

**Nomination of Justin Walker to the United States Court of Appeals for the D.C. Circuit
Questions for the Record
Submitted May 13, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1) According to your Senate Judiciary Questionnaire (SJQ), you met with President Trump and Majority Leader McConnell on January 8, 2020 to discuss your nomination to the D.C. Circuit. You are only the third circuit court nominee to meet with this President. In addition, press reports suggest that your meeting with the President and Leader McConnell “ultimately veer[ed] to [President] Trump’s then-looming impeachment trial.” (Seung Min Kim, *Trump taps former Kavanaugh clerk to fill vacancy on powerful D.C. appeals court*, Wash. Post (Apr. 3, 2020))

a) What did you discuss with the President and Leader McConnell regarding the President’s impeachment trial?

After the meeting concluded, I left the Oval Office, and Senator McConnell stayed. If the *Washington Post* article is correct, it is referring to discussions after my meeting ended. I did not discuss the impeachment trial with President Trump.

b) What else did you discuss with the President during your interview?

The President asked about my experience as a district court judge. He also asked about my opinion of Justice Kavanaugh.

2) During your hearing, I asked you a number of questions about your investiture speech. I focused my questions on the portion of your speech in which you said that “in Brett Kavanaugh’s America, we will not surrender while you wage war on our work or our cause or our hope or our dream.” In that same speech, you also said: “[A]lthough we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.” During your hearing, you explained that you were defending federal judges who support the rule of law. At your hearing, you said: “I was in my speech saying that I am unabashed as other judges have been in my defense of the rule of law and of the approach to judging that considers text rather than inserting a judge’s political opinions into what the law is.”

a) Who are the “critics” that you claimed call you “terrifying” and describe you “as deplorable”?

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice

Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term’s most high-profile case. That disappointment was public,

both from the written Joint Dissent and from Justice Kennedy’s announcement of that dissent from the bench, when he said, “We must submit, with due respect, that today’s decision somehow overlooks this Court’s historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times.”

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

b) Please provide specific examples of one of these “critics” calling you, or any other federal judge, “deplorable.”

Please see my answer to Question 2(a).

c) Please explain what you meant by the risk of losing “our courts and our country” to these critics you identified.

Please see my answer to Question 2(a).

3) Question 26 of the SJQ asks nominees to “describe [their] experience in the entire judicial selection process, from beginning to end (including the circumstances which led to [their] nomination and the interviews in which [they] participated).” The question is not limited to the particular nomination for which that Questionnaire has been filed.

In the SJQ you submitted in relation to your nomination to the Western District of Kentucky, you wrote the following about your selection process: “I expressed an interest in judicial service to Senator Mitch McConnell on June 22, 2018. On October 11, 2018, I discussed the topic with Senator Rand Paul in a meeting where Senator Mike Lee and a member of Senator Paul’s staff were also present. On March 7, 2019, I was interviewed in Washington, D.C. by attorneys from the White House Counsel’s Office and the Department of Justice’s Office of Legal Policy. On March 26, 2019, an attorney from the White House Counsel’s Office called me and told me the White House intended to move forward with my nomination.” (WDKY SJQ, Question 26)

In Questions for the Record (QFRs) that I submitted to you following your July 2019 nominations hearing, I asked you the following: “Please describe your experience during the *entire* judicial selection process, including communications you received between June 22, 2018 and March 7, 2019 regarding your nomination to be a federal judge.” (Feinstein QFR 4(a))

You responded: “My answer to Question 26 of the Senate Judiciary Questionnaire accurately describes my experience in the entire judicial selection process.” (Walker Response to Feinstein QFR 4(a))

In the SJQ you submitted in relation to your nomination to the D.C. Circuit, you wrote the following about your selection process: “In early September 2018, I was contacted by the White

House Counsel's Office to inquire whether I would be interested in interviewing for the vacancy on the D.C. Circuit that would be created by then-Judge Kavanaugh's elevation to the Supreme Court. On September 10, 2018, I interviewed with attorneys from the White House Counsel's Office for that vacancy, which was ultimately filled by Judge Neomi Rao." (D.C. Circuit SJQ, Question 26)

- a) **Why did you fail to note in your Western District of Kentucky SJQ that you were contacted by and ultimately interviewed with the White House Counsel's Office in September 2018, in relation to a vacancy on the D.C. Circuit?**

Question 26 refers to "your nomination" and "this nomination." It does not refer to other people's nominations or to meetings that were not part of "this nomination."

- b) **Why did you fail to note in your response to my previous QFRs that you were contacted by and ultimately interviewed with the White House Counsel's Office in September 2018, in relation to a vacancy on the D.C. Circuit?**

Please see my response to Question 3(a).

- 4) In the SJQ you submitted in relation to your nomination to the Western District of Kentucky, you wrote the following about your selection process: "I expressed an interest in judicial service to Senator Mitch McConnell on June 22, 2018."

- a) **Prior to your June 22, 2018 conversation with Senator McConnell, did you initiate contact directly with Senator McConnell to express your interest in judicial service?**

I did not.

- i) **If not, did you initiate contact through Senator McConnell's staff or through an intermediary? If an intermediary, who?**

Approximately a year before my June 2018 conversation with Senator McConnell, at lunch, a friend asked if I'd ever had any interest in judicial service. My friend had once been on the staff of Senator McConnell. I do not know if, when, or how word made it from my friend to Senator McConnell.

- b) **Prior to your June 22, 2018 conversation with Senator McConnell, did Senator McConnell, Senator McConnell's staff, or an intermediary reach out to you to gauge your interest in judicial service?**

Please see my answer to Question 4(a)(i).

- i) **If so, who reached out, when, and what did they specifically ask?**

Please see my answer to Question 4(a)(i).

- c) **Which specific judicial vacancy did you discuss on June 22, 2018?**

We discussed the Western District of Kentucky.

- d) When did you first express your interest in being appointed to the D.C. Circuit? To whom? Please specify the individuals *both* in the United States Senate and in the Trump Administration to whom you first expressed interest in an appointment to the D.C. Circuit.**

In the summer of 2018, I was contacted to inquire whether I would be interested in interviewing for the vacancy on the D.C. Circuit that would be created by then-Judge Kavanaugh's elevation to the Supreme Court. I was contacted about the D.C. Circuit without first expressing interest.

- e) In advance of your nomination to the D.C. Circuit, did you discuss your interest in being appointed to the D.C. Circuit with any of the following individuals? If your answer is "Yes" to any of the questions below, please identify the date of your discussion.**

- i) Justice Brett Kavanaugh.**

Although I do not recall specific dates, I discussed my possible nomination to the D.C. Circuit with Justice Kavanaugh and Justice Kennedy. I do not recall speaking of my interest in advance of the nomination to Leonard Leo, Carrie Severino, Mike Davis, or Ed Whelan about my nomination.

- ii) Justice Anthony Kennedy.**

Please see my answer to Question 4(e)(i).

- iii) Leonard Leo.**

Please see my answer to Question 4(e)(i).

- iv) Carrie Severino of the Judicial Crisis Network.**

Please see my answer to Question 4(e)(i).

- v) Mike Davis of the Article III project.**

Please see my answer to Question 4(e)(i).

- vi) Ed Whelan of the Ethics and Public Policy Center.**

Please see my answer to Question 4(e)(i).

- 5) Based on your public Financial Disclosure Report — submitted on May 8, 2020 — the Federalist Society paid you \$2,000 in honoraria in 2019. That is on top of the \$8,500 in honoraria you received from the Federalist Society in 2018.

- a) Please list each of the appearances or events in 2019 for which you were compensated by the Federalist Society. For each, please include the date, a summary of the subject matter, and the specific honorarium amount.**

March 18, 2019: Speaker, Supreme Court Preview, Federalist Society, Washington & Lee School of Law. My presentation described some pending Supreme Court cases and summarized my law review article, *The Schechter-to-Chevron Spectrum*. I received \$1,000 honorarium.

March 18, 2019: Speaker, Supreme Court Preview, Federalist Society, Liberty School of Law. My presentation described some pending Supreme Court cases and summarized my law review article, *The Schechter-to-Chevron Spectrum*. I received \$1,000 honorarium.

- b) Have you received any honoraria from the Federalist Society in 2020? If so, please list each of the appearances or events in 2020 for which you were compensated by the Federalist Society. For each, please include the date, a summary of the subject matter, and the specific honorarium amount.**

I have received no honoraria from the Federalist Society in 2020.

- 6) In QFRs that I submitted to you following your July 2019 nominations hearing, I asked you the following: “Do you believe that human activity is contributing to or causing climate change?” (Feinstein QFR 18)

You responded: “These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.” (Walker Response to Feinstein QFR 18)

Other judicial nominees during this administration have been willing to respond directly to this question. Did those nominees violate the judicial canons?

All nominees and judges must interpret the judicial canons for themselves, according to their best readings of the canons.

- 7) In QFRs that I submitted to you following your July 2019 nominations hearing, I asked you about your 2018 article, in which you praised then-Judge Kavanaugh for providing a “roadmap” to strike down the ACA’s individual mandate. I asked you the following: “Please explain the ‘roadmap’ to strike down the ACA’s individual mandate.” (Feinstein QFR 5(a))

You responded: “[T]he role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct preclude me, in my role as a judicial nominee, from going beyond what was said in the 2018 article.” (Walker Response to Feinstein QFR 5(a))

However, in March 2020, at your investiture ceremony for the Western District of Kentucky, you publicly discussed the Court’s opinion in *NFIB v. Sebelius*. There, you said that the “worst words” you heard while clerking for Justice Kennedy were “the Chief Justice thinks this might be a tax.” That was an apparent reference to Chief Justice Roberts’ opinion upholding the ACA as a function of Congress’s taxation power.

As a sitting federal judge, your comments went beyond what you said in your 2018 article about the ACA. Which judicial canons did you violate during your investiture speech?

Please see my answer to Question 2(a).

8) 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.

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?

It is never appropriate for lower courts to depart from Supreme Court precedent. Although it may occasionally be proper for a district to observe that the Supreme Court's jurisprudence is confusing or problematic in its application, a district judge must decide a case based on fidelity to Supreme Court precedent.

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

As a general rule, district court decisions are not binding in future cases, although district court judges should apply the principles of res judicata and collateral estoppel and are bound by decisions in the case in which the decisions are issued.

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

The principles of stare decisis are important to order, predictability, and the rule of law. The Supreme Court alone must decide whether to overturn a precedent. District courts and circuit courts must faithfully apply any changes to precedents made by the Supreme Court.

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

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

Roe is binding precedent of the Supreme Court, and lower courts must apply it fully and faithfully, as with all precedents of the Supreme Court.

b) Is it settled law?

Yes. For lower court judges, all Supreme Court precedent, including *Roe v. Wade*, is settled law.

10) 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. For lower court judges, all Supreme Court precedent, including *Obergefell v. Hodges*, is settled law.

11) 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?

These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view. If confirmed, I will follow *Heller* and any Supreme Court precedent interpreting *Heller*.

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

The majority's opinion in *Heller* stated, "Like most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626 (2008). The Court went on to state that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms in sensitive places such as schools and government buildings." *Id.* at 626-37.

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

These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.

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

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

In *Citizens United*, the Supreme Court held that "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view. If confirmed, I will follow *Citizens United* and any Supreme Court precedent interpreting *Citizens United*.

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

These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that “person” under the Religious Freedom Restoration Act included “corporations.” 573 U.S. 682, 707-08 (2014). These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view. If confirmed, I will follow *Hobby Lobby* and any Supreme Court precedent interpreting *Hobby Lobby*.

- 13) Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

This issue is implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.

- 14) 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?

As a district court judge, and if I’m confirmed to the D.C. Circuit, I would fully and faithfully follow the Supreme Court’s landmark decision in *Loving v. Virginia*, 388 U.S. 1 (1967). “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Id.* at 12.

- 15) Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

This issue is implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.

- 16) You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2006. You further indicated that you served on the Executive Committee for International and National Security Law Practice Group from 2017 to 2019 and on the Executive Committee for the Louisville Chapter from 2016 to 2019. 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?**

The language in that quotation was drafted by the Federalist Society, not by me, and because I did not draft it, I don’t know what meaning was intended.

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

Please see my answer to Question 16(a).

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

Please see my answer to Question 16(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.**

After I was nominated, I received an email from an old friend, Lee Otis, congratulating me on my nomination. I replied by saying thank you for the warm wishes.

- e) Why did you join the Federalist Society in 2006?**

The Federalist Society hosted some of the most intellectually vibrant presentations and events at my law school, often including diverse perspectives on important legal questions. I joined in law school because I valued what I learned from its presentations and events.

- f) Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?**

No.

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct].” (*Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

- g) Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?**

The Draft Ethics Opinion is a draft. The Committee that drafted it has asked for comment on it. I joined more than 200 other sitting judges in signing a letter disagreeing with the conclusions of the draft. The letter expresses the belief that the Committee should not turn the draft into a final opinion.

h) If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

I commit to following the Code of Judicial Conduct and every binding interpretation of it.

17) 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 discussed with attorneys from the Department of Justice and the White House Counsel's Office my familiarity with various Supreme Court precedents, including precedents on administrative law. Although I do not recall exactly what was asked or what I said, it would have been consistent with my understanding of current Supreme Court precedents.

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 and spoken publicly as an academic on administrative law topics, and audience members sometimes ask questions after I speak. Aside from that, I don't remember anyone asking about my thoughts on administrative law.

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

I first studied administrative law at Harvard in a class taught by then-Dean Elena Kagan. Since then, I have written and spoken about this area of the law. My view with regard to the intersection of administrative law and circuit courts is that circuit court judges must follow all statutes and Supreme Court precedents in this area fully and faithfully.

For example, *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, held that when statutory ambiguity leaves "a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. 837, 843-44 (1984). To determine if a statute is ambiguous, courts consider the

statute's text, its structure, relevant precedents, similar statutory language, other informative context, and canons of construction like *expressio unius* and *eiusdem generis*. After using all the tools of statutory construction, if the statutory provision's best reading is apparent, the provision is not ambiguous. If, however, it remains unknowable which interpretation of two or more competing meanings is the best reading, then the statutory provision is ambiguous.

Many Judges and Justices with varying approaches to administrative law have said that major questions do not trigger *Chevron* deference. Justice Stephen Breyer once wrote, "A court may . . . ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). In 2014, *King v. Burwell* clarified that *Chevron* does not apply when at issue is a "question of deep 'economic and political significance.'" 135 S. Ct. at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)). As Justice Kavanaugh has written, *King v. Burwell* "raises two significant questions that the Supreme Court will presumably have to confront soon: First, how major must the questions be for *Chevron* to apply? Second, if *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for cases involving less major but still important questions?" *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016).

Both *King* and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), offer some guidance on whether an issue is of "deep 'economic and political significance.'" *King*, 135 S. Ct. at 2489. *Chevron* applies in an "ordinary" case. *Brown & Williamson*, 529 U.S. at 159. But a court should not defer to an agency on a question like "whether an industry will be entirely, or even substantially, rate-regulated." *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994). Or whether the FDA can regulate cigarettes. *Brown & Williamson*, 160-61. Or whether buyers on the federal health insurance exchange are eligible for tax credits available to buyers on state health insurance exchanges. *King*, 135 S. Ct. at 2496.

To be sure, there is distance on a spectrum from the most "ordinary" of cases on one end, and the questions in *MCI v. AT&T*, *Brown & Williamson v. FDA*, and *King v. Burwell* on the other end. But the place of particular questions on that spectrum – including the place on that spectrum of the issue in *Chevron* itself – is implicated by pending and impending litigation. Indeed, a significant portion of the D.C. Circuit's docket involves agency interpretations of statutes. "A judge should not make public comment on the merits of a matter pending or impending in any court." Canon of Code of Conduct for United States Judges 3(A)(6). As a district judge, and if I'm confirmed to the D.C. Circuit, I will approach agency arguments in favor of *Chevron* deference – and opposing parties' arguments against *Chevron* deference – with an open mind.

18) Do you believe that human activity is contributing to or causing climate change?

These issues are implicated by pending or impending litigation. The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.

19) When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has given lower courts guidance on this question. The Court has said that as a general matter, legislative history is not necessary when a statute is unambiguous, while it can be considered when a statute is ambiguous. Lower court judges should apply all Supreme Court

precedents with regard to legislative history and should consider all arguments raised by litigants, including arguments related to legislative history.

20) 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.

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

I drafted these answers, shared them with the Department of Justice's Office of Legal Policy, and then received input. Each answer is mine alone.

Written Questions for Justin Walker
Submitted by Senator Leahy
May 13, 2020

1. When I asked you about your negative views towards the Affordable Care Act (ACA), and whether you knew the number of Americans who could risk losing protections without the ACA during the COVID-19 pandemic, you stated that your “heart goes out to all of them.” Those words are cold comfort to the millions of Americans who could lose a lifeline if the ACA were to be dismantled as you apparently desire.

a) Do you still believe that the Supreme Court’s decision to uphold the ACA is “indefensible” and “catastrophic,” as you previously wrote?

As I testified in my confirmation hearing, *NFIB v. Sebelius* is binding Supreme Court precedent, which I will continue to fully and faithfully follow as a district court judge and, if confirmed, as a circuit court judge. Before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic.

a) You also stated during the hearing that “good judging means taking the judge’s personal policy preferences out of the equation.” Will you commit to taking your own personal policy preferences about the ACA out of the equation and adhering to binding precedent upholding the law?

As I testified at my confirmation hearing, I was not commenting on the policy merits of the Affordable Care Act. I also made clear that I will continue to fully and faithfully follow *NFIB v. Sebelius* and other binding Supreme Court precedent as a district court judge and if confirmed, as a circuit court judge.

2. You also claimed during the hearing that one of the main themes of your highly controversial investiture speech was denouncing the “politicization of the judiciary.” Yet your investiture speech attacked Chief Justice Roberts’ reasoning in upholding the ACA, characterized the non-partisan American Bar Association as among your “opponents,” warned that we “will lose our courts and our country to critics who...describe us as deplorable,” and committed to “not surrender[ing]” while Justice Kavanaugh “wage[s] war.”

a) Can you please clarify how each of the statements you made above are intended to denounce the politicization of the judiciary, of which you were a member when you made them?

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the

judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as

knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term's most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy's announcement of that dissent from the bench, when he said, "We must submit, with due respect, that today's decision somehow overlooks this Court's historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times."

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

b) Would you agree that even the perception of partisan bias damages a judge's credibility as a fair and impartial adjudicator? Do you believe anything you said during your investiture could have created that perception of partisanship or bias?

Please see my answer to Question 2(a).

3. You previously argued that you believe the FBI Director should "not think of himself as the nation's protector, instead he must think of himself as an agent of the President."

a) Do you still view the FBI Director in this way? Do you feel the same way about the Secretaries of executive agencies? What about Inspectors General? US Attorneys?

I wrote about the FBI as an academic and private citizen engaged in a dialogue on a matter of public importance. It would be inappropriate for me, as a sitting district court judge and as a nominee to the D.C. Circuit, to comment further on separation-of-powers issues, which are pending before federal courts throughout this country. *See* Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

4. According to your Senate Questionnaire you met with President Trump and Senator McConnell on January 8th, 2020 to discuss the D.C. Circuit vacancy.

- a) **When you met with the President, did he speak with you about future decisions you might be in the position of making on the D.C. Circuit?**

No.

- b) **Did he in any way request your support, or otherwise suggest your support would be appreciated, in future cases before the D.C. Circuit involving his personal, political, or financial interests? If so, how did you respond?**

No.

5. In your controversial opinion in *On Fire Christian Center v. Fischer*, you observe that the plaintiffs seeking to gather on Easter Sunday aren't driven by "the logic of this world." As a Catholic myself, I deeply respect passion for the Easter holiday and everything it represents.

- a) **As a federal judge, however, you've sworn to uphold our man-made Constitution and laws. Do you agree then, while discharging your official duties as a judge, you must abide by the "logic of this world?" If not, why not?**

Yes.

Senator Dick Durbin
Written Questions for Justin Walker
May 13, 2020

For questions with subparts, please answer each subpart separately.

1. At the time you submitted your committee questionnaire last month, you said that “I have not presided over any cases that have gone to verdict or judgment.” **Is that still correct?**

I interpreted the SJQ question to ask whether I’ve presided over trials that have gone to verdict or judgment. It is still correct that I have not. The U.S. District Court for the Western District of Kentucky has cancelled all trials due to the pandemic. *See, e.g.*, General Order 20-09 (W.D.K.Y. Apr. 17, 2020). I have, however, presided over civil and criminal cases that have gone to judgment through settlements, motions to dismiss, summary judgment, and guilty pleas.

2. In your investiture speech in March, you said: “I wanted to thank my nomination’s opponents, including the American Bar Association.” You went on to say: “Thank you for serving as an enduring reminder that although my legal principles are prevalent, they have not yet prevailed. That although we are winning we have not won. And that although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.”

- a. **To whom were you referring when, as a sitting federal judge, you said “we are winning”?**

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the

law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term’s most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy’s announcement of that dissent from the bench, when he said, “We must submit, with due respect, that today’s decision somehow overlooks this Court’s historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times.”

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

b. When would you know if you have “won”?

Please see my answer to Question 2(a).

c. Is the point of judging to win?

Please see my answer to Question 2(a).

3. You said in your committee questionnaire that in late 2019, Senator McConnell contacted you to gauge your interest in serving on the D.C. Circuit, and that on January 8, 2020, you “met with President Trump to discuss the vacancy in a White House meeting also attended by Leader McConnell.”

a. Why, as a sitting federal judge, did you meet with President Trump and Leader McConnell together for this discussion?

I was honored to be invited to the White House with Senator McConnell to meet with the President, and I was honored that he was considering nominating me to the D.C. Circuit. Other judges have met with Presidents when the President is considering nominating them to a different court.

b. Did you discuss any legal topics with President Trump and Leader McConnell in this meeting? If so, please list the topics that were discussed.

I do not recall discussing any specific areas of the law.

c. Did you discuss the President’s impeachment in this meeting?

I did not discuss the impeachment trial.

4. On July 10, 2018, you were quoted in the *Baltimore Post-Examiner* describing the D.C. Circuit as “packed with liberals.” **What did you mean by this?**

I have great respect for every judge on the D.C. Circuit. They are exceptional lawyers and they are patriots. In that article, I made predictions about Justice Kavanaugh in my role as an academic and a citizen engaged in the political process – the same predictions made by many ideologically diverse legal experts. Others reflected my view of Justice Kavanaugh’s temperament and fidelity to text, constitutional structure, and the limited role of judges. I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct preclude me, in my role as a judge and a judicial nominee, from saying more than what was said in the interviews in the summer of 2018.

- 5. Do you believe that wealthy individuals or special interests that make undisclosed donations to organizations that help choose judicial nominees should make their donations public so that judges can have full information when they make decisions about recusal in cases in which these donors are parties or have an interest?**

28 U.S.C. § 455 governs when a judge must recuse, and I faithfully follow that statute in my role as a district court judge. If confirmed, I will faithfully follow that statute as a circuit court judge. It would be inappropriate for me, as a member of the judicial branch, to comment on whether Congress should amend that statute to address the situation described in this question.

6.

- a. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network that**

advocate in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.

As a sitting judge and as a judicial nominee, it would be inappropriate for me to comment on the appropriateness of particular political donations.

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

Please see my answers to Questions 5 and 6.a., above.

7. Does the Constitution authorize a president to pardon himself?

As a sitting district court judge and a circuit court nominee, it would be improper for me to comment on a speculative hypothetical that courts across this country could face. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

8. Was President Trump wrong when he said “I have an Article II where I have the right to do whatever I want as President”?

As a sitting district court judge and a circuit court nominee, it would be improper for me to opine about any public comments made by a leader of another branch of government. As a sitting district court judge, I am faced with separation-of-powers questions in cases and, if confirmed, I will face separation-of-powers questions on the D.C. Circuit. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

9. What does the word “shall” mean in a statute?

Bryan Garner has described “shall” as “among the most heavily litigated words in the English language.” FEDERAL AVIATION ADMINISTRATION, WHAT’S THE ONLY WORD THAT MEANS MANDATORY? HERE’S WHAT LAW AND POLICY SAY ABOUT ‘SHALL, WILL, MAY, AND MUST.’ https://www.faa.gov/about/initiatives/plain_language/articles/mandatory/ (last accessed May 14, 2020). As a sitting district court judge and a circuit court nominee, it would be inappropriate for me to comment further. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

10. When do you believe it is appropriate for the Supreme Court to overrule one of its precedents?

The principles of stare decisis are important to order, predictability, and the rule of law. The Supreme Court alone must decide whether to overturn a precedent. District courts and circuit courts must faithfully apply any changes to precedents made by the Supreme Court.

11. Should circuit court judges ever write opinions—whether majority opinions, concurrences, or dissents—calling for the Supreme Court to review and consider

reversing its own precedents? Or is it improper for lower court judges to opine on what the Supreme Court should do?

If confirmed, I would follow all binding precedents fully and faithfully. Although it may occasionally be proper for a circuit judge to observe that the Supreme Court's jurisprudence is confusing or problematic in its application, a circuit judge must decide a case based on fidelity to Supreme Court precedent. As a district judge and if confirmed to the D.C. Circuit, I will be mindful of the scope of a judge's discretion, the limits of a judge's power, and the proper hierarchy in our federal judiciary, in which there is only "one Supreme Court" and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

12. In your ceremonial investiture speech in March, you said: "Well, my friends, there's nothing terrifying about the original meaning of our Constitution and there's nothing deplorable about defending it."

- a. **Has the original meaning of the Constitution changed or evolved over time, or is it immutable?**

The Constitution has been amended 27 times. Each time, it was either clarified or changed. When I referred to its original meaning, I was referring to its original meaning as amended.

- b. **What is the original meaning of the Constitution's Foreign Emoluments Clause?**

As a sitting district court judge and circuit court nominee, it would be inappropriate for me to answer this question because it will likely present itself in a current or future case. *See* Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

- c. **What is the original meaning of the Eighth Amendment?**

Please see my answer to Question 12(b).

- d. **What is the original meaning of the Fourth Amendment?**

Please see my answer to Question 12(b).

- e. **What is the original meaning of the Commerce Clause?**

Please see my answer to Question 12(b).

- f. **Are there any provisions in the Constitution where the original meaning is unclear or ambiguous? If so, please list all such provisions.**

Please see my answer to Question 12(b).

- g. **Are there any provisions in the Constitution where you believe controlling Supreme Court decisions have incorrectly articulated the provision's original meaning? If so, please list all such provisions.**

As a sitting district court judge and circuit court nominee, all Supreme Court precedents bind me. I faithfully follow all binding Supreme Court precedent as a district judge, and I will continue to faithfully follow all binding Supreme Court precedent if I am confirmed as a circuit judge.

**Nomination of Justin Walker
to the United States Court of Appeals for the District of Columbia Circuit
Questions for the Record
Submitted May 13, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
 - a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I have reviewed the article.

- 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.

The Canons of the Code of Conduct for United States Judges prohibit me from commenting on political matters.

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

Please see my response to Question 1(b).

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

In a *Washington Post* article regarding President Trump’s announcement that he intended to nominate me to the D.C. Circuit, Leonard Leo told the *Post*, “Judge Walker has had an impressive legal career, during which he has aligned himself with originalism, textualism, and the important separation of powers principles that make our country great.”

- e. Have you have any communications with Leonard Leo about your nominations to either the district court or the D.C. Circuit, either before or after your nominations? Please specify.

No.

- f. Have you have any communications with Carrie Severino, President of the “Judicial Crisis Network,” about your nominations to either the district court or the D.C. Circuit? Please specify.

No.

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

Please see my response to Question 1(b).

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

The metaphor has limits, but I agree with the sentiment behind it that judges must go where the law leads, without passion or prejudice for any political or policy preference.

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

There are occasions when the law requires a judge to consider the practical consequences of a ruling. For example, under the standard for considering a preliminary injunction, a judge considers, among other things, whether the plaintiff “is likely to suffer irreparable harm in the absence of preliminary relief, [whether] the balance of equities tips in his favor, and [whether] an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008).

3. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court’s decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act’s individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, “came after weeks of negotiations and trade-offs among the justices.”
 - a. In your view, what is the role of negotiating with other judges when deliberating on a case?

If I were a judge on a multi-member panel, I would not trade votes.

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

Please see my answer to Question 3(a).

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

The Supreme Court has stated that the original meaning of constitutional text can be important to determining the text's meaning. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004). If confirmed, I would consider Supreme Court and D.C. Circuit precedent when discerning the contours of a constitutional provision, and I would follow such precedent fully and faithfully.

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

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

A judge must follow the law, without passion or prejudice for any party or any personal viewpoints. However, judges should display empathy while impartially applying the law. The law has profound consequences for litigants and the public, including the victims of crime, and a judge should be mindful of those consequences.

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

Life experiences can teach a judge lessons about the importance of being a good listener, of being a lifelong learner, and of humility – all of which are important qualities in a judge.

5. 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.

6. 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 an important role in our constitutional system, ensuring that certain questions are decided by litigants' peers.

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

The Supreme Court has issued important decisions regarding arbitration clauses. As a district court judge I have always followed precedent, and if confirmed, I would follow those precedents fully and faithfully, taking into consideration all appropriate constitutional and statutory provisions.

- 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 6(b).

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

Federal Rule of Appellate Procedure 10 states what composes the record on appeal. In general, the record on appeal consists of what the parties filed in the district court, any transcripts, and the district court docket. Fed. R. App. P. 10(a).

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

I will faithfully follow Federal Rule of Appellate Procedure 10 if I am confirmed to the D.C. Circuit. I am also fully committed to honoring the adversarial process.

9. 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.

Judicial independence is central to the rule of law. As an academic, I have written about its importance. The Code of Conduct for United States Judges and Advisory Opinion #116 protect the independence of the judiciary, and I will look to them for guidance in the event I am invited to attend a seminar or conference of any type. As Advisory Opinion #116 says, "it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis." As part of that case-by-case analysis, if confirmed, I will consider each of the factors that Advisory Opinion #116 lists as appropriate for consideration.

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

Please see my response to Question 9(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 9(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 9(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 9(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 9(b)(i).

- 10. As we discussed at your hearing, you signed a March 18, 2020 letter denouncing the Codes of Conduct Committee's draft Advisory Opinion No. 117. Senate Judicial Questionnaire Question 12(c) requires that you "Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials"). When I asked why you did not disclose a copy of this letter to the committee in response to Question 12(c), you responded that it "wasn't a public letter." Do you believe that policies addressing a judge's membership in private organizations are a matter of public interest? If not, please explain?

Yes.

- 11. With respect to the letter described in Question 11, where in the text of SJQ Question 12(c) do you read a requirement that the communication be public?

Judges frequently communicate with other judges about cases and other matters of public interest, and I did not interpret SJQ Question 12(c) to request those communications. If judges were required to disclose their communications with other judges, it would have a chilling effect on judicial decisionmaking.

- 12. With respect to the letter described in Question 11, is there any legal privilege that protects this letter from disclosure to the committee? Please specify.

Please see my answer to Question 11.

- 13. With respect to the letter described in Question 11, you testified that Judge Thapar and Judge Katsas drafted the letter and that you did not offer any edits. Did you discuss this letter with either Judge Thapar or Judge Katsas?

Yes.

14. With respect to the letter described in Question 11, you said you believed other judges also participated in drafting this letter. Who are they?

When asked at my hearing, I did not recall the other judges, but I have since checked the letter. At the end of the letter, the 200 judges who signed it are in alphabetical order, except for the first four judges. Those first four are Judges Katsas, Oldham, Pryor, and Thapar. It is my understanding that they drafted the letter.

15. With respect to the letter described in Question 11, have you had any communications concerning this letter with Carrie Severino, President of the “Judicial Crisis Network”? Please specify.

No.

16. With respect to the letter described in Question 11, have you had any communications concerning this letter with Ed Whelan, President of the “Ethics and Public Policy Center”? Please specify.

No.

17. With respect to the letter described in Question 11, you testified that approximately 200 current federal judges “nominated by every president going back to Gerald Ford” signed the letter in defense of the Federalist Society. In fact, 93% of the letter’s signatories were appointed by Republican presidents. Does that figure cause you any concern that Federalist Society membership implies affiliation with the Republican Party or other partisan causes? Please explain.

No. The Committee of Conduct asked for our comments on a draft opinion that drew a line between organizations like the Federalist Society and the American Constitution Society on the one hand, and the American Bar Association on the other hand. The 200 plus judges who signed the letter commented that the draft opinion’s line is not a principled line. Drawing principled lines is one of the things judges are trained to do.

18. With respect to the letter described in Question 11, 29 Republican Senators wrote to the Committee on the Codes of Conduct arguing that the Federalist Society is an organization “devoted to the law, the legal system, [and] the administration of justice,” that the American Bar Association engages in “zealous ideological advocacy,” and did not take a position on the American Constitution Society. I request that you review that letter if you haven’t already done so. Does either the tone or the content of the Senators’ letter cause you concern that judicial membership in the Federalist Society could imply affiliation with the Republican Party or partisan causes?

No.

19. Your questionnaire indicates that you have been a member of the Federalist Society since 2006.

- a. If confirmed, do you plan to remain a member of the Federalist Society?

Yes.

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

As a district court judge, I follow the guidance of Opinion No. 40, and if confirmed, I plan to continue to follow the guidance of Opinion No. 40 and “regularly . . . reexamine the activities of each organization [extending an invitation to me] to determine if it is proper to continue the relationship.”

- c. If confirmed, do you plan to donate money to the Federalist Society?

I do not.

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

I have not.

20. If the Codes of Conduct Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

I will follow the Code of Judicial Conduct and every binding interpretation of it.

21. Do you agree with the general principle that judges should seek to maintain impartiality, both actual and perceived?

Yes.

22. I asked you about your media advocacy on behalf of Brett Kavanaugh. You indicated that your friend Matt Latimer was the “only person who coordinated or prepared or advised on your TV appearances.” Is that correct?

When asked about the summer of 2018 television appearances at my hearing, I said, “In the vast majority of those TV appearances, I received a direct email from the TV producer, and they asked if I would be willing to share my experience about Justice Kavanaugh, and I was willing to do it.” I also said, “An old friend of mine, on a volunteer basis, made a few emails early on, but again, it was quite informal.” As I said at the hearing, the friend was Matt Latimer, who has “more knowledge about the world of cable news than I do. And he did it without pay, and he did it because he likes me, and I did it because I admire Justice Kavanaugh.”

Because I had received a direct email from the television producer for the vast majority of my TV appearances, and because the interviews were two years ago, I consulted my records after the hearing. While a vast majority of my TV appearances did involve direct outreach from a television producer, I did not recall in the moment, at the time of the hearing, that a minority of my media interviews were also facilitated by, in addition to Matt Latimer, a friend in Louisville named Tyler Glick and a public relations firm called CRC. Had I recalled either, I would have described them at the hearing. I was an academic in the summer of 2018, and it is part of the job of an academic to

sometimes accept invitations to speak about areas of expertise when invited to do so, with or without intermediaries.

23. During the period in which you were defending Brett Kavanaugh in the media (print, radio, broadcast TV, cable TV, etc.), please identify any communications you had with any of the following individuals or organizations. If you had any communications with any of these individuals or organizations, please specify the date(s) and content of such communications. If you had communications with any of the organizations listed, please specify which individuals within the organization(s) you communicated with.

In response to these Questions for the Record, I have researched Greg Mueller, and it appears he is President of CRC. I do not recall speaking to Leonard Leo, Judicial Crisis Network, Carrie Severino, Ethics and Public Policy Center, Ed Whelan, Mike Davis, Concerned Women for America, Independent Women's Voice, or Independent Women's Forum during the period of Justice Kavanaugh's confirmation process. As an academic, I gave several speeches to local chapters of the Federalist Society during Justice Kavanaugh's confirmation process, which are listed and described in my SJQ.

- a. The Federalist Society for Law and Public Policy Studies
- b. Leonard Leo
- c. Judicial Crisis Network
- d. Carrie Severino
- e. Ethics and Public Policy Center
- f. Ed Whelan
- g. Greg Mueller
- h. CRC Concepts
- i. Mike Davis
- j. Concerned Women for America
- k. Independent Women's Voice
- l. Independent Women's Forum

24. While serving as a judicial law clerk did you ever communicate with the media about a case? If yes, was that communication authorized by the judge or justice for whom you were clerking?

I did not.

Senate Judiciary Committee
“Nominations”
Questions for the Record
May 6, 2020
Senator Amy Klobuchar

Questions for Judge Justin Walker, Nominee to the D.C. Circuit Court of Appeals

We discussed the *Chevron* doctrine at Wednesday’s hearing, and in an exchange with Senator Grassley, you said that “*Chevron* does not apply to certain agency regulations when they involve a very major question.” As you know, *Chevron* is the most cited case in administrative law, and modifying or overturning it could upend how our courts review regulations governing critical matters such as whether our water is clean and workplaces are safe.

- Do you agree that a judge could misuse this “major question” determination to avoid *Chevron* deference and invalidate a rule that does not align with his or her policy preferences? In your view, how is a judge supposed to distinguish between regulations that involve a “major question” and those that do not?

As I testified in the confirmation hearing, *Chevron* is binding precedent from the Supreme Court of the United States. I faithfully follow it and all binding Supreme Court precedent as a district judge, and I will continue to do so if I am confirmed to the D.C. Circuit.

Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., held that when statutory ambiguity leaves “a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” 467 U.S. 837, 843-44 (1984). To determine if a statute is ambiguous, courts consider the statute’s text, its structure, relevant precedents, similar statutory language, other informative context, and canons of construction like *expressio unius* and *eiusdem generis*. After using all the tools of statutory construction, if the statutory provision’s best reading is apparent, the provision is not ambiguous. If, however, it remains unknowable which interpretation of two or more competing meanings is the best reading, then the statutory provision is ambiguous.

Many Judges and Justices with varying approaches to administrative law have said that major questions do not trigger *Chevron* deference. Justice Stephen Breyer once wrote, “A court may . . . ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.” *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). In 2014, *King v. Burwell* clarified that *Chevron* does not apply when at issue is a “question of deep ‘economic and political significance.’” 135 S. Ct. at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)). As Justice Kavanaugh has written, *King v. Burwell* “raises two significant questions that the Supreme Court will presumably have to confront soon: First, how major must the questions be for *Chevron* to apply? Second, if *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for cases involving less major but still important questions?” *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016).

Both *King* and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), offer some guidance on whether an issue is of “deep ‘economic and political significance.’” *King*, 135 S. Ct. at 2489. *Chevron* applies in an “ordinary” case. *Brown & Williamson*, 529 U.S. at 159. But a court should not defer to an agency on a question like “whether an industry will be entirely, or even substantially, rate-regulated.” *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994). Or whether the FDA can regulate cigarettes. *Brown & Williamson*, 529 U.S. at 160-61. Or whether buyers on the federal health insurance exchange are eligible for tax credits available to buyers on state health insurance exchanges. *King*, 135 S. Ct. at 2496.

To be sure, there is distance on a spectrum from the most “ordinary” of cases on one end, and the questions in *MCI v. AT&T*, *Brown & Williamson v. FDA*, and *King v. Burwell* on the other end. But the place of particular questions on that spectrum – including the place on that spectrum of the issue in *Chevron* itself – is implicated by pending and impending litigation. Indeed, a significant portion of the D.C. Circuit’s docket involves agency interpretations of statutes. “A judge should not make public comment on the merits of a matter pending or impending in any court.” Canon of Code of Conduct for United States Judges 3(A)(6). As a district judge, and if I’m confirmed to the D.C. Circuit, I will approach agency arguments in favor of *Chevron* deference – and opposing parties’ arguments against *Chevron* deference – with an open mind.

In a working draft of a law review article that you wrote earlier this year, you predicted that the Supreme Court will roll back its 1935 opinion in *Humphrey’s Executor*, which affirmed the constitutionality of the structure of the Federal Trade Commission (FTC), which was intended to be independent of politics to better protect people from fraud. As we have seen a surge in reports of fraud targeting consumers during the coronavirus pandemic, it is critical that agencies like the FTC are able to carry out their missions.

- You characterized the Court’s decision as “allow[ing] Congress to strip the President of the power to remove renegade regulators.” Is it your opinion that rules made by independent agencies lack legitimacy because they may not reflect the President’s political preferences?

As a sitting district court judge and a D.C. Circuit nominee, it is inappropriate for me to opine further than what I wrote in the article. Specifically, it is inappropriate for me to opine about the legitimacy of rules made by another branch of government because those issues are being litigated in courts across the country. *See* Canon 4(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- If you are confirmed to the D.C. Circuit, will you commit to applying the Supreme Court’s precedent in *Humphrey’s Executor*?

Yes.

**Nomination of Justin R. Walker, to be United States Circuit Judge
for the District of Columbia Circuit
Questions for the Record
Submitted May 13, 2020**

QUESTIONS FROM SENATOR COONS

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

The Supreme Court has stated, “[w]e begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 849-50 (1992); *Cruzan v. Director, MDH*, 497 U.S. 261, 269-79 (1990); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

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

Yes, the Supreme Court has considered whether the right is expressly enumerated, and I would follow its guidance.

- 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. Please see my response to Question 1.

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

I would consider whether the right has previously been recognized by Supreme Court or circuit precedent, and I would follow binding precedent fully and faithfully. In the absence of a binding precedent, I would consider precedents of other circuit courts.

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

Yes.

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

These precedents currently bind me and will continue to bind me. If confirmed, I would follow *Lawrence*, *Casey*, and all other binding precedents fully and faithfully.

- f. What other factors would you consider?

Please see my response to Question 1.

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

The Supreme Court held in *United States v. Virginia* (1996) that the Fourteenth Amendment's Equal Protection Clause prohibits distinctions on the basis of sex unjustified by an "exceedingly persuasive justification." As a district court judge, I follow *United States v. Virginia* fully and faithfully. If I were confirmed to the D.C. Circuit, I would continue to do the same.

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

The Supreme Court has provided guidance for interpreting the Fourteenth Amendment. As a district court judge I have always followed precedent, and if confirmed, I would apply those precedents fully and faithfully. The Canons of Judicial Conduct prohibit me from going beyond that and offering personal views on the merits of Supreme Court decisions, predicting the outcome of future litigation before me, or addressing current controversies.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Please see my response to Question 2(a).

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

Please see my response to Question 2(a).

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

Please see my response to Question 2(a).

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

Griswold v. Connecticut and *Eisenstadt v. Baird* recognized a right to use contraceptives. As a district court judge, I have always followed precedent, and if confirmed, I would follow *Griswold*, *Eisenstadt*, and all Supreme Court precedent fully and faithfully

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

Roe v. Wade, *Planned Parenthood v. Casey*, and *Whole Woman's Health v. Hellerstedt* recognized such a right. As a district court judge I have always followed precedent, and if confirmed, I would follow these and all Supreme Court precedent fully and faithfully.

- 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?

Lawrence v. Texas recognized such a right. As a district court judge, I have always followed precedent and, if confirmed, I would follow *Lawrence* and all Supreme Court precedent fully and faithfully.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3(a), and 3(b).

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

The Supreme Court has provided guidance on when to consider evidence that sheds light on our changing understanding of society and sociological and scientific data. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996). As a district court judge, I have always followed precedent and, if confirmed, I would follow those precedents fully and faithfully.

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

Please see my response to Question 4(a).

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”
 - a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Obergefell is binding precedent. As a district court judge, I have always followed precedent, and if confirmed, I would follow *Obergefell* and all Supreme Court precedents fully and faithfully. Related issues are implicated by pending or impending litigation, and the Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view beyond that.

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

Please see my response to Question 5(a).

6. 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?

Brown v. Board of Education is a landmark decision, as I stated at my 2019 confirmation hearing. As a district court judge, I have always followed precedent. If confirmed, I would follow *Brown* and all Supreme Court precedents fully and faithfully. Historians and legal academics have debated the relationship between *Brown* and originalism, but my academic scholarship has not explored that relationship.

- 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 May 13, 2020).

Please see my response to Question 6(a).

- 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 stated that the original meaning of constitutional text can be important to determining the text’s meaning. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004).

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

Please see my response to Question 6(c).

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

If confirmed, I would consider Supreme Court and D.C. Circuit precedent when discerning the contours of a constitutional provision, and I would follow such precedent fully and faithfully.

7. At your investiture, you said that the “worst words” you can hear from Justice Kennedy are “the Chief Justice thinks this might be a tax.”
 - a. Were you referring to Chief Justice Roberts’ view that the Affordable Care Act’s individual mandate should be upheld under the Taxing Clause?

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have

suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term’s most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy’s announcement of that dissent from the bench, when he said, “We must submit, with due respect, that today’s decision somehow overlooks this Court’s historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times.”

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

- b. Why were these the “worst words” you could hear from Justice Kennedy?

Please see my answer to Question 7(a).

- c. During the hearing on your nomination, I asked you about your assertion in a 2018 article that the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), was “indefensible.” You testified, “While I made statements as an academic and as a private citizen, I don’t think it’s appropriate now for me as a sitting judge to go beyond what I said in my role at the time.” Why was it appropriate for you to go beyond what you had previously said about *NFIB v. Sebelius* at your investiture?

Please see my answer to Question 7(a).

- d. Do you stand by your criticism of *NFIB v. Sebelius* as “indefensible”?

Please see my answer to Question 7(a).

8. At your investiture, you stated, “Although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.” During the hearing on your nomination, you testified that in your investiture speech, you were “not trying to inject politics” into your speech and instead were “trying to push back against the politicization of the judiciary.”
 - a. Please explain how your use of the word “deplorable,” an apparent reference to Hillary Clinton’s 2016 presidential campaign, did not inject politics into your speech.

Please see my answer to Question 7(a).

- b. During the hearing on your nomination, I asked you who you meant by “we” in your speech. You responded that you meant “those who approach judging with the respect for the rule of law and the separation of powers and fidelity to text and the belief that a judge should say what the law is and not what he or she thinks that the law should be.” Please explain who is “waging war” against this group of people and how that “war” is being waged.

Please see my answer to Question 7(a).

9. Last month, you enjoined part of the Louisville, Kentucky, stay-at-home order. Some, including Professor Josh Blackman, have criticized your rhetoric as “over-the-top” and not “necessary to decide the narrow question” before you. Professor Blackman also noted that to reach a decision in the case, you “did not even need to discuss the Free Exercise Clause of the First Amendment. Kentucky’s [Religious Freedom Restoration Act] provided all the relief the Plaintiff’s [sic] sought. Constitutional questions should generally be avoided. But here, they were addressed head-on.”
 - a. Do you agree that constitutional questions should be avoided if they are not necessary to resolve a case?

Supreme Court cases on the constitutional avoidance doctrine bind me as a district judge, and they will continue to bind me as a circuit court judge should I be confirmed. *See, e.g., Nielson v. Preap*, 139 S.Ct. 954 (2019).

- b. Why did you address the Free Exercise Clause in your decision?

The Free Exercise Clause analysis had binding Supreme Court precedent directly on point. *See On Fire Christian Center, Inc. v. Fischer*, --- F.Supp.3d ----, 2020 WL 1820249 at *6-7 (W.D.K.Y. Apr. 11, 2020) (applying *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520 (1993)). There is little case law discussing Kentucky’s Religious Freedom Restoration Act, as my colleague on the Western District of Kentucky, Judge Hale, recently noted: “the Kentucky Religious Freedom Restoration Act is largely untested in the courts” *Maryville Baptist Church v. Beshear*, --- F. Supp. 3d ----, 2020 WL 1909616 at *3 n.2 (W.D.Ky. Apr. 18, 2020) (injunction pending appeal granted in *Maryville Baptist Church, Inc. v. Beshear*, --- F.3d ---- (6th Cir. May 2, 2020) (per curiam)).

- c. When is it appropriate for a judge to address constitutional questions that are not necessary to resolve a case?

Supreme Court cases on the constitutional avoidance doctrine bind me as a district judge, and they will continue to bind me as a circuit court judge should I be confirmed. *See, e.g., Nielson v. Preap*, 139 S.Ct. 954 (2019).

- d. You issued a temporary restraining order in this case without hearing from attorneys for the City of Louisville. Did your chambers or staff make any attempt to contact the City of Louisville or its attorneys before you issued this order?

The temporary restraining order motion arrived on my desk at 6pm on Friday evening, April 10. It was impractical, if not impossible, to set up a telephonic status conference to try to resolve it long after the close of business on Friday evening or early Saturday morning. The plaintiff needed an answer on whether its members could attend a drive-in church service on Sunday, and it needed that answer by early Saturday afternoon so that its members could plan accordingly.

I issued the temporary restraining order after full consideration of Federal Rule of Civil Procedure 65, which defines when a district court can issue a temporary restraining order without notice. The City of Louisville knew of the pending lawsuit from the plaintiff as early as Thursday, April 9, but it ignored the plaintiff's inquiries. Even after the lawsuit was filed, Louisville could have electronically filed a response or even simply an entry of appearance on Friday evening or Saturday morning. It did neither. Its lawyers confirmed in open court at the preliminary injunction hearing that they didn't try to contact the Court.

- e. Do you agree that a judge should strive to hear from both parties before making a decision in a case?

Generally yes, though Federal Rule of Civil Procedure 65(b) authorizes a district judge to issue a temporary restraining order without notice to the defendant in limited circumstances in order to avoid an irreparable injury.

10. In a draft article to be published in the *Indiana Law Journal* titled "The Kavanaugh Court and the *Schechter-to-Chevron* Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable," you criticized *Humphrey's Executor*, 295 U.S. 602 (1935), a case that laid the foundation for independent agencies like the Federal Reserve that are playing a critical role in responding to the current pandemic.

- a. Do you stand by your criticism of *Humphrey's Executor*, a unanimous, 85-year-old precedent?

Humphrey's Executor binds me as a district court judge and will bind me if I am confirmed to the D.C. Circuit. If confirmed to the D.C. Circuit, I will follow it fully and faithfully, as I do now as a district court judge.

- b. Are you aware of any subsequent Supreme Court or court of appeals decision calling into question the constitutionality of independent agencies?

The scope of *Humphrey's Executor* is implicated by pending or impending litigation. *See, e.g., Seila Law LLC v. CFPB*, No. 19-7 (U.S. Supreme Court Oral Arg. Mar. 3, 2020). The Canons of the Code of Conduct for United States Judges therefore prohibit me from expressing a view.

11. During the hearing on your nomination, I asked you whether a president can direct the FBI to investigate his political opponents. Your answer was not responsive to my question. Can a president direct the FBI to investigate his political opponents?

It is inappropriate for me, as a sitting district court judge and as a nominee to the D.C. Circuit, to comment further on separation of powers issues, which are pending before federal courts throughout this country. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

12. In your Senate Judiciary Committee Questionnaire, you stated that you met with President Trump and Leader McConnell at the White House on January 8, 2020, to discuss the vacancy that you have been nominated to fill. However, Judge Griffith did not announce his retirement until March 2020.

- a. When were you first informed that this seat would become vacant, and how did you receive this information?

In late 2019, in anticipation of a long-rumored upcoming vacancy on the D.C. Circuit, Senate Majority Leader Mitch McConnell contacted me to gauge my continued interest in serving on the D.C. Circuit.

- b. When did you first discuss Judge Griffith’s potential or pending vacancy with Leader McConnell?

Late 2019.

- c. Did you meet with President Trump when you interviewed for the seat on the D.C. Circuit to be vacated by then-Judge Kavanaugh in 2018?

No.

- d. Most court of appeals nominees have not reported interviewing with President Trump. Were you told why you would interview with President Trump to discuss Judge Griffith’s vacancy?

No. It is my understanding that President Trump has met with two of the three people he has nominated to the D.C. Circuit.

13. In a 2018 interview with the *Baltimore Post-Examiner*, you praised the nomination of then-Judge Kavanaugh to the Supreme Court. You said that as a result of his nomination, “Issues like affirmative action, school prayer, gun rights, and abortion will see drastic changes. I predict an end to affirmative action, an end to successful litigation about religious displays and prayers, an end to bans on semi-automatic rifles, and an end to almost all judicial [decisions allowing abortion]. ”

- a. Why did you predict that then-Judge Kavanaugh’s confirmation would lead to an end to affirmative action?

It would be improper for me to answer this question because affirmative action is being litigated in courts across the country. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- b. Why did you predict that then-Judge Kavanaugh’s confirmation would lead to an end to successful litigation about religious displays and prayers?

It would be improper for me to answer this question because religious displays and prayers are frequently the subject of litigation in courts across the country. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- c. Why did you predict that then-Judge Kavanaugh’s confirmation would lead to an end to bans on semi-automatic rifles?

It would be improper for me to answer this question because bans on semi-automatic rifles are frequently litigated in courts across the country. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- d. Why did you predict that then-Judge Kavanaugh’s confirmation would lead to an end to all judicial decisions allowing abortions?

It would be improper for me to answer this question because the issue of abortion is frequently litigated in courts across this country. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

Nominations
Hearing before the Senate Committee on the Judiciary
May 6, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Judge Justin R. Walker

1. At your nomination hearing, I asked whether you continue to believe that *NFIB v. Sebelius*, in which the Supreme Court upheld the Affordable Care Act’s individual mandate under the Taxing Clause under Article I, is “indefensible.”¹ You characterized your past criticism² of the *Sebelius* decision as “legal analysis regarding the limits of Congress’s power under Article I” not on “the policy merits of any health care proposal or health care statute.”³

a. Please describe the “legal analysis regarding the limits of Congress’s power under Article I” to which you were referring.

I wrote that article as an academic and private citizen engaged in a public dialogue before I was a judicial nominee. As I testified, *NFIB v. Sebelius* binds me as a district court judge and it would continue to bind me if I were confirmed to the D.C. Circuit.

b. If you had no views about the Affordable Care Act’s “policy merits,” would that preclude you from striking it down?

The Supreme Court’s precedents in *NFIB v. Sebelius* and *King v. Burwell* bind me as a district court judge and would continue to bind me if I were confirmed to the D.C. Circuit. As a sitting judge and a judicial nominee, it would be inappropriate for me to opine on whether the Affordable Care Act should be struck down. That issue is currently before the Supreme Court. Canon 3(A)(4) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

In that same piece in which you called the *Sebelius* decision “indefensible,” you specifically “thank[ed]” President Trump for the “individual mandate finally coming off the books.”⁴

c. What did you mean by the “individual mandate finally coming off the books”?

I wrote that article as an academic and private citizen engaged in a public dialogue before I was a judicial nominee. I understand that the role of a judge is different than that of an academic. As I testified, *NFIB v. Sebelius* binds me as a district court judge and it would continue to bind me if I were confirmed to the D.C. Circuit. As a sitting judge and a judicial nominee, it would be inappropriate for me to comment on removing the individual mandate because that issue is currently before the Supreme Court. Canon 3(A)(4) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

¹ Transcript, Senate Judiciary Committee Holds Hearing on the Nomination of Justin Walker to be US Circuit Judge for the District of Columbia, CQ (May 6, 2020), <https://plus.cq.com/doc/congressionaltranscripts-590174624> [hereinafter Transcript on the Nomination of Justin Walker].

² Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful*, THE FEDERALIST (July 3, 2018), <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/>.

³ Transcript on the Nomination of Justin Walker, *supra* note 1.

⁴ Walker, *supra* note 2.

d. Why did you “thank[]” President Trump for the “individual mandate finally coming off the books”?

Please see my answer to Question 1(c).

At your nomination hearing, you also testified that your prior criticism of the “legal reasoning in the majority decision in *NFIB v. Sebelius* . . . was not a commentary on the merits of any particular health care policy.”⁵

e. Please explain how “thank[ing]” President Trump comports with your sworn assertion that your past criticism of the *Sebelius* decision “was not commentary on the merits of any particular health care policy”.

Please see my answer to Question 1(c).

2. In 2018, you wrote that you are “very familiar” with the *Sebelius* “opinion” because you served as Justice Kennedy’s law clerk during that term.⁶ You further stated that Justice Kennedy was among the “dissenters” in *Sebelius* “who explained that the [Affordable Care Act’s individual] mandate violated the Constitution.”⁷ Since then, you have called *Sebelius* the “most public, high-profile case of the year”⁸ and publicly criticized Chief Justice Roberts for “think[ing]” that the individual mandate “might be a tax.”⁹

It has since been reported that, as a law clerk to Justice Kennedy, you “vigorously argued that the [individual] mandate [was] central to provisions [in the Affordable Care Act] such as those guaranteeing coverage for pre-existing conditions and expanding Medicaid coverage to needy people.”¹⁰

a. Please describe the doctrine of severability, including—

i. the standard for determining the severability of an unconstitutional provision in a federal statute.

The Supreme Court is currently considering a case on severability in a federal statute. *See Barr v. American Association of Political Consultants, Inc.*, No. 19-631 (oral arg. May 6, 2020). Therefore, it would be inappropriate for me to comment on the subject of that litigation. *See* Canon 3(A)(4) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”). I applied and discussed binding precedents on severability in my opinion in *L.D. Management v. Thomas*, --- F. Supp. 3d ---, 2020 U.S. Dist. LEXIS 72593 (W.D.K.Y. Apr. 24, 2020).

ii. the standard for determining whether the statute, absent the unconstitutional provision, will function in a manner consistent with Congress’s intent.

⁵ Transcript on the Nomination of Justin Walker, *supra* note 1.

⁶ Walker, *supra* note 2.

⁷ *Id.*

⁸ Transcript on the Nomination of Justin Walker, *supra* note 1.

⁹ Judge Justin R. Walker, Investiture Part Four – Judge Walker Speech (Mar. 13, 2020), <https://www.youtube.com/watch?v=k5iUfudxuM8> [hereinafter Investiture Speech].

¹⁰ Joan Biskupic, *Trump Nominee, Once a Supreme Court Clerk, Still Unhappy at How Obamacare Ruling Played Out*, CNN (updated May 3, 2020), <https://www.cnn.com/2020/05/03/politics/justin-walker-affordable-care-act-obamacare/index.html>.

Please see my answer to (2)(a)(i).

- b. Under the doctrine of severability, what is the outcome when an unconstitutional provision in a federal statute is determined to be nonseverable from the remainder of the statute?**

Please see my answer to (2)(a)(i).

- c. Have you ever argued, advised, suggested, recommended, or proposed—**
i. that the individual mandate is unconstitutional?

The Supreme Court is currently considering whether removing the individual mandate renders the Affordable Care Act unconstitutional. *See California v. Texas*, No. 19-840. Therefore, it would be inappropriate for me to comment on the question at issue in that litigation. *See* Canon 3(A)(4) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- ii. that the individual mandate is central to provisions in the Affordable Care Act, including those guaranteeing coverage for pre-existing conditions and expanding Medicaid coverage to needy people?**

Please see my answer to 2(c)(i).

- iii. that if the individual mandate is unconstitutional, that it is nonseverable from the remaining provisions of the Affordable Care Act or any subset of remaining provisions of the Affordable Care Act?**

Please see my answer to 2(c)(i).

In March 2020, the Supreme Court granted certiorari in *California v. Texas*, on appeal from the Fifth Circuit Court of Appeals. During the October 2020 term, the Supreme Court will consider, in part, whether the Affordable Care Act’s individual mandate is unconstitutional and whether it is severable from the rest of the Affordable Care Act.¹¹

The Trump Administration has long maintained that individual mandate is unconstitutional, and, since May 2019, has argued that, “[u]nder severability principles, in the absence of the mandate, Congress would not have intended to retain . . . the rest of the [Affordable Care Act], which involves numerous other interdependent provisions . . . designed to work together to expand health-insurance coverage and to shift healthcare costs.”¹² Accordingly, the Trump Administration contends that the Affordable Care Act must be struck down in its entirety. Even President Trump himself, on the day of your nomination hearing, said as much, promising, “We want to terminate health care under [the Affordable Care Act].”¹³

¹¹ *See generally California v. Texas*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/california-v-texas/>.

¹² Brief for the Federal Defendants, at 18, *Texas v. California*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011).

¹³ Devlin Barrett, *Trump Vows Complete End of Obamacare Law Despite Pandemic*, WASH. POST (May 6, 2020), https://www.washingtonpost.com/world/national-security/trump-obamacare-supreme-court/2020/05/06/4a53ba54-8fe1-11ea-9e23-6914ee410a5f_story.html.

- d. At any point (1) prior to your nomination to the District Court for the Western District of Kentucky, (2) between your confirmation to the District Court for the Western District of Kentucky and your nomination to the Court of Appeals for the District of Columbia Circuit, and (3) since your nomination to the Court of Appeals for the District of Columbia Circuit, have you spoken with any person in the Trump Administration, including the White House and the Department of Justice, regarding the Administration's arguments, position, or strategy in *California v. Texas*? If so—**

After briefing had been filed, a friend who works for DOJ pointed out that the brief had been filed.

- i. please list with whom you spoke.**
 - ii. please explain the capacity in which you spoke with them.**
 - iii. please provide a summary of what you spoke about.**
- e. At any point (1) prior to your nomination to the District Court for the Western District of Kentucky, (2) between your confirmation to the District Court for the Western District of Kentucky and your nomination to the Court of Appeals for the District of Columbia Circuit, and (3) since your nomination to the Court of Appeals for the District of Columbia Circuit, have you spoken with any Senator or Senate staffer regarding the Trump Administration's arguments, position, or strategy in *California v. Texas*? If so—**

Not that I recall.

- i. please list with whom you spoke.**
 - ii. please explain the capacity in which you spoke with them.**
 - iii. please provide a summary of what you spoke about.**
- f. At any point (1) prior to your nomination to the District Court for the Western District of Kentucky, (2) between your confirmation to the District Court for the Western District of Kentucky and your nomination to the Court of Appeals for the District of Columbia Circuit, and (3) since your nomination to the Court of Appeals for the District of Columbia Circuit, have you spoken with any party or party representative challenging the constitutionality of the individual mandate or the Affordable Care Act in *California v. Texas*? If so—**

Not that I recall.

- i. please list with whom you spoke.**
 - ii. please explain the capacity in which you spoke with them.**
 - iii. please provide a summary of what you spoke about.**
- 3. During your nomination to the District Court for the Western District of Kentucky, you were asked, in Questions For the Record, about past statements that you had made on a number of**

topics, including *NFIB v. Sebelius*, the independence of the Federal Bureau of Investigation, principles in administrative law, firearm restrictions based on public safety, and then-Judge Brett Kavanaugh during his nomination to the Supreme Court, among others.¹⁴ In response to many, if not most, of these questions, you stated:

I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or judicial nominee. The canons of judicial conduct preclude me, in my role as a judicial nominee, from going beyond what [you previously had said or written].¹⁵

- a. Please identify the specific “canons of judicial conduct” that so “preclude[d]” you from answering questions about statements you made before you were nominated to the District Court for the Western District of Kentucky.**

Canons 1, 2, 3, and 5.

On March 13, 2020, you delivered remarks at your investiture in Louisville, Kentucky. During your remarks, you specifically thanked those who had opposed your nomination. You said:

Thank you for serving as an enduring reminder that although my legal principles are prevalent, they have not yet prevailed. That although we are winning we have not won. And that although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable. Well, my friends, there’s nothing terrifying about the original meaning of our Constitution and there’s nothing deplorable about defending it.¹⁶

- b. Please explain—**

- i. what you meant by “although my legal principles are prevalent, they have not yet prevailed”.**

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they

¹⁴ See generally Questions For the Record, Nomination of Justice Reed Walker to the United States District Court for the Western District of Kentucky (submitted Aug. 7, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Walker%20Responses%20to%20QFRs.pdf> [hereinafter QFRs for the Western District of Kentucky].

¹⁵ See *id.* at p. 4.

¹⁶ Investiture Speech, *supra* note 9.

might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term’s most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy’s announcement of that dissent from the bench, when he said, “We must submit, with due respect, that today’s decision somehow overlooks this Court’s historic role and responsibility to teach, to confirm, to insist upon this

proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times.”

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

ii. who you believe is “winning” and what you meant by “winning”.

Please see my answer to Question 3(b)(i).

iii. what you meant by “we will lose our courts and country”.

Please see my answer to Question 3(b)(i).

iv. who are the “critics who call us terrifying and who describe us as deplorable”.

Please see my answer to Question 3(b)(i).

c. At the time you delivered these remarks, were you bound by the same “canons of judicial conduct” that you cited in your responses to Questions For the Record submitted during your nomination to the District Court for the Western District of Kentucky?

Yes.

i. If so, please identify the specific canons that permitted you to make these remarks during your investiture but “preclude[d]” you from responding to aforementioned Questions For the Record.

Canons 1, 2, 3, and 5

ii. If not, please explain why not.

4. In 2018, during one of the 119 interviews you participated in during the Kavanaugh nomination, you said that then-Judge Kavanaugh wrote a “thoughtful, historically based decision” in *Heller v. D.C.*,¹⁷ otherwise known as “*Heller II*.”

To be clear, Judge Kavanaugh did not write the decision in *Heller II*; he dissented from the majority decision that upheld a ban on semi-automatic rifles and large-capacity magazines. You were serving as his law clerk at the time. Since then, you have characterized Judge Kavanaugh’s dissenting opinion “[p]robably the most thorough pro-Second Amendment analysis by a lower-court judge in history.”¹⁸

¹⁷ Television Interview by Dana Perino with Justin Walker, Fox News (Sept. 3, 2019), available at <https://grabien.com/file.php?id=450869> [hereinafter Television Interview by Dana Perino].

¹⁸ Yvonne Gonzalez, *Kavanaugh Hearing Crucial for Undecided Senators, Cortez Masto Says*, LAS VEGAS SUN (Sept. 26, 2018) (SJQ Attachments 12(e) at p. 539).

In that same interview, you praised Judge Kavanaugh for declining to balance gun rights against public safety – an analysis that you said was “precluded by the Supreme Court’s *Heller* decision” and “by the Second Amendment” because of “the decision by the Framers to make that balancing choice themselves and to take some of that question out of the democratic process.”¹⁹

a. Do you believe the majority decision in *Heller II* was wrong?

Heller II is binding D.C. Circuit precedent, and it will bind me if I am confirmed.

b. If you are confirmed to the Court of Appeals for the District of Columbia Circuit, would you follow Judge Kavanaugh’s dissenting opinion in *Heller II*?

Please see my Answer to 4(a).

5. In response to a Question For the Record submitted during your nomination to the District Court for the Western District of Kentucky, you said, “*Roe* is binding precedent of the Supreme Court, and lower courts should apply it fully and faithfully, as with all precedents of the Supreme Court.”²⁰

a. Please explain—

i. on which courts *Roe* is and is not binding.

Roe is binding on all lower courts.

ii. the central holding of *Roe* and whether *Roe* protects a pregnant woman’s right to choose.

The Supreme Court recognized this right in *Roe* and has subsequently reaffirmed it. I am bound by those precedents as a district judge and will continue to be bound by them if I am confirmed to the D.C. Circuit.

In 2018, during another one of the 119 interviews you participated in during the Kavanaugh nomination, you predicted that the confirmation of Justice Kavanaugh would mean “an end to almost all judicial restrictions on abortion.”²¹

b. Please list the “judicial restrictions on abortions” you were referring to and the cases in which those “restrictions” were established.

The Supreme Court recognized the right to an abortion in *Roe* and has subsequently reaffirmed it. I am bound by those precedents as a district judge and will continue to be bound by them if I am confirmed. In the interview your question refers to, I was asked to predict in my role as an academic and a citizen engaged in the political process, and made many of the same predictions made by many ideologically diverse legal experts. Others reflected my view of Justice Kavanaugh’s temperament

¹⁹ Television Interview with Dana Perino, *supra* note 17.

²⁰ QFRs for the Western District of Kentucky, *supra* note 14, at p. 7.

²¹ Carrie Johnson, *Brett Kavanaugh Supported Broad Leeway For Presidents Under Investigation*, NPR (Jul. 10, 2018), <https://www.npr.org/2018/07/10/627504728/brett-kavanaugh-supported-broad-leeway-for-presidents-under-investigation>.

and fidelity to text, constitutional structure, and the limited role of judges. I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct preclude me, in my role as a judicial nominee, from saying more than what was said in the interviews in the summer of 2018.

I would like to know how you reconcile your written statement that “*Roe* is binding precedent of the Supreme Court, and lower courts should apply it fully and faithfully” with your prediction that Justice Kavanaugh would mean “an end to almost all judicial restrictions on abortion.”

I can see only two options:

- If you believe that, under current Supreme Court precedent, including *Roe*, the courts have almost no role in protecting reproductive rights, that is a terrifying admission. If you read *Roe* as allowing “an end to almost all judicial restrictions on abortion,” then women hoping to protect their rights can find no comfort in your statements.
- Alternatively, if you believe that *Roe* gives the courts a role in protecting reproductive rights, then your prediction about now-Justice Kavanaugh is chilling for a different reason because it concedes that Justice Kavanaugh will overturn *Roe*. If that is true, then Justice Kavanaugh misled this body when he persuaded some of our colleagues that he would uphold *Roe*.

c. Do you believe it is consistent with *Roe* and its progeny to eliminate “almost all judicial restrictions on abortion,” or can such “restrictions” be eliminated only if *Roe* is overturned?

The Supreme Court is currently considering restrictions on abortion in *June Medical Services LLC v. Russo*, No. 18-1323 (Oral Arg. Mar 4, 2020). Therefore, the Canons of Judicial Conduct preclude me from answering this question. See Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in *any court*.” (emphasis added)). Please also see my answer to Question 5(b).

Questions for the Record for Justin R. Walker
From Senator Mazie K. Hirono

1. At the hearing, I asked you about your statements in a July 2018 Baltimore Post-Examiner article. According to the article, you had advocated for then Judge-Kavanaugh to be a Supreme Court Justice by arguing that he would “shift the court dramatically to the right” and had said:

“This is a conservative revolution as big as the Reagan Revolution. Issues like affirmative action, school prayer, gun rights, and abortion will see drastic changes. I predict an end to affirmative action, an end to successful litigation about religious displays and prayers, an end to bans on semi-automatic rifles, and an end to almost all judicial [decisions allowing abortion]. This change will give Donald Trump the most conservative judicial legacy of any Republican in history, by far.”

When I asked you at the hearing whether you consider yourself part of this “conservative revolution,” you stated, “as a sitting judge and as a judicial nominee, it’s not appropriate. In fact, I am prohibited from the canons of judicial ethics from commenting on politics or matters of public concern. The predictions I made about Justice Kavanaugh were, I think, consistent with similar predictions that people left, right and center...”

- a. Please identify the specific provision of the canons of judicial ethics that prohibit you from answering my question.

Canon 5(c).

- b. Please explain how the specific provision of the canons of judicial ethics that you believe prohibits you from answering my question about your prior “conservative revolution” statement, nonetheless allows you to make the following statements at your March 13, 2020 investiture speech as a sitting judge:

“Thank you for serving as an enduring reminder that although my legal principles are prevalent, they have not yet prevailed. That although we are winning we have not won. And that although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.”; and

“Because in Brett Kavanaugh’s America, we will not surrender while you wage war on our work or our cause or our hope or our dream.”

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my

speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term's most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy's announcement of that dissent from the bench, when he said, "We must submit, with due respect, that today's decision somehow overlooks this Court's historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times."

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

c. Do you believe your legal record aligns with Justice Kavanaugh's legal record?

My goal as a district court judge has not been to align my decisions with any particular judge, but rather to align my decisions with the Constitution, statutory law, and binding precedents, including all Supreme Court precedents.

2. The D.C. Circuit handles more administrative law cases than any other circuit. You have been critical of a key Supreme Court precedent that requires courts to defer to the expertise of administrative agencies enforcing a law unless it is unreasonable. In a TV interview, you said, "for decades courts have been pretty deferential to agencies and the result has been a \$2 trillion annual regulatory burden on the American people and on the American economy."

a. In your view, who specifically are 'burdened' by these regulations, such as worker safety standards, and how are they burdened?

I made those statements as an academic. I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct preclude me, in my role as a judicial nominee, from going beyond what was said in the 2018 article. Because I currently have and am likely to have cases involving federal regulations, it would be improper for me to comment on those regulations. *See* Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

b. During the COVID-19 pandemic, agencies like the Department of Health and Human Services, the Centers for Disease Control and Prevention, and Occupational Safety and Health Administration (OSHA), and experts like Dr. Fauci are critical to protecting the health and safety of workers and everyday Americans. If you were confirmed and a regulation requiring employers to maintain certain public health safety standards were challenged, would you defer first to experts at the agency issuing the worker safety standards if the regulation were reasonable?

Please see my answer to Question 2(a).

3. At your investiture on March 13, 2020, you thanked your “nomination opponents including the American Bar Association.” You said, “Thank you for serving as an enduring reminder that although my legal principles are prevalent, they have not yet prevailed. That although we are winning we have not won. And that although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.”
 - a. At the hearing, you said your reference to the “we” who are winning were “those who approach judging with the respect for the rule of law and the separation of powers and fidelity to text and the belief that a judge should say what the law is and not what he or she thinks that the law should be.” If that’s who you say you were referring to as winning, who are the people were you implying were losing and how are you beating them?

Please see my answer to Question 1(b).

- b. As a sitting judge, how are you engaging in this battle that you are “winning”?

Please see my answer to Question 1(b).

- c. The American Bar Association (ABA) criticized you for your lack of trial experience as a nominee for the district court judgeship you hold now. How did the ABA “serv[e] as an enduring reminder that although [your] legal principles are prevalent, they have not yet prevailed”?

Please see my answer to Question 1(b).

- d. When you say ‘my legal principles’ have ‘not yet prevailed,’ is it your view that you have a different set of legal principles than the parties coming before you?

Please see my answer to Question 1(b).

- e. You said you are celebrating but cannot take it for granted because you risk losing your courts. Is it your view that as a judge, you and whoever you describe as “we” have won the courts?

Please see my answer to Question 1(b).

- f. Who has described you and those you allude to as on your side as “deplorable” and in what ways could you ‘lose the courts’ to them?

Please see my answer to Question 1(b).

4. You participated in at least 119 radio, TV, and print interviews and wrote several op-eds where you advocated for the Supreme Court confirmation of your former boss, then-Judge Kavanaugh. In an op-ed you wrote for The Federalist in 2018, you called the Supreme Court’s decision upholding the Affordable Care Act (ACA) an “indefensible decision,” and its Taxing Clause argument “catastrophic[.]” Regarding the individual mandate in the ACA,

you wrote that then-Judge Kavanaugh had advanced a “thorough and principled takedown of the mandate” and provided “a roadmap for the Supreme Court—the Supreme Court dissenters, justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, who explained that the mandate violated the Constitution.”

In your investiture speech on March 13, 2020, you spoke about your clerkship with Justice Kennedy. You stated that the “worst words” you can hear from Justice Kennedy are “the Chief Justice thinks this might be a tax,” an apparent reference to Chief Justice Roberts’ decision in *NFIB v. Sebelius*, which upheld the ACA’s individual mandate under the Taxing Clause.

- a. During your more than one hundred media appearances and op-eds, how many other Supreme Court precedents did you call an “indefensible decision”?

To the best of my recollection, none.

- b. When Senator Durbin asked you at the hearing whether, in light of your comments about the Affordable Care Act’s constitutionality, you would recuse yourself from any case involving constitutional challenges to the Affordable Care Act’s provisions, you responded, “28 U.S.C. 455 outlines when a judge should or should not recuse from a case. And I pledge to you today to follow that statute to the letter.” Do you believe calling a Supreme Court precedent “indefensible” warrants recusal from cases involving that precedent, under 28 U.S.C. 455?

28 U.S.C. § 455 governs when a judge must recuse. I faithfully follow that statute in my role as a district court judge, and if confirmed, I would faithfully follow that statute as a circuit court judge.

5. In your 2018 op-ed in *The Federalist*, you defended then-Judge Kavanaugh against what you called “unfair attacks” from the right regarding his health care record. You wrote, “Kavanaugh’s dismissal of the Taxing Clause argument is a roadmap to the conclusion reached by the dissenters—that the individual mandate is unconstitutional under the Taxing Clause.”

The dictionary defines “roadmap” as “a detailed plan to guide progress toward a goal.” In other words, one starts with the goal and then develops a roadmap to get there. Do you think it is proper for judges to create “roadmaps” in their judicial opinions?

As an academic, in describing then-Judge Kavanaugh’s dissent, I meant that it was a guide for navigating the legal question in *NFIB v. Sebelius*. Legal treatises often serve as similar guides for judges. *See, e.g.,* Wayne LaFave, *Criminal Procedure Vol. I-VII*. It is not appropriate for judges to start with a policy goal and then engage in legal reasoning to get there, and my article did not say then-Judge Kavanaugh had done that.

6. On March 13, 2020, you gave an investiture speech where you compared Justice Kavanaugh to the Biblical figure St. Paul and said, “Because in Brett Kavanaugh’s America, we will not surrender while you wage war on our work or our cause or our hope or our dream.”

- a. At the hearing, when Senator Feinstein asked you what you meant by “Brett Kavanaugh's America,” you responded: “Justice Kavanaugh and Justice Kennedy are mentors of mine. And I will defend both of them. I'll defend them both until...” What is the “our cause” that you are refusing to surrender?

Please see my answer to Question 1(b).

- b. Who is “wag[ing] war” against your work and your cause?

Please see my answer to Question 1(b).

- c. In what ways are you “not surrender[ing]” to those who wage war on your cause?

Please see my answer to Question 1(b).

7. In your forthcoming article for the Indiana Law Journal titled, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court will Make the Administrative State More Democratically Accountable*, you argued that “by traveling from Schechter to Chevron, the Supreme Court has profoundly undermined the democratic accountability central to the Constitution’s conception of self-government.” You further argued:

“In short, although administrative and constitutional law scholars will correctly view an overturning of *Humphrey’s Executor* as a jurisprudential earthquake, most citizens outside that bubble, including even most lawyers, will likely view its overturning with a collective yawn. Here too, the comparison to Janus is not far off the mark. It’s precisely the type of major decision that Chief Justice Roberts believes the Supreme Court’s reputation can bear—radical, but nerdy; enormously consequential from the perspective of democratic accountability, but not emotionally charged like issues of Obamacare and abortion. And Roberts’s decision to author *Free Enterprise Fund* further suggests that this might be a hill he’s willing to fight on—even if, unlike Justice Kavanaugh, he hasn’t spent the past decade jurisprudentially preparing to lead the charge.”

- a. In your article, you described the Supreme Court’s precedent in *Humphrey’s Executor v. United States*, which unanimously upheld the Federal Trade Commission Act’s limitations on the President’s authority to remove a Commissioner, as having “allowed Congress to strip the President of the power to remove renegade regulators.” Please explain how overturning of *Humphrey’s Executor* would be a “jurisprudential earthquake.”

As a sitting district court judge and a D.C. Circuit nominee, it would be inappropriate for me to opine beyond what I wrote in the article. *Humphrey’s Executor* is binding Supreme Court precedent that I faithfully follow as a district court judge and I will faithfully follow if I am confirmed. Only the Supreme Court can overturn it, should it choose to do so.

Specifically, it would be inappropriate for me to opine about the legitimacy of rules made by another branch of government because those issues are being litigated in courts across the country. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- b. How is overturning *Humphrey's Executor* the type of decision "that Chief Justice Roberts believes the Supreme Court's reputation can bear—radical, but nerdy; enormously consequential from the perspective of democratic accountability, but not emotionally charged like issues of Obamacare and abortion"?

Please see my answer to Question 7(a).

- c. In your view, how has Justice Kavanaugh "spent the past decade jurisprudentially preparing to lead the charge"?

Please see my answer to Question 7(a).

Nomination of Justin R. Walker
United States Court of Appeals for the D.C. Circuit
Questions for the Record
Submitted May 13, 2020

QUESTIONS FROM SENATOR BOOKER

1. The COVID-19 pandemic has threatened Americans’ lives and livelihoods and disrupted our way of life. At the time of your hearing, the death toll in the United States from COVID-19 had surpassed 70,000. Since then, it has topped 80,000 and continues to climb. But instead of holding a hearing on any of the many urgent problems relating to this pandemic, this Committee held a hearing last week on your nomination to the D.C. Circuit, for a position that will not be vacant until September.¹
 - a. Do you think it was appropriate for the Committee to hold a hearing on your nomination last week?

The Canons of the Code of Conduct for United States Judges prohibit me from expressing a view on issues implicated by political questions, and the question of when and whether to hold a Senate Committee hearing is a political question.

- b. Did you indicate any objection or concern to anyone in the Administration or on the majority side of the Committee about the scheduling of your confirmation hearing?

No.

2. During your district court confirmation process last year, I asked you the following question for the record:

As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”² Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

You responded: “The canons of judicial conduct preclude me, in my role as a judicial nominee, from commenting on the statements of political leaders.”

¹ *Future Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies> (last modified May 12, 2020).

² 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>.

Canon 5, on political activities, states, among other things: “A judge should not . . . make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office.”³

- a. This question is about recusal and disqualification standards for federal judges. Why can’t you answer it?

As your question recognizes, Canon 5 prohibits judges from publicly endorsing or opposing a political candidate’s views. 28 U.S.C. § 455 governs when a judge must recuse. It is improper for me to opine beyond that because this issue may surface in a case. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- b. Which specific provision of the canons of judicial conduct do you believe precludes you from saying whether a judge’s race or ethnicity is a valid basis for recusal or disqualification?

Please see my answer to Question 2(a).

- c. Speaking at the investiture for your district judgeship in March 2020, you said: “Although we celebrate today, we cannot take for granted tomorrow—or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.”⁴ Was your use of the term “deplorable” a reference to a widely publicized remark by Hillary Clinton during the 2016 campaign about then-candidate Donald Trump’s supporters? If your answer is not a simple yes, please provide a full explanation.

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from

³ *Code of Conduct for United States Judges*, Canon 5(A)(2), U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (last modified Mar. 12, 2019).

⁴ *Judge Justin Walker Investiture Part Four – Judge Walker Speech*, YOUTUBE (Mar. 13, 2020) [hereinafter *Investiture Speech*], <https://www.youtube.com/watch?v=k5iUfudxuM8>.

the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); cf. Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term’s most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy’s announcement of that dissent from the bench, when he said, “We must submit, with due respect, that today’s decision somehow overlooks this Court’s historic role and responsibility to teach, to confirm, to insist upon

this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times.”

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

- d. When you talked in your investiture speech about “los[ing] our courts and our country to critics who call us terrifying and who describe us as deplorable,” who was the “we” to whom you were referring?

Please see my answer to Question 2(c).

- e. Why do you think the judicial conduct canons prevented you from answering a question before this Committee about judicial recusal and disqualification standards, but allowed you to comment publicly at your investiture on a campaign statement by Hillary Clinton?

Please see my answer to Question 2(c).

- f. Do you believe that your investiture speech fully complied with the Code of Conduct for United States Judges?

Yes.

3. You stated in your questionnaire responses to this Committee that, on January 8, 2020, you “met with President Donald Trump to discuss the vacancy, in a White House meeting also attended by Leader McConnell.”⁵ At least one press report indicated that this conversation “ultimately veer[ed] to Trump’s then-looming impeachment trial.”⁶

- a. What questions did President Trump ask you at this meeting?

The President asked about my experience as a district court judge. He also asked about my opinion of Justice Kavanaugh.

- b. What areas of the law did you discuss with President Trump at this meeting?

I do not recall discussing any specific areas of the law.

⁵ SJQ at 70.

⁶ Seung Min Kim, *Trump Taps Former Kavanaugh Clerk To Fill Vacancy on Powerful D.C. Appeals Court*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/politics/trump-taps-former-kavanaugh-clerk-to-fill-vacancy-on-powerful-dc-appeals-court/2020/04/03/3ddb5e50-7446-11ea-ae50-7148009252e3_story.html.

- c. Did President Trump ask you to make any commitments at this meeting?

No.

- d. At this meeting, did you discuss in any way President Trump's upcoming impeachment trial?

I did not discuss the impeachment trial.

- e. If so, what did you say to President Trump regarding the impeachment trial or the impeachment process generally?

Please see my answer to Question 3(d).

4. In one of your 35 reported appearances on Fox News supporting Brett Kavanaugh's nomination to the Supreme Court, you called then-Judge Kavanaugh "a warrior" and "a fighter for conservative legal principles who will not go wobbly."⁷
- a. You are seeking a seat on the D.C. Circuit, where Justice Kavanaugh sat before he joined the Supreme Court. Should we understand from this statement that you intend to be, like him, "a warrior" and "a fighter for conservative legal principles who will not go wobbly"?

I was speaking in the role of an academic and a citizen engaged in the political process. I understand that that role is different than the role of a judge or a judicial nominee. It is the responsibility of a judge to decide "cases and controversies" based on the law, not to engage in the political process. The canons of judicial conduct preclude me, in my role as a judicial nominee, from going beyond what I said in 2018 before I was a judge or judicial nominee.

- b. Why is it desirable, in your view, for a judge or a Justice to be a "warrior" for "conservative legal principles"?

Please see my answer to Question 4(a).

- c. Do you think that the person Justice Kavanaugh replaced—your former boss, Justice Kennedy—sometimes went "wobbly"? If you are unable to answer the question directly, why did you feel the need to provide an assurance that Justice Kavanaugh would "not go wobbly"?

I have great respect for both Justice Kennedy and Justice Kavanaugh. Please see my answer to Question 4(a).

⁷ *Law Professor: Judge Kavanaugh Has Backbone of Iron*, FOX NEWS (July 8, 2018), <https://video.foxnews.com/v/5806728724001>.

- d. In your investiture speech, you said that “every case requires a judge to respect his limited role in our Constitution’s structure.”⁸ But in a 2018 media interview, you said, with Justice Kavanaugh on the Court, “I predict an end to affirmative action, an end to successful litigation about religious displays and prayers, an end to bans on semi-automatic rifles, and an end to almost all judicial restrictions on abortion.” If, based on your prediction, a single Justice is responsible for such major changes to American law, does that fit the conception you articulated of the “limited role” of a judge?

In that interview, I made predictions about Justice Kavanaugh in my role as an academic and a citizen engaged in the political process – the same predictions made by many ideologically diverse legal experts. Others reflected my view of Justice Kavanaugh’s temperament and fidelity to text, constitutional structure, and the limited role of judges. I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct preclude me, in my role as a judicial nominee, from saying more than what was said in the interviews in the summer of 2018.

- e. You also said in your investiture speech, “In Kavanaugh’s America, we will not surrender while you wage war on our work, or our cause, or our hope, or our dream.”⁹ What did you mean by “Kavanaugh’s America,” and who is “wag[ing] war” on it?

Please see my answer to Question 2(c).

5. In 2018, you called the Supreme Court’s decision upholding the Affordable Care Act’s individual mandate, *National Federation of Independent Business v. Sebelius*,¹⁰ “an indefensible decision.”¹¹ You also stated that the Court’s reliance on Congress’s taxing power to uphold the individual mandate was “catastrophic[.]”¹² At your investiture speech in March 2020, you said, alluding to that case, “The greatest words you can hear from Justice Kennedy are, ‘you’re hired.’ And the worst words are, ‘the Chief Justice thinks this might be a tax.’”¹³
 - a. You clerked for Justice Kennedy during the Term when *NFIB v. Sebelius* was decided. Did Justice Kennedy actually say these words to you?

Please see my answer to Question 2(c).

- b. Whether or not he actually said these specific words to you, do you think it was appropriate for you to publicly disclose, or at least appear to disclose, in-chambers communications with Justice Kennedy?

⁸ *Investiture Speech*, *supra* note 4.

⁹ *Id.*

¹⁰ 567 U.S. 519 (2012).

¹¹ Justin Walker, *Brett Kavanaugh Said Obamacare Was Unprecedented and Unlawful*, FEDERALIST (July 3, 2018), <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful>.

¹² *Id.*

¹³ *Investiture Speech*, *supra* note 4.

Please see my answer to Question 2(c).

- c. Why, in your view, are “the Chief Justice thinks this might be a tax” the “worst” words you can hear from Justice Kennedy?

Please see my answer to Question 2(c).

- d. When you were asked during your confirmation process last year about your 2018 statement that *NFIB v. Sebelius* was “an indefensible decision,” you responded in writing, “The canons of judicial conduct preclude me, in my role as a judicial nominee, from going beyond what was said in the 2018 article.”

But at your investiture ceremony in March 2020, you were willing to offer new negative commentary about the Supreme Court’s decision in that case. Why do you think the judicial conduct canons allowed you to make those comments about *NFIB v. Sebelius* at your investiture, but not to answer questions on the same subject before this Committee?

Please see my answer to Question 2(c).

- e. Do you stand by your 2018 statement that the Court’s decision in *NFIB v. Sebelius* was “indefensible” and “catastrophic[]”?

In that op-ed, I was speaking in the role of an academic and a citizen engaged in the political process. I understand that that role is different than the role of a judge or a judicial nominee. It is the responsibility of a judge to decide “cases and controversies” based on the law, including binding precedent. *NFIB v. Sebelius* is binding precedent. The canons of judicial conduct preclude me, in my role as a judicial nominee, from going beyond what was said in the 2018 article.

- f. Given that you previously called *NFIB v. Sebelius* “indefensible” and “catastrophic[],” and given that—as a sitting federal judge—you said that learning about the Chief Justice’s taxing power rationale was the “worst” thing you could hear from Justice Kennedy, why shouldn’t this Committee conclude that you continue to believe *NFIB v. Sebelius* was wrongly decided?

As I testified in my confirmation hearing, *NFIB v. Sebelius* is binding Supreme Court precedent which I will continue to faithfully follow as a district court judge and if confirmed, as a Circuit Court judge.

- g. If you are confirmed, why should an individual in a case before you involving the Affordable Care Act expect to have a fair and impartial judge, in light of public comments you have made both before and after becoming a federal judge?

Please see my answer to Question 5(f).

- h. Given the positions you have taken on this issue, would you recuse yourself from any cases involving the Affordable Care Act if you are confirmed?

As I said at my hearing, I follow 28 U.S.C. § 455 as a district judge, and I will continue to follow it if confirmed to the D.C. Circuit.

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

The interpretation of statutory and constitutional text is often not easy, and it does not always lend itself to easy labels, which can sometimes confuse more than they clarify. Justice Kagan once said to the Judiciary Committee, “We are all originalists.” Regardless of what labels are used, I believe that an inquiry into a statute or constitution’s meaning begins with its text, including how prior judicial decisions have interpreted that text and how that text was understood at the time of its enactment into law. When there is binding precedent, that precedent controls the outcome in the district court and the court of appeals.

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

Please see my answer to Question 6.

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

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

The Supreme Court has given lower courts guidance on this question. The Court has said that as a general matter, legislative history is not necessary when a statute is unambiguous, while it can be considered when a statute is ambiguous. Lower court judges should apply all Supreme Court precedents with regard to legislative history and should consider all arguments raised by litigants, including arguments related to 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?

Please see my response to Question 8(a).

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

Every case that comes before a judge requires the judge to remember and respect the limited role of the judiciary in our constitutional structure.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.¹⁴ Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Heller* is binding precedent. As a district court judge, I have always followed precedent and, if confirmed, I would apply it fully and faithfully. The Canons of Judicial Conduct prohibit me from going beyond that and offering personal views on the merits of Supreme Court decisions.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.¹⁵ Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Citizens United* is binding precedent. As a district court judge, I have always followed precedent and, if confirmed, I would apply it fully and faithfully. The Canons of Judicial Conduct prohibit me from going beyond that and offering personal views on the merits of Supreme Court decisions.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹⁶ Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Shelby County* is binding precedent. As a district court judge, I have always followed precedent and, if confirmed, I would apply it fully and faithfully. The Canons of Judicial Conduct prohibit me from going beyond that and offering personal views on the merits of Supreme Court decisions.

10. 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.¹⁷ 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.¹⁸

¹⁴ 554 U.S. 570 (2008).

¹⁵ 558 U.S. 310 (2010).

¹⁶ 570 U.S. 529 (2013).

¹⁷ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁸ *Id.*

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

The right to vote is fundamental. As Chief Justice Roberts said, “it is preservative of all the other rights.” The Canons of Judicial Conduct prohibit me from going beyond that and opining on current controversies.

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

Please see my answer to Question 10(a).

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my answer to Question 10(a).

11. 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.¹⁹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.²⁰ 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.²¹ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²²

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

Yes, unfortunately there is implicit racial bias in our criminal justice system.

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

I am aware of data like the statistics referenced in the question indicating that people of color are disproportionately represented in our nation’s jails and prisons.

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

¹⁹ 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>.

²⁰ *Id.*

²¹ 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>.

²² *Id.*

Although this issue is of great importance, it has not been a focus of my academic research and scholarship.

- 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.²³ Why do you think that is the case?

The disparity referenced should be of serious concern to society and the legal community. The reason for the disparity is a topic of political, scholarly, and societal discussion. Although, I have not had an occasion to study these issues personally or form a view on them myself, I appreciate their importance.

- 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.²⁴ Why do you think that is the case?

Please see my response to Question 11(d).

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

Judges must be aware of these issues of great concern and should welcome opportunities to learn more. Bias should have no role in the courtroom. I am committed to continued study and any other appropriate steps useful to creating a courtroom where litigants have confidence in equal justice.

12. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.²⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁶

- 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.

This question raises important public policy issues that properly are the subject of serious consideration and public conversation. Although I have not had occasion to study these issues personally or form a view on them myself, I appreciate their importance.

²³ 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.

²⁴ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

²⁵ 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>.

²⁶ *Id.*

- 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.

Please see my response to Question 12(a).

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

Yes.

14. 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.

15. Do you believe that *Brown v. Board of Education*²⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I said at my 2019 confirmation hearing, *Brown* was correctly decided.

16. Do you believe that *Plessy v. Ferguson*²⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Plessy was not correctly decided.

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

No.

18. 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."²⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The canons of judicial conduct preclude me, in my role as a judicial nominee, from commenting on the statements of political leaders.

²⁷ 347 U.S. 483 (1954).

²⁸ 163 U.S. 537 (1896).

²⁹ 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 May 13, 2020
For the Nomination of**

Justin Walker, to be United States Circuit Judge for the District of Columbia Circuit

1. On July 3, 2018, you wrote an op-ed in *The Federalist* regarding the Affordable Care Act (ACA) and the Supreme Court’s decision upholding the law in *NFIB v. Sebelius*. In the article, you called the Court’s opinion an “indefensible decision” and said the arguments in favor of the validity of the law were “catastrophically accepted by the Supreme Court.”

18 Republican attorneys general are still seeking to overturn the ACA. Based on early filings, it appears that Attorney General Barr and the Justice Department are also prepared to ask the U.S. Supreme Court to strike down the entire law that guarantees health care to millions of Americans, including those with pre-existing conditions.

In light of your public remarks about the ACA, Senator Durbin asked if you would commit to recusing yourself from any case involving the constitutionality of the law. You refused to make that commitment.

- a. **Do you agree that your article casts serious doubt about your ability to fairly and impartially decide cases relating to the constitutionality of the ACA?**

No.

- b. **How do you think you can address those concerns short of recusal?**

As I testified, I strictly follow the recusal standard of 28 U.S.C. § 455 as a district judge, and I will faithfully follow that standard if I am confirmed.

- c. **If confirmed, will you agree to immediately consult with the Administrative Office of the U.S. Courts and request a public opinion as to whether you should recuse from any case involving the constitutionality of the ACA?**

As I testified, I strictly follow the recusal standard of 28 U.S.C. § 455 as a district judge, and I will faithfully follow that standard if I am confirmed. As I testified, I will consult the Administrative Office if I think it’s appropriate to do so.

2. During an investiture speech you delivered less than two months ago, you said:
“[A]lthough my legal principles are prevalent, they have not yet prevailed. [A]lthough we are winning we have not won. And [] although we celebrate today, we cannot take for granted tomorrow or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.”

When asked about these remarks at your hearing, you said that you intended to address the politicization of the judiciary and the need for independence on the bench.

a. Please explain how your references to “winning” and “losing our courts” help promote confidence in the independence of our federal judiciary.

At multiple points in my investiture speech, I communicated a principle that is at the heart of an independent judiciary: the law should not be political. This is a separation-of-powers principle. It is why under our Constitution, judges decide “cases and controversies,” while Congress, not the judiciary, is vested with the “legislative powers herein granted.” It is also why the Constitution provides for judges’ life tenure and salary protection. The independence of the judiciary was a theme of my investiture speech, and before that, it was a theme of my academic scholarship.

In my speech, I was at times forceful in pushing back against the politicization of the judiciary and against an approach to judging that injects policy and politics into judicial decisions. As Justice Scalia often told audiences, “The judge who always likes the results he reaches is a bad judge.” It is for the political branches to make policy. And in my investiture speech I defended an approach to judging that binds judges to the original meaning of text, without regard to the policy outcomes they might prefer. Many other judges have given similar speeches, making the same point, in a similar manner. *See, e.g.*, Hon. Neil M. Gorsuch, Remarks at National Archives (Sep. 25, 2019) (“What happens when judges act as legislators, and instead of following the law faithfully, begin to make things up? Well maybe the first real departure by the United States Supreme Court from the Constitution as it was originally written was *Dred Scott*. . . . And the judges who did that thought they were . . . helping avert a Civil War and that making it up was worthwhile. They acted as legislators. Judges make rotten politicians. They guessed wrong, and instead of averting the Civil War, they helped contribute to it.”); *cf.* Hon. Neil M. Gorsuch, *A Republic, If You Can Keep It* (2019) (“Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure.”).

When I referred to “my legal principles,” I was referring to fidelity to text, respect for the separation of powers, and the humility to know that a judge’s role is to apply the law rather than to make the law. I expressed optimism that these legal principles, which are fundamental to the rule of law, were “prevalent.” But I also sounded a cautionary note: they are not universally shared. This may have been a more sobering message than is typical for investiture speeches, but it is not a controversial one.

At the same time, I know from my time with Justice Kennedy and Justice Kavanaugh, and from my role models on the D.C. Circuit, including Judge Griffith, the judge I’ve been nominated to replace, that a judge can and must be collegial and open-minded while vigorously defending the separation of powers. On the district court, I have attempted to follow their example of being collegial and open-minded, and if I’m fortunate enough to be confirmed to the D.C. Circuit, I will attempt to follow their example there as well.

Finally, to the extent there has been confusion about the allusion in my investiture speech to Justice Kennedy’s dissent in *NFIB v. Sebelius*, the confusion has taken two forms. First, some have suggested I was revealing confidential communications from Justice Kennedy to me. To the contrary, I was referring to Justice Kennedy’s dissent, which is public, and the Chief Justice’s

majority opinion, which is also public. In my speech, I referred to Justice Kennedy saying, “You’re hired,” just before referring to the Chief Justice’s conclusion that “this might be a tax.” But just as I did not mean that Justice Kennedy literally told me, using these exact words, “You’re hired,” I did not mean that Justice Kennedy literally told me, using these exact words, “The Chief Justice thinks this might be a tax.” The opinions in that case, reported in the United States Reports, are the only foundation necessary to know that the Chief Justice believed the individual mandate could be construed as a tax and that Justice Kennedy disagreed – just as knowledge of my employment at the Supreme Court is the only foundation needed to know that Justice Kennedy told me I was hired, regardless of whether he used those exact words.

Second, some have suggested that my reference was more than a tongue-in-cheek allusion to the obvious: that *NFIB v. Sebelius* was the most high-profile decision of the Term I clerked for Justice Kennedy; that his dissent in *NFIB v. Sebelius* was sincerely felt; that no Justice likes being in dissent; and that no clerk likes to see his Justice in dissent. The context here is important. In my speech, I paid tribute to Justice Kennedy. I thanked him for hiring me. I described his impact on me. And I concluded my tribute to him with a light-hearted allusion to a time when he was publicly disappointed in the outcome of the Term’s most high-profile case. That disappointment was public, both from the written Joint Dissent and from Justice Kennedy’s announcement of that dissent from the bench, when he said, “We must submit, with due respect, that today’s decision somehow overlooks this Court’s historic role and responsibility to teach, to confirm, to insist upon this proposition: The Constitution, though it dates from the founding of the Republic, does and always must have powerful meaning and vital relevance in the context of our own times.”

To be sure, before I was a judge or a judicial nominee, I was an academic who wrote about *NFIB v. Sebelius*. But I understand that the role of an academic and a citizen engaged in the political process is different than the role of a judge or a judicial nominee. The canons of judicial conduct – including Canons 2, 3(a)(6), and 5 – preclude me, in my role as a judge and judicial nominee, from going beyond what was said in my previous writings as an academic. And I did not go beyond that in my investiture speech.

b. Please explain how your references to “winning” and “losing our courts” serve to quell concerns about politicization of the judiciary.

Please see my answer to Question 2(a).

3. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortions. After the law passed, the number of those health care facilities dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman’s Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

a. When determining whether a law places an undue burden on a woman’s right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?

Roe and its progeny are binding precedents. As a district judge, I follow all binding precedents fully and faithfully, and I would follow them fully and faithfully as a circuit judge as well. The Supreme Court is currently considering restrictions on abortion in *June Medical Services LLC v. Russo*, No. 18-1323 (Oral Arg. Mar 4, 2020). Therefore, the Canons of Judicial Conduct preclude me from commenting on the issues being litigated in that and other cases. See Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in *any court*.” (emphasis added)).

- b. When determining whether a law places an undue burden on a woman’s right to choose, do you agree that the analysis should consider whether the law has an overall impact of reducing abortion access statewide?**

See my Answer to 3(a).

4. In 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that the right to marry is fundamental and must be guaranteed to all same-sex couples.

- a. In your view, does the right to marry carry an implicit guarantee that everyone should be able to exercise that right equally?**

Obergefell is binding precedent and, if confirmed, I would follow it and all Supreme Court precedents fully and faithfully. Related issues are implicated by pending or impending litigation, and it is therefore improper for me to comment further. See Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

- b. If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

See my Answer to 4(a).

- c. If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?**

See my Answer to 4(a).

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

Yes. See *Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (United States Sentencing Commission 2017).

**Senator Josh Hawley
Questions for the Record**

**Hon. Justin Reed Walker
Nominee, U.S. Court of Appeals for the District of Columbia Circuit**

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*.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., held that when statutory ambiguity leaves “a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” 467 U.S. 837, 843-44 (1984).

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

I would begin by considering the statute’s text, its structure, relevant precedents, similar statutory language, other informative context, and canons of construction like *expressio unius* and *eiusdem generis*. After using all the tools of statutory construction, if the statutory provision’s best reading is apparent, the provision is not ambiguous. If, however, it remains unknowable which interpretation of two or more competing meanings is the best reading, then the statutory provision is ambiguous.

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?

Although a court may consider the agency’s reasoning at *Chevron* step 2, it must never abdicate its constitutional duty to say what the law is.

2. One exception to *Chevron* deference established by the Supreme Court in *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), is the major questions doctrine.

a. Please explain your understanding of the major questions doctrine following the Supreme Court’s decision in *King v. Burwell*, 135 S. Ct. 475 (2014).

Many Judges and Justices with varying approaches to administrative law have said that major questions do not trigger *Chevron* deference. Justice Stephen Breyer once wrote, “A court may . . . ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in

the course of the statute’s daily administration.” *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). In 2014, *King v. Burwell* clarified that *Chevron* does not apply when a “question of deep ‘economic and political significance’” is at issue. 135 S. Ct. at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)). As Justice Kavanaugh has written, *King v. Burwell* “raises two significant questions that the Supreme Court will presumably have to confront soon: First, how major must the questions be for *Chevron* to apply? Second, if *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for cases involving less major but still important questions?” *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016).

Both *King* and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), offer some guidance on whether an issue is of “deep ‘economic and political significance.’” *King*, 135 S. Ct. at 2489. *Chevron* applies in an “ordinary” case. *Brown & Williamson*, 529 U.S. at 159. But a court should not defer to an agency on a question like “whether an industry will be entirely, or even substantially, rate-regulated.” *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994). Or whether the FDA can regulate cigarettes. *Brown & Williamson*, 160-61. Or whether buyers on the federal health insurance exchange are eligible for tax credits available to buyers on state health insurance exchanges. *King*, 135 S. Ct. at 2496.

To be sure, there is distance on a spectrum from the most “ordinary” of cases on one end, and the questions in *MCI v. AT&T*, *Brown & Williamson v. FDA*, and *King v. Burwell* on the other end. But the place of particular questions on that spectrum – including the place on that spectrum of the issue in *Chevron* itself – is implicated by pending and impending litigation. Indeed, a significant portion of the D.C. Circuit’s docket involves agency interpretations of statutes. “A judge should not make public comment on the merits of a matter pending or impending in any court.” Canon of Code of Conduct for United States Judges 3(A)(6). As a district judge, and if I’m confirmed to the D.C. Circuit, I will approach agency arguments in favor of *Chevron* deference – and opposing parties’ arguments against *Chevron* deference – with an open mind.

b. What is the relevant test or standard for a lower court to apply in deciding whether an issue is of sufficient “economic and political significance” that the major questions doctrine applies?

Please see my answer to Question 2(A).

c. Was the issue in *Chevron* one of “economic and political significance”?

Please see my answer to Question 2(A).

3. 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?

As a district judge, I have tailored injunctions to be narrow. See *L.D. Mgmt. Co. v. Thomas*, --- F. Supp. 3d ----, 2020 U.S. Dist. LEXIS 72593 (W.D.K.Y. Apr. 24, 2020); *On Fire Christian Center, Inc. v. Fischer*, --- F. Supp. 3d ----, 2020 U.S. Dist. LEXIS 65924 (W.D.K.Y. Apr. 11, 2020). On

each occasion, I have cited the Supreme Court’s guidance in *Califano v. Yamasaki* that as a general rule, a court’s injunction “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” 442 U.S. 682, 702 (1979). I cannot go beyond describing what I’ve done on the district court because, as I said at my hearing, the question of nationwide injunctions is currently being litigated in courts across the country. “A judge should not make public comment on the merits of a matter pending or impending in any court.” Canon of Code of Conduct for United States Judges 3(A)(6).