its ability to mitigate the effects of tariffs "in a manner that will not run afoul of our obligations under the World Trade Organization and other trade treaties of which we are a part."

If confirmed, will you commit to recusing yourself from issues involving the Trump Administration's implementation of tariffs and efforts to mitigate the effects of tariffs?

If a question were to come before me on a matter on which I had directly worked as an attorney, I would recue myself from that case. Recusal obligations for the federal judiciary are governed by 28 U.S.C. § 455.

9. In January 2019, Secretary Perdue appointed three individuals—all of whom had been nominated to Senate-confirmed positions—to senior leadership positions at USDA. (Press Release, "Perdue Selects Three Senior Leaders at USDA" (Jan. 28, 2019)) In July 2019, Secretary Perdue appointed an additional individual who had been nominated to a Senate-confirmed position to a senior leadership position at USDA. (Press Release, "Secretary Perdue Swears in USDA's Principal Deputy Chief Financial Officer Scott Soles" (Aug. 13, 2019)) All of these individuals' nominations are still pending before the Senate.

   a. **As USDA General Counsel, did you advise on or engage in any issues related to Secretary Perdue's decision to hire these individuals while their nominations are pending in the Senate?**

      The Office of General Counsel provided legal advice regarding the requirements of the Vacancies Reform Act.

   b. **If cabinet secretaries can simply appoint individuals to serve as the deputy to the position for which they have been nominated, what would stop the Executive branch from circumventing the Congressional advise and consent process by empowering non-Senate confirmed advisers to functionally head federal departments and agencies?**

      This is a matter which could come before the federal courts. Consequently, I may not, consistent with the Code of Conduct for United States Judges, comment on it. See Canon 3(A)(6), Code of Conduct for United States Judges.

10. Question 15(b) of the Senate Judiciary Questionnaire asks nominees to list "services rendered, whether compensated or not, to any political party or election committee." In response to question 15(b) on your Senate Judiciary Questionnaire, you wrote, "I have

never held a position or played a role in a political campaign." (Stephen Vaden Senate Judiciary Questionnaire (Sep. 25, 2019))

However, in your Public Financial Disclosure Report from 2017, you listed several election committees and at least one political party for which you provided "legal services." (Stephen Vaden Public Financial Disclosure Report, Senate Committee on Agriculture, Nutrition and Forestry (July 14, 2017))

Please list all instances in which you have provided services, including compensated or uncompensated legal services, to any political party or election committee.

The referenced Public Financial Disclosure Report filed as part of my nomination process for the role of General Counsel of the Department of Agriculture lists those matters on which the law firms for which I worked were compensated for legal services provided. In each case, my role was that of an attorney providing legal advice to a client.

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

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

    Roe v. Wade is binding Supreme Court precedent that all lower courts are bound to faithfully apply. Trial courts are bound to apply all Supreme Court precedents regardless of whether one refers to them as "super-stare decisis" or "super-precedent."

    b. Is it settled law?

    Please see my response to 11(a).

12. 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?**

    Obergefell is binding Supreme Court precedent that I will faithfully apply if confirmed.

13. 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 trial court nominee, it is inappropriate for me to comment about whether I personally agree or disagree with a particular majority decision or dissent from the Supreme Court, especially in areas in which there is pending or impending litigation. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

The Supreme Court's decision in *Heller* explained that "nothing in this opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008). Because the permissible scope of state firearm regulation remains subject to litigation, as a judicial nominee, it would not be appropriate for me to comment further. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

I am aware that this was a question debated between the majority and dissenting opinions in *Heller*. As a judicial nominee, it would not be appropriate for me to express an opinion on the *Heller* decision or the Supreme Court's reasoning in that case. If confirmed, I am bound to apply *Heller*'s interpretation of the Supreme Court's prior cases.

14. 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. Fed. Elections Comm'n*, 558 U.S. 310, 342 (2010). If confirmed as a trial court judge, I would faithfully apply *Citizens United* and all other precedents of the Supreme Court. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

Please see my response to question 14(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.*, 573 U.S. 682 (2014), the Supreme Court held that certain corporations could assert claims under the Religious Freedom Restoration Act of 1993 (RFRA). The Court also held that its "decision on that statutory question makes it unnecessary to reach the First Amendment claim" that had also been raised in the case. *Id.* at 736. If confirmed, I would faithfully apply *Hobby Lobby* and all other precedents of the Supreme Court. Moreover, it would be inappropriate for me to opine about legal issues currently the subject of pending litigation in the court system. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

The Supreme Court has made clear that the Constitution contains strong guarantees of equal protection in a variety of contexts. The Court has also made clear that the Constitution strongly protects the free exercise of religion. Both of these are well-established and fundamental guarantees. Because the intersection of these two guarantees is the subject of pending and impending litigation, it would not be appropriate for me to opine on issues that might come before me if I am confirmed. *See* Canon 3A(6) of the Code of Conduct for United States Judges. If confirmed, I am committed to faithfully enforcing every provision of the Constitution, including the Equal Protection and Free Exercise Clauses, consistent with the Supreme Court and other applicable precedents.

16. 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 ruled that state laws prohibiting interracial marriage violate Equal Protection in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Please see my response to Question 15.

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

Please see my response to Questions 15 and 16.

18. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2005. Additionally, you indicated that you have been a member of the Administrative Law and Regulation Practice Group Executive Committee since 2015. 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 was not involved in the drafting of that statement, and I would not presume to speak for the Federalist Society.

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

Please see my response to question 18(a).

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

Please see my response to question 18(a).

d. 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.

I have had several members of the Federalist Society congratulate me and express support for my nomination in my personal interactions with them.

e. What did your role as member of the Administrative Law and Regulation Practice Group Executive Committee entail?

Committee members are expected to help put together teleconference calls and write articles about current legal topics of interest in the area of administrative law. The articles I wrote and teleconferences in which I participated have been provided to the Committee in response to question 12 of the public Senate Judicial Questionnaire.

19. 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 difference 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 was not asked to provide my views on administrative law questions.

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?

I have written articles in publications sponsored by the Federalist Society and given remarks at events sponsored by the Federalist Society, the American Agricultural Law Association, the Federal Administrative Law Judges Conference, and other organizations on administrative law topics. Otherwise, I have not been asked about my views about administrative law by these organizations.

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

As a nominee to a trial court, my only role would be to apply binding Supreme Court precedents, such as *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), and *Chevron v. National Resources Defense Council*, 468 U.S. 837 (1984), to administrative law cases. I may not give personal views on topics that may come before the federal courts. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

I am aware that the large majority of scientific studies link human activity to the changing climate. Beyond that, I may not comment on a question that may come before the federal or state courts or involve political questions. *See* Canon 3(A)(6), Cannon 5, Code of Conduct for United States Judges.

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

The Supreme Court has held that legislative history, if clear, may be used to assist in determining the meaning of a truly ambiguous statutory text. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Milner v Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011); *see also, e.g.*, *Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018). In

Federal Communications Commission v. AT&T, 562 U.S. 397 (2011), the Supreme Court held that the context surrounding the passage of a statute, including the history of its enactment, may be used if a term in a statute is ambiguous after textual examination and cannons of construction are exhausted. The Supreme Court has also held that only pre-enactment legislative material may be considered when determining the meaning of a statute. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

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

    No.

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

    I reviewed the questions, drafted answers, and sought comments from individuals in the Office of Legal Policy at the U.S. Department of Justice and received their input. Each answer is my own.

Senator Dick Durbin
Written Questions for Stephen Vaden
November 20, 2019

For questions with subparts, please answer each subpart separately.

Questions for Stephen Vaden

1. **Have you ever appeared before the Court of International Trade?**

   No.

2. **Are you admitted to practice before the Court of International Trade?**

   No.

3. **Have you ever litigated any matters involving laws pertaining to international trade? If so, please list and describe each such matter.**

   I have not personally litigated any matters involving international trade; however, in my current role as General Counsel of the Department of Agriculture, I have advised the Secretary of Agriculture and other senior Department officials on, among other trade-related items, (1) the importation of lemons from Argentina into the United States, (2) the sugar suspension negotiations with Mexico, (3) the efforts of American potato producers to gain access to the Mexican domestic market, (4) the legal effect of a withdrawal from NAFTA, (5) how the Commodity Credit Corporation can make trade mitigation payments to American producers without running afoul of the limits on direct support to farmers administered by the World Trade Organization, and (6) the advisability of the United States' filing a counterstatement with the World Trade Organization challenging India's calculation of its own domestic support payments to farmers.

4. **You say in your questionnaire that you have not tried any cases to verdict in your career. Have you ever observed an entire trial that went to verdict? If so, please list and describe each such trial.**

   I have observed trials that went to verdict. As a law clerk to the Honorable Samuel H. Mays, Jr., of the United States District Court for the Western District of Tennessee, I observed several trials go to verdict. Notably, in the case of *United States v. Moncier*, 2:07-cr-00040 (E.D. Tenn.), Judge Mays sat by designation in the Eastern District of Tennessee to preside over a bench trial of an attorney charged with criminal contempt. I assisted Judge Mays throughout his involvement with the case, including on motions *in limine* and the court's final findings of fact and conclusions of law convicting Mr. Moncier.

   Additionally, as General Counsel of the Department of Agriculture, I oversee attorneys involved in litigating more than 4,000 matters in the federal court system as well as more

than 1,000 matters in administrative tribunals. I am regularly called on to provide advice and make decisions regarding case strategy in those matters.

5. **What has been your specific role or involvement in President Trump's imposition of tariffs?**

   I have advised the Secretary of Agriculture on how the Commodity Credit Corporation can make trade mitigation payments to American producers to ameliorate for the harm caused by retaliatory tariffs imposed by foreign governments.

6. **Do you believe President Trump's imposition of tariffs has benefitted American farmers?**

   As a judicial nominee, it would be inappropriate for me to state a personal view on a current matter of political debate. *See* Cannon 5, Code of Conduct for United States Judges.

7. While you have been at USDA, the agency has administered trade mitigation payments of billions of dollars to American farmers who are suffering due to President Trump's trade wars and tariffs.

   USDA has offered up to $28 billion in trade assistance, known as Market Facilitation Program (MFP) payments, which are funded through the Commodity Credit Corporation on whose board of directors you sit. However, there are extreme disparities in the way these aid payments are allocated across the country and between types of farms.

   USDA trade aid to Illinois farmers averages $69 per acre. But aid averages $75 per acre in Georgia; $87 per acre in Mississippi; and $94 per acre in Alabama. In fact, payments in 35 Alabama and Mississippi counties far exceed the highest Illinois payment, with some cotton growers receiving $150 per acre, double the Illinois average.

   These disparities have a significant harmful effect on soybean farmers. As a result of the President's trade policies, American soybeans have dropped from 40% of the Chinese marketplace to 19%, with prices at times falling to ten-year lows. Yet, by comparison, MFP payments overcompensate Southern cotton farmers, whose market losses to China have been far less than what Midwestern soybean farmers have faced.

   Since MFP was established to address the China trade dispute, how do you explain to soybean growers why cotton growers should receive more financial help than them?

   The Market Facilitation Program (MFP) is designed to assist producers who have been negatively impacted by market disruptions caused by tariff retaliation. The MFP payment rates for the 2018 and 2019 MFP are based on USDA's estimate of gross trade damage caused by retaliatory tariffs. For the 2019 MFP, USDA developed a single rate per acre in each county for MFP-eligible non-specialty crops, which includes commodities both directly and indirectly affected by the trade dispute, in order to minimize potential distortions. Therefore, different counties will have different MFP rates based on the historical production

of eligible commodities and the relative level of trade damage caused by retaliatory tariffs. Soybean farmers, including those in Illinois, are receiving assistance according to the trade damage they have faced. As of October 18, 2019, Illinois farmers have received $667.8 million from MFP while farmers in Georgia, Mississippi, and Alabama combined have received $336.7 million.

8. What has been your involvement in USDA's effort to relocate the Economic Research Service from the Washington D.C. area to the Kansas City area?

   The Office of General Counsel provided legal advice to the Department on its authorities to move the Economics Research Service from Washington, D.C., to Kansas City.

9. In December 2017, President Trump issued a proclamation shrinking the Bears Ears National Monument by 85 percent.

   The original Bears Ears Monument, established in 2016, was an effort by five tribal nations to protect lands that play a role in their cultures. This effort was supported by the archeological and environmental community to protect the numerous archeological sites from oil and gas development and off-road vehicle use.

   In the process of shrinking the monument, the Administration did not contact the tribes who helped establish the Monument and ignored their requests to meet. The Administration also ignored 98% of the 2.8 million comments that opposed efforts to shrink the Monument. The Administration provided no scientific reasoning as to why they were shrinking the Monument, did no additional surveying, and relied on data from the Department of Interior which only accounted for 10 percent of the lands within the Monument. The Administration's decision to roll back the Monument using the Antiquities Act runs contrary to the purpose of the law, which is to protect lands from development.

   a. What specifically was your role in shrinking the Bears Ears National Monument?

      Career attorneys provided answers to Department of Interior and Department of Justice attorneys on questions related to the Secretary of Agriculture's authority to manage national monuments jointly with the Secretary of Interior and regarding past alterations of monument boundaries.

   b. Were you involved in the decision to decline to provide data from the USDA's Forest Service to the Department of Interior as the Department of Interior was considering shrinking the Bears Ears National Monument?

      No.

10. In July 2019, the Trump Administration finalized a management plan for the remaining, shrunken area of Bears Ears that would allow trees to be plowed down using heavy chains

and allow other ranching and development, and that would also remove five Native American tribes from the management board of the monument.

The *Washington Post* quoted Carleton Bowekaty, the co-chair of the Bears Ears Inter-Tribal Coalition, saying of this plan: "It's like seeing that your grandmother's house has been robbed. These lands are sacred to us, and they are being destroyed—sometimes inadvertently—by people who don't understand our culture and way of like. That's why we want all of this area protected, so we can help educate others and share our traditions with all people."

However, according to the *Post*, officials from the Interior Department and Forest Service said that the management plan "balanced the region's economic interests against the need to safeguard it."

a. What has been your role in the crafting of this management plan?

Career attorneys provided advice on Federal Register notices regarding the Forest Service as a cooperating agency in management plan development.

b. Do you feel this management plan has appropriately respected tribal interests in land that they hold sacred?

As a judicial nominee, it would be inappropriate for me to comment on a matter that is currently in litigation or could come before the federal courts. *See* Cannon 3(A)(6), Code of Conduct for United States Judges.

11. In Illinois, we have 150 "supportive living facilities" across rural areas and cities that provide an independent living environment for 8,000 elderly and disabled residents. For 20 years, the State of Illinois has had a Medicaid waiver that allows these facilities to provide care and health services for this vulnerable population in a non-institutional setting.

USDA has consistently re-authorized these centers as SNAP vendors, to enable eligible residents to pool SNAP benefits to facilitate the service of meals – in part because these individuals face physical difficulty with conventional individual grocery purchases. Last year, USDA decided to reverse course and no longer allow this arrangement—despite never finding any allegations of fraud or abuse.

In a February Senate Agriculture Committee hearing, I pressed Secretary Perdue to halt these disapprovals. At an April hearing, I asked Food and Nutrition Service (FNS) Administrator Brandon Lipps to commit to continuing SNAP benefits for these seniors and disabled, and he pledged to work with the Illinois Delegation before taking further action.

Now I hear that USDA has stopped processing several of these applications, despite the very clear language we put in the Farm Bill stipulating that USDA cannot deny any application for 18 months on the grounds of being determined an "institution." So in this year's Senate Agriculture appropriations bill, I have extended this provision beyond 18 months because

USDA appears to be ignoring the law. There do not seem to be any deficiencies in these applications.

a. Is it true that USDA is not approving new applications for SNAP authorizations for these facilities, despite a requirement for USDA to grant or deny complete applications within 45 days?

FNS is holding applications from six SLF's that would have otherwise been denied. One of the SLF's filed a complaint and motion in the United States District Court for the Central District of Illinois (*Peoria SLF, LLC v. Gold,* No. 19-cv-01324 (Oct 7, 2019)), requesting that FNS approve its pending application.

b. How many facilities are caught in this limbo?

Currently, there are six SLF applications that are being held.

c. What is USDA's explanation or basis for ignoring the Farm Bill language and withholding approval?

This issue is in litigation. See response to subpart (a) of this question. Accordingly, I cannot express an opinion on that question as a judicial nominee. *See* Canon 3A(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

d. Please state explicitly why USDA believes it has authority to refuse to grant or deny such applications.

This issue is in litigation. See response to subpart (a) of this question. Accordingly, I cannot express an opinion on that question as a judicial nominee. *See* Canon 3A(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

e. Can you give me your commitment that USDA will continue approving the applications of these facilities within the next month? If not, please explain why not.

USDA will follow the law, as passed by Congress, and any court decision interpreting that law.

f. Has USDA/FNS responded to the June 28, 2017 letter on this matter that was sent by the Illinois Department of Human Services?

Yes, in a response dated June 14, 2019. I apologize for the tardy response of the Department to this correspondence.

Senate Judiciary Committee
"Nominations"
Questions for the Record
November 13, 2019
Senator Amy Klobuchar

Questions for Stephen Vaden, Nominee to the United States Court of International Trade

In 2015, you published an article discussing the Supreme Court's decision in *Perez v. Mortgage Bankers Association* in which you argued that courts provide too much deference to federal agencies. You wrote that the Court's decision "identified a very real problem: the ability of the administrative state to insulate its ever-expanding regulatory reach from meaningful judicial review."

- What do you believe is the proper deference that a court should give to the decisions of administrative agencies?

  The Supreme Court recently clarified when courts should defer to interpretative rules in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). There, the Court held that courts should only defer to interpretative rules when the (1) agency's regulation is genuinely ambiguous, (2) its interpretation is reasonable, and (3) the "context and character" of the agency interpretation entitle it to controlling weight.

  With regard to agencies' interpretations of statutes passed by Congress, *Chevron v. Natural Resources Defense Council*, 468 U.S. 837 (1984), establishes a two-part test for when deference applies. If Congress has directly spoken on the question, an agency has no authority to interpret the enactment in a different manner than Congress directed. If Congress has not directly spoken to the issue and has delegated it to the agency for it to apply its expertise, a court may not substitute its own interpretation of the statute for that of the agency as long as the agency's interpretation is reasonable.

While in private practice, you filed an amicus brief defending North Carolina's voting regulations requiring voter ID, reducing the early voting period, and eliminating same-day registration. The Fourth Circuit described these restrictions as "target[ing] African Americans with almost surgical precision."

- In light of your involvement in that case, what do you believe is the proper role of the judiciary in protecting citizens' constitutional right to vote?

  The Supreme Court has held that the right to vote is a "fundamental political right" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Courts therefore must "carefully and meticulously scrutinize[]" any "alleged infringement of the right of citizens to vote." *Harper v. Va. Bd. of Elec.*, 383 U.S. 663, 667 (1966).

- Do you agree that not all voter ID laws have neutral justifications?

In *North Carolina Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the Fourth Circuit held that North Carolina's provisions were enacted with discriminatory intent and invalidated them for that reason.

Nomination of Stephen A. Vaden, to be a Judge
of the United States Court of International Trade
Questions for the Record
Submitted November 20, 2019

QUESTIONS FROM SENATOR COONS

1. Please describe in detail any experience you have practicing in the U.S. Court of International Trade.

   I have not practiced before the Court of International Trade.

2. Please describe in detail your experience interpreting the customs and international trade laws of the United States.

   In my current role as General Counsel of the Department of Agriculture, I have advised the Secretary of Agriculture and other senior Department officials on, among other trade-related items, (1) the importation of lemons from Argentina into the United States, (2) the sugar suspension negotiations with Mexico, (3) the efforts of American potato producers to gain access to the Mexican domestic market, (4) the legal effect of a withdrawal from NAFTA, (5) how the Commodity Credit Corporation can make trade mitigation payments to American producers without running afoul of the limits on direct support to farmers administered by the World Trade Organization, and (6) the advisability of the United States' filing a counterstatement with the World Trade Organization challenging India's calculation of its own domestic support payments to farmers.

3. If confirmed, do you intend to sit by designation on any U.S. District Court or Court of Appeals?

   If the Chief Justice of the United States assigned me to sit by designation, I would follow that order. *See* 28 U.S.C. § 293.

4. Did you discuss the issue of sitting by designation with anyone before or after expressing interest in this nomination? Please describe any such discussion.

   Although my primary interest in being nominated is serving on the court itself, I am aware of the possibility of sitting by designation; and that possibility has come up during the nomination process.

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

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

Many Supreme Court decisions, from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), set forth the governing legal framework for assessing this question. I would faithfully apply that framework.

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

Yes, I would follow the analysis dictated by the Supreme Court in *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 a court of appeals?

I would be bound to consider and apply all relevant Supreme Court and Federal Circuit Court of Appeals precedents. *See*, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997). I would respectfully consider precedent from other circuits for whatever persuasive force it might have.

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

Yes, I would consider that consistent with my obligation to follow not only the specific holdings but also the essential reasoning, of all relevant Supreme Court and Federal Circuit Court of Appeals precedent. *See*, *e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996).

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*).

Casey and *Lawrence* are binding Supreme Court precedents. I would apply those precedents fully and faithfully should I be confirmed.

f. What other factors would you consider?

If confirmed, I would consider any other factors that appear relevant under Supreme Court and Federal Circuit Court of Appeals precedents.

6. 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 long held that the Equal Protection Clause mandates heightened scrutiny for gender-based classifications as well as for race-based classifications. *See*, *e.g.*,

United States v. Virginia, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 170 (1976). I would apply these precedents fully and faithfully.

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?

   See answer to question 6.

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?

   See answer to question 6.

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 prohibits states from "bar[ring] same-sex couples from marriage on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). The extent to which the Fourteenth Amendment prohibits discrimination based on sexual orientation in other contexts is an unsettled question that could come before me as a judge; therefore, I cannot express an opinion on that question as a judicial nominee. *See* Canon 3A(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

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

   The extent to which the Fourteenth Amendment prohibits discrimination based on transgender status is an unsettled question that could come before me as a judge. Accordingly, I cannot express an opinion on that question as a judicial nominee. *See* Cannon 3(A)(6), Code of Conduct for United States Judges.

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

   The Supreme Court has held that there is a constitutional right to privacy that includes the right of married and unmarried persons to use contraceptives. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). If confirmed, I would faithfully apply these precedents.

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

The Supreme Court recognized such a constitutional privacy right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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

The Supreme Court recognized such a constitutional privacy right in *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.

Please see my answers to the previous subparts of this question.

8. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

In some cases, such as *United States v. Virginia* and *Obergefell*, the Supreme Court has looked to changed understandings of society. In other cases, the Court has focused more on understandings prevailing at the time of the Founding. *See*, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). I have not had occasion to study this question exhaustively; however, as a trial court judge, I would fully and faithfully apply each of the precedents to matters that might come before me.

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

A trial judge or jury may consider such evidence when it is relevant to a disputed issue and based on a reliable methodology. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). In evaluating such evidence, I would apply Supreme Court and Federal Circuit precedents.

9. 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?

      The decision of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is binding Supreme Court precedent. If confirmed, I will faithfully apply *Obergefell* and all other precedents of the Supreme Court.

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

      As discussed in response to Questions 5 and its subparts, the Supreme Court has developed several factors to consider in analyzing substantive due process. I would faithfully apply those precedents in matters that might come before me.

10. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

   a. 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. 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?

      Legal scholars vigorously dispute whether *Brown* is consistent with originalism. Regardless of its consistency with originalism or any other interpretive technique, *Brown*, as Supreme Court precedent, is binding on all lower court judges.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' or 'equal protection,' or 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited November 20, 2019).

As the Professors' criticism suggests, the determination of a provision's original public meaning can sometimes be difficult. Moreover, that determination does not end the constitutional analysis, as the provision must be applied to the specific factual context at issue, which may involve circumstances unforeseen by the Framers of the Constitution. *See*, *e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment covers GPS tracking devices attached to cars).

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). Trial court judges must follow the Supreme Court's precedents regardless of whether a given precedent is based on the public's understanding of a constitutional provision's meaning at the time of its adoption.

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

Please see my response to Question 6(c).

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

I would follow Supreme Court and Court of Appeals for the Federal Circuit precedent regarding what sources are properly considered in applying constitutional provisions in cases brought before the court.

11. In an amici brief you coauthored in *North Carolina State Conference of the NAACP v. McCrory*, you defended changes to North Carolina's voting laws that the Fourth Circuit subsequently held "target[ed] African Americans with almost surgical precision." You asserted that Section 2 of the Voting Rights Act "plainly does not condemn voting practices merely because they 'result' in statistically disparate *outcomes*." You further asserted that "[i]f minorities are free to vote subject only to the usual burdens of voting imposed on everyone, they have a full and fair 'opportunity' to vote, and cannot possibly have any *less* opportunity than non-minorities."

a. Do you believe that facially neutral voting restrictions can be unlawful?

In *North Carolina Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the Fourth Circuit held that North Carolina's provisions were enacted with discriminatory intent and invalidated them for that reason. Beyond this, as a judicial nominee, it would not be appropriate for me to comment on issues that could come before the courts. *See* Canon 3, Code of Conduct for United States Judges.

b. Do you believe that facially neutral voting restrictions can have a disproportionate impact

on minorities?

Please see my response to question 11(a) above.

c. Do you believe that laws passed with the stated purpose of protecting "voter integrity" can suppress the votes of minorities?

Please see my response to question 11(a) above.

12. In responses to questions for the record that you submitted in conjunction with your nomination to serve as U.S. Department of Agriculture General Counsel, you were asked your position on climate change. You responded, "[the U.S. Department of Agriculture Office of the General Counsel] provides legal counsel, not scientific counsel." Do you agree that the overwhelming scientific consensus is that climate change is occurring, and humans are the dominant cause?

As Secretary Perdue has noted in prior communications to Congress, including an August 22, 2017, letter to Senator Stabenow, USDA has no policy prohibiting its employees from studying the effects of climate change or discussing its impacts.

13. In a letter to Congresswoman Pingree, the Inspector General of the U.S. Department of Agriculture wrote that there were concerns that the department's 2018 relocation of the Economic Research Service and the National Institute of Food and Agriculture was "used as a means to suppress research on controversial topics such as climate change." Is it ever appropriate to relocate government employees to suppress their research?

No.

14. In a 2015 article in the *Federalist Society Review*, you wrote that the U.S. Court of Appeals for the D.C Circuit had "identif[ied] a very real problem: the ability of the administrative state to insulate its ever-expanding regulatory reach from meaningful judicial review," and you characterized *Auer* deference as "requir[ing] judicial deference to almost any interpretation an agency elects to give its regulations." If a regulation is unclear, what is the appropriate level of deference that should be afforded to an administrative agency's interpretation?

The Supreme Court recently clarified when courts should defer to interpretative rules in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). There, the Court held that courts should only defer to interpretative rules when the (1) agency's regulation is genuinely ambiguous, (2) its interpretation is reasonable, and (3) the "context and character" of the agency interpretation entitle it to controlling weight.

With regard to agencies' interpretations of statutes passed by Congress, *Chevron v. Natural Resources Defense Council*, 468 U.S. 837 (1984), establishes a two-part test for when deference applies. If Congress has directly spoken on the question, an agency has no authority to interpret the enactment in a different manner than Congress directed. If

Congress has not directly spoken to the issue and has delegated it to the agency for it to apply its expertise, a court may not substitute its own interpretation of the statute for that of the agency as long as the agency's interpretation is reasonable.