Senator Chuck Grassley
Questions for the Record

Cheryl Ann Krause
Nominee, United States Circuit Judge for the Third Circuit

1. **Do you believe that a judge's gender, ethnicity, or other demographic factor has any or should have any influence in the outcome of a case? Please explain.**

   Response: No. Demographic factors should have no influence on the outcome of a case. Judges have a solemn duty to decide cases fairly, impartially and objectively, applying the law and precedent to the facts of the case before them without preconceived notions of the litigants or the outcome.

2. **What is the most important attribute of a judge, and do you possess it?**

   Response: The most important attributes of a judge in my view are an impartial and faithful adherence to applicable law and precedent, including respect for principles of judicial restraint, honesty and integrity, and respectful treatment of litigants, colleagues, and court personnel. I do possess those attributes and believe the way I have comported myself in my career reflects those attributes.

3. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

   Response: In my view, a judge should be even-tempered, fair and open-minded, diligent in her approach to studying the applicable law and the record on appeal, mindful of the limited powers of an Article III judge and the distinct roles of the elected representatives of the people under Articles I and II, vigorous in her work ethic, clear and cogent in her writing, respectful in her treatment of litigants, professional and collegial in her interactions with fellow judges and court personnel, and dedicated to mentoring her law clerks and contributing to ongoing improvements in the administration of justice through, for example, participation on judicial committees. I consider all of these aspects important in the temperament of a judge and am confident that, if I am fortunate enough to be confirmed, my conduct will reflect them.

4. **In general, Supreme Court precedents are binding on all lower federal courts, and Federal Circuit precedents are binding on the Court of International Trade. Are you**

committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Personal beliefs do not have a place in impartial and objective judicial decision-making. I recognize and deeply respect the important role of *stare decisis* in our legal system and the stability and predictability that it provides. If I am confirmed, I am fully committed to following the precedent of the Supreme Court and Third Circuit without regard to any personal views I might hold.

5. **At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: In the absence of controlling precedent, I would look to the sources of persuasive authority authorized by the Supreme Court and Third Circuit. Depending on the legal question presented and the facts and circumstances of the specific case, those sources would include the text and structure of any constitutional provision or statute at issue, canons of statutory construction adopted by the Supreme Court and Third Circuit, closely related or analogous decisions of those courts and decisions of other circuits, and original sources, such as the Federalist Papers, consistent with the guidance of the Supreme Court in cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004).

6. **What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: If I have the privilege of serving as an appellate judge, I would faithfully follow the decisions of the Supreme Court and Third Circuit in any case or controversy that came before me, regardless of any personal views I might have of those decisions.

7. **Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: It is appropriate for a federal court to declare a Congressional statute unconstitutional only where the constitutional question cannot be avoided and the statute is clearly inconsistent with the Constitution. Enactments of Congress are presumed to be constitutional and should be interpreted to avoid constitutional problems where more than one plausible interpretation is possible. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

8. Please describe your understanding of the workload of the Third Circuit. If confirmed, how do you intend to manage your caseload?

Response: In FY 2013, according to the Administrative Office of U.S. Courts and the Clerk of the U.S. Court of Appeals for the Third Circuit, the Third Circuit had 3,912 filings and 2,845 merits determinations (including appeals and original proceedings), and each merits panel was assigned approximately 30 cases per sitting. If I have the honor of serving as a judge on this circuit, I would handle this substantial workload by keeping a steady and vigorous pace in my chambers, communicating regularly with my colleagues, law clerks and staff, and setting internal deadlines to ensure that motions are handled and opinions are issued in a timely and efficient manner. I would also seek out the advice of my colleagues as to their experience with best practices for managing this caseload.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: I consider the Constitution to be a domestic document that should be interpreted based on domestic sources, and, if confirmed, I would not rely on foreign law or views of the world community to determine its meaning. The Supreme Court has referenced international authorities in extremely limited circumstances, such as in interpreting the Eighth Amendment's prohibition on "cruel and unusual punishments," *Roper v. Simmons*, 543 U.S. 551, 575 (2005), and I would abide by those cases and all Supreme Court precedent.

10. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: I believe it essential to the public trust in the judicial system and respect for the rule of law that judges be and be perceived to be impartial and objective in interpreting the law and applying precedent, free of any political ideology or motivation. I consider this a core tenet for a federal judge, in addition to being a statutory and ethical mandate under 28 U.S.C. § 455 and the Code of Conduct for United States Judges. If confirmed, I would fully honor these obligations.

11. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: I do not believe that a judge's personal views have any place in judicial decision-making. Judges have a solemn duty to administer equal justice under law and treat all those who appear before them fairly, impartially, and with an open mind. I can assure the Committee that I would adhere to these fundamental principles if I have the honor to serve as a judge and would strive to ensure that all litigants who appeared before me not only were treated fairly but felt that they were treated fairly and with respect and dignity.

12. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: A circuit court panel has no authority to overturn circuit precedent, and *en banc* review is only appropriate where there is a conflict between two panel decisions or with a decision of the Supreme Court, or where there is an issue of "exceptional importance." Fed. R. App. P. 35(a). Furthermore, if *en banc* review is granted, principles of *stare decisis* require careful consideration of the criteria for overruling precedent set forth by the Supreme Court in *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009), and by the Third Circuit in *Al-Sharif v. United States Citizenship & Immigration Services*, 734 F.3d 207, 212 (2013) (*en banc*), including the workability of the precedent, its antiquity, the extent of reliance interests, and the soundness of its reasoning.

13. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: The role of an attorney in zealously advocating for good faith interpretations of the law that promote the client's interests is very different from the role of a judge in applying law and precedent to the particular facts of the case impartially and objectively. In reaching decisions as a judge if confirmed, I would look to the text and structure of any constitutional provision or statute at issue, Supreme Court and Third Circuit precedent, decisions of other circuits for persuasive authority in the absence of controlling authority, and original sources consistent with the guidance of the Supreme Court in cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004). I expect there will be a number of challenges in transitioning from an advocate to a judge if I have the privilege of being confirmed, including establishing procedures in chambers for efficient and effective case management and learning the court's internal operating procedures. If confirmed, I would solicit and welcome the advice of experienced colleagues who have successfully made this transition.

14. Do you think that collegiality is an important element of the work of a Circuit Court? If so, how would you approach your work and interaction with colleagues on the Court?

Response: Collegiality is important at all levels of the federal judiciary but particularly among appellate judges who hear cases and deliberate as a panel, seek consensus to reach decisions, and review and comment on each other's drafts. If I have the good fortune to be confirmed, I would strive to continue the strong tradition of collegiality on the Third Circuit, including the professionalism and respect with which the judges treat each other, litigants, and court personnel.

15. At a speech in 2005, Justice Scalia said, "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says."

a. Do you agree with Justice Scalia?

Response: Yes. I am not familiar with the speech or the context for this quotation but agree with the statement quoted.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

16. Do you think judges should consider the "current preferences of the society" when ruling on a constitutional challenge? What about when seeking to overrule longstanding Supreme Court or circuit precedent?

Response: I do not understand Supreme Court jurisprudence to account for the "current preferences of society" in deciding constitutional challenges or requests to overrule longstanding Supreme Court or circuit precedent, and I would not do so if I am fortunate enough to be confirmed. I am aware that the Supreme Court has taken account of "evolving standards of decency" in considering the meaning of "cruel and unusual punishment" in its Eighth Amendment jurisprudence. *Roper v. Simmons*, 543 U.S. 551, 560-64 (2005). If confirmed, I would follow all applicable Supreme Court precedent.

17. What is your judicial philosophy on applying the Constitution to modern statutes and regulations?

Response: I view the Constitution as embodying fixed and enduring principles intended by our Founding Fathers to be applied to both newer and older statutes and regulations. If confirmed, I would apply those principles to any statutory or regulatory provisions challenged in a justiciable case or controversy, consistent with Supreme Court and Third Circuit precedent.

18. What role do you think a judge's opinions of the evolving norms and traditions of our society have in interpreting the written Constitution?

Response: I do not believe a judge's opinions of "evolving norms and traditions of our society" have a role interpreting the Constitution. A judge's personal opinions should not factor into the objective and impartial application of law to the facts of a case, and, outside of the Supreme Court's consideration of "evolving standards of decency" in determining the meaning of "cruel and unusual punishment," *Roper v. Simmons*, 543 U.S. at 560-64, I do not understand the Supreme Court or Third Circuit to rely on "evolving norms and traditions" as an approach to constitutional interpretation.

19. What is your understanding of the current state of the law with regard to the interplay between the establishment and free exercise clause of the First Amendment?

Response: The Supreme Court has observed that the Establishment Clause and Free Exercise Clause "often exert conflicting pressures" but that "there is room for play in the joints between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (citations and internal quotation marks omitted). Were I to be confirmed and to confront these issues in a concrete case or controversy, I would carefully study applicable Supreme Court and Third Circuit precedent and apply them to the particular facts of the case before me.

20. Do you believe that the death penalty is an acceptable form of punishment?

Response: The Supreme Court has held in *Gregg v. Georgia*, 428 U.S. 153 (1976), and subsequent cases that, so long as there are adequate procedural safeguards, the death penalty is constitutional, with certain exceptions, *e.g.*, for juvenile status and mental retardation. If confirmed, I would follow Supreme Court precedent in this, as in all areas.

21. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: To the extent this refers to a view that the meaning of the Constitution changes over time, I do not agree with it. The Constitution was intended by our Founding Fathers to embody profound and enduring principles to govern the structure and limited powers of the federal government, the relationship between the federal government and the States, and certain inalienable rights of citizens. While the factual scenarios to which these principles apply necessarily change over time as technology and society change, *see, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001), those principles remain fixed and constant, absent constitutional amendment.

22. Do you believe there is a right to privacy in the U.S. Constitution?

a. Where is it located?

Response: The Constitution does not use the term "right to privacy," but the Supreme Court has recognized a privacy interest in the freedom of association and belief under the First Amendment, *e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), in the freedom from unreasonable searches and seizures under the Fourth Amendment, *e.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013), and in certain personal freedoms, such as the right to marital privacy, under the liberty aspect of the Due Process Clause of the Fifth and Fourteenth Amendments, *see Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

b. From what does it derive?

Response: Please see Response to Question 22(a).

c. What is your understanding, in general terms, of the contours of that right?

Response: My understanding of the contours of that right tracks the relevant Supreme Court precedent. If I am confirmed and a justiciable case or controversy were to come before me in which a party asserted a privacy interest, I would carefully consider the constitutional provision at issue and any applicable Supreme Court and Third Circuit precedent and apply the law to the facts and circumstances of that case.

23. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the "penumbras" and "emanations" of the Constitution.

a. Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by "reading between the lines"?

Response: Controlling Supreme Court precedent does not support interpreting the Constitution or Bill of Rights based on "penumbras," "emanations," or "reading between the lines." The Supreme Court has observed there are certain fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted). If confirmed and confronted in a justiciable controversy with an assertion of an unenumerated right, I would look to the text and original meaning of the constitutional provision at issue and apply the current precedent of the Supreme Court and Third Circuit.

b. Is it appropriate for a judge to go searching for "penumbras" and "emanations" in the Constitution?

Response: No. Under governing Supreme Court precedent, it is not appropriate for a judge to go searching for "penumbras" and "emanations" in the Constitution.

24. In *Brown v. Entertainment Merchants Association*., Justice Breyer supplemented his opinion with appendices comprising scientific articles on the sociological and psychological harm of playing violent video games.

a. When, if ever, do you think it is appropriate for appellate judges to conduct research outside the record of the case?

Response: Under applicable Supreme Court and Third Circuit case law, it is not appropriate for appellate judges to conduct research outside the record of a case except in highly unusual situations. The Federal Rules of Appellate Procedure direct that the record on appeal and the parties' appendices are limited to the record before the district court, the transcript and the docket. *See* Fed. R. App. P. 10(a), 16, 30. The Third Circuit has taken a strict approach to the application of these rules and held that appellate judges should not consider anything outside this record except in exceptional circumstances or in order to determine mootness. *See Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 226 & n.25 (3d Cir. 2009). If confirmed, I would follow these rules and precedents.

b. When, if ever, do you think it is appropriate for appellate judges to base their opinions psychological and sociological scientific studies?

Response: Whether it would be appropriate for an appellate judge to consider psychological and sociological scientific studies in deciding a particular case would turn on applicable Supreme Court and circuit precedent on the use of such materials, the relevance of the studies to the particular issues and facts and circumstances presented, whether the studies had been presented to or considered by the district court in reaching its decision below, and compliance with the relevant provisions of the Federal Rules of Appellate Procedure and Federal Rules of Evidence.

25. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: The Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008), did not address the precise standard of scrutiny in a Second Amendment challenge other than to indicate it exceeds rational basis review. The Third Circuit has applied a "means-end" analysis and held that the standard of scrutiny may vary depending on the type of law challenged and the nature of the Second Amendment restriction at issue. *See Drake v. Filko*, 724 F.3d 426, 435-37 (3d Cir. 2013); *United States v. Marzzarella*, 614 F.3d 85, 89, 96-98 (3d Cir. 2010). Were I to be confirmed, I would follow this precedent as well as any intervening guidance from the Supreme Court and Third Circuit.

26. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following Supreme Court precedents faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: I do not believe a judge's personal views have any role in judicial decision-making. If I have the privilege of serving as an appellate judge, I would honor my solemn obligation to faithfully follow and give full force and effect to the decisions of the Supreme Court in any case or controversy that came before me, regardless of any personal views I might hold of those decisions.

27. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize

yourself with the case before providing your answers. Please provide separate answers to each subpart.

a. In the penultimate sentence of the Court's opinion, Justice Kennedy wrote, "This opinion and its holding are confined to those lawful marriages."[1]

i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.

Response: Yes. This statement narrows and qualifies the holding of *Windsor* and is therefore part of its holding.

ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes "lawful marriages"?

Response: I understand "those lawful marriages" to refer to the class described earlier in the same paragraph of "those persons who are joined in same-sex marriages made lawful by the State" and "those whom the State, by its marriage laws, sought to protect in personhood and dignity." *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Yes. The Court's opinion is explicit that its holding is so limited.

iv. Are you committed to upholding this precedent?

Response: If confirmed as a judge, I am committed to faithfully upholding *Windsor* and all current Supreme Court precedent.

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, "By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."[2]

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[1] *United States v. Windsor*, 133 S.Ct. 2675 at 2696.
[2] *Id.* 2689-2690.

i. **Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes. The Court's opinion constitutes binding precedent recognizing the "virtually exclusive province of the States" to define and regulate marriage subject to Congress's authority, "in enacting discrete statutes [to] make determinations that bear on marital rights and privileges" and "subject to constitutional guarantees." *Id.* at 2690-92 (internal quotation marks omitted).

ii. **Will you commit to give this portion of the Court's opinion full force and effect?**

Response: Yes. If confirmed, I am committed to giving full force and effect to *Windsor*, as I would any Supreme Court opinion, in its entirety.

c. **Justice Kennedy also wrote, "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."[3]**

i. **Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes. I understand the Court's full opinion to be binding precedent entitled to full force and effect by the lower courts.

ii. **Will you commit to give this portion of the Court's opinion full force and effect?**

Response: Yes. If confirmed, I am committed to giving full force and effect to *Windsor*, as I would any Supreme Court opinion, in its entirety.

d. **Justice Kennedy wrote, "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[4]**

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[3] *Id.* 2691.
[4] *Id.* (internal citations omitted).

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. I understand the Court's full opinion to be binding precedent entitled to full force and effect by the lower courts.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If confirmed, I am committed to giving full force and effect to *Windsor*, as I would any Supreme Court opinion, in its entirety.

e. Justice Kennedy wrote, "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'"[5]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes. I understand the Court's full opinion to be binding precedent entitled to full force and effect by the lower courts.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes. If confirmed, I am committed to giving full force and effect to *Windsor*, as I would any Supreme Court opinion, in its entirety.

28. What would be your definition of an "activist judge"?

Response: I understand the term "activist judge" to refer to a judge who injects personal views into judicial decision-making or a judge who reaches beyond the concrete case or controversy presented to decide issues not properly before the court. Neither is an approach to judicial decision-making to which I ascribe.

[5] *Id.* (internal citations omitted).

29. Please describe with particularity the process by which these questions were answered.

Response: I received these questions on March 19, 2014. After conducting research and drafting my answers, I reviewed my responses with a representative of the Office of Legal Policy of the Department of Justice. I continued reviewing and editing my responses on March 20 and 21, 2014, and on March 21, 2014, I authorized the Office of Legal Policy to submit them on my behalf to the Committee.

30. Do these answers reflect your true and personal views?

Response: Yes.

Questions for the Record
Senator Ted Cruz

Responses of Cheryl Ann Krause
Nominee, United States Circuit Judge for the Third Circuit

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: My judicial philosophy, if I am fortunate enough to be confirmed, would involve approaching each case fairly, impartially, with an open mind and without preconceived notions as to the parties or the outcome. I would adhere to principles of judicial restraint, with deference to the limited powers of an Article III judge and the distinct roles of the elected representatives of the people under Articles I and II. I would carefully and thoroughly analyze the threshold issue of justiciability and the text of any law at issue, the arguments of the parties, the opinion below, the record, and applicable precedent, and I would faithfully apply the law to the facts of the particular case before me. I am not sufficiently familiar with the full body of opinions of any single justice to identify one whose philosophy is most analogous with mine. However, I admire the Honorable Anthony M. Kennedy of the United States Supreme Court, for whom I had the privilege to clerk, for his love of learning, his deep knowledge of history and constitutional law, his vigorous work ethic, his collegiality, and the dignity and humility with which he conducts himself.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: In interpreting the Constitution, if I have the honor of serving as an appellate judge, I would look to its text and to original sources, such as the Federalist Papers, consistent with the guidance of the Supreme Court in cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (2004).

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If I am confirmed to serve on the Court of Appeals, I would be bound by the precedent of the Supreme Court and would have no authority to overturn precedent within the circuit unless the court were sitting *en banc*, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, since a panel is bound by the decisions of prior panels within the circuit. Under Rule 35, *en banc* review is only appropriate when there is a conflict between two panel decisions or with a decision of the Supreme Court, or where there is an issue of "exceptional importance." Even when these criteria are satisfied, principles of *stare decisis* still require careful consideration of whether to do so with consideration for the criteria described by the Supreme Court in *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009), and by the Third Circuit in *Al-Sharif v. United States Citizenship & Immigration Services*, 734 F.3d 207, 212 (2013) (*en*

banc), including the workability of the precedent, its antiquity, the extent of reliance interests, and the soundness of its reasoning.

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: This quotation from *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), reflects binding Supreme Court precedent and, if confirmed, I would follow that precedent and subsequent precedent concerning state sovereign interests and judicially enforceable limitations on federal power, including in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992).

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court's recent case law on the scope of Congress's Commerce Clause power has focused on economic activity and identified as permissible categories of regulation the use of the channels of interstate commerce, instrumentalities of interstate commerce, and activities with a substantial relation to interstate commerce. The Court noted in striking down the statutes at issue in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the absence of a nexus to economic activity. However, Justice Scalia has observed that Congress's power under the Commerce Clause may extend to regulation of non-economic activity "if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment). If confirmed and confronted with this issue in a justiciable case or controversy, I would carefully consider the relevant Supreme Court and Third Circuit precedent, including intervening cases that might provide guidance, and the particular facts and circumstances presented in applying the law to the facts of the case before me.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that the President's power to issue executive orders or executive actions must emanate from the Constitution itself or from authorization provided by Congress. *See id.* at 585. Justice Jackson's concurrence in that case provides the tripartite scheme commonly used by the Supreme Court and appellate courts for evaluating the legitimacy of the executive action at issue, depending on how closely it is tied to Congressional authorization. *See id.* at 635. If confirmed and presented with this question in a pending case, I would analyze the particular Presidential action at issue and apply relevant Supreme Court and Third Circuit precedent to the record before me to analyze whether the action was properly authorized by the Constitution or by Congress.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has held a right is "fundamental" for purposes of the Due Process Clause when it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted). The Court has also required a "careful description of the asserted fundamental liberty interest." *Id.* at 721 (citations and internal quotation marks omitted). If I have the privilege of serving as an appellate judge, I would adhere to Supreme Court precedent and any relevant precedent of the Third Circuit in addressing substantive due process issues.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has identified two tiers of review above rational basis review for Equal Protection Clause analysis: intermediate scrutiny for classifications like gender that "frequently bear[] no relation to ability to perform or contribute to society" and therefore "generally provide[] no sensible ground for differential treatment," and strict scrutiny for classifications like race, alienage and national origin that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (internal quotation marks omitted). If confirmed, I would adhere to Supreme Court and Third Circuit precedent in determining the tier of scrutiny appropriate to the facts and circumstances of any particular case that comes before me.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: Justice O'Connor, in her majority opinion in *Grutter*, anticipated that the use of racial preferences would no longer be necessary in higher education 25 years from that decision. If confirmed and confronted with a case or controversy raising this issue, I would be bound by the Supreme Court's decision in *Grutter*, as in all cases, including any intervening guidance issued by the Court.