

Nomination of Peter Joseph Phipps to the U.S. Court of Appeals for the Third Circuit
Questions for the Record
June 12, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

It is never appropriate for an inferior court to depart from Supreme Court precedent.

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

Circuit court judges are under a duty to observe and apply binding Supreme Court precedent. While it is generally improper for a circuit court judge to question Supreme Court precedent, there may be instances where respectfully identifying an issue well-positioned for Supreme Court review could be beneficial.

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

A circuit court typically can overturn its own precedent only through an en banc hearing, which requires consent of a majority of the active circuit judges who are not disqualified from the case. *See* Fed. R. App. P. 35(a); 3d Cir. L.A.R. 35.3 (2011). Such en banc review “is not favored.” Fed. R. App. P. 35(a); *see also* 3d Cir. L.A.R. 35.4 (explaining that “en banc hearing or rehearing of appeals is not favored”). Ordinarily en banc review “will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions or (2) the proceeding involves a question of exception importance.” Fed. R. App. P. 35(a). When sitting en banc, the Third Circuit is not bound by precedent “in the same way that a panel would be bound,” but the en banc panel is still constrained “to the degree counselled by principles of stare decisis.” *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 813 (3d Cir. 1991).

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

The Supreme Court has made clear that “[o]verruling precedent is never a small matter.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015). Adhering to prior precedent, while not an “inexorable command,” constitutes “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827

(1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

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

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

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Roe v. Wade*.

b. Is it settled law?

Yes, *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Roe v. Wade*.

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

Yes, *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Obergefell*.

4. 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?

I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Heller*. As far as commenting on Justice Stevens’s

dissenting opinion, as an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

The Supreme Court in *Heller* recognized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In *Heller*, the Supreme Court specifically stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27.

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

Heller does not expressly overrule or abrogate any prior Supreme Court precedent. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

5. 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 identified over twenty prior instances in which it had “recognized that the First Amendment protection extends to corporations.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010). In the context of the specific issue in *Citizens United*, limits on corporate expenditures for electioneering communications, the Supreme Court held that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.” *Id.* at 365. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

Please see my response to Question 5.a.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2012), the Supreme Court addressed whether the protections afforded by the Religious Freedom Restoration Act applied to corporations, but the issue of the applicability of the Free Exercise Clause to corporations was not resolved in that case. Because there may be litigation implicating this unanswered question, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

6. In 2016, Senator Toomey withheld a blue slip for Rebecca Haywood, who had been nominated to the Third Circuit, citing concerns about Haywood’s level of experience. At the time of her nomination, Haywood had served in the U.S. Attorney’s Office for the Western District of Pennsylvania for 17 years; had clerked for Judge Bloch of the Western District for three years on two different occasions; and had previously served as an associate at Jones Day. Then-Chairman Grassley respected Senator Toomey’s blue slip and Haywood’s nomination did not go forward.

Judge Vanaskie — whose seat you have been nominated to fill — spent over 16 years on the Middle District of Pennsylvania before his elevation to the Third Circuit.

a. Why do you think your eight months as a district court judge qualify you to sit on the Third Circuit?

I believe my qualifications for the Third Court are enhanced by my eight months of service on the district court, but my qualifications extend well beyond that. On the district court, I have presided over more than a hundred hearings and ruled on several hundred motions. Due to the volume of cases that were transferred to me, I have had the opportunity to adjudicate issues at all stages of litigation, across a broad spectrum of subject matter, in a wide range of procedural postures – from temporary restraining orders, to motions to dismiss, to discovery disputes, to summary judgment, and to trial. Those experiences have provided me with additional insight into the creation of the record for potential appeal in each of those cases.

Consistent with my judicial experience, the American Bar Association has rated me as well-qualified to serve on the Third Circuit. In addition, my prior experiences have prepared me well for the Third Circuit: from my legal education at Stanford Law School, to my clerkship for Chief Judge R. Guy Cole, Jr. of the U.S. Court of Appeals for the Sixth Circuit, to my work as a litigator in private practice, to my five years teaching administrative law at Duquesne University School of Law as an adjunct law professor, to my fifteen years of experience as a career public servant and litigation attorney in the Federal Programs Branch of the Civil Division of the U.S. Department of Justice, during which I was entrusted by three different administrations of both

political parties with some of the most high-profile, complex, and sensitive litigation involving the United States.

- b. At the time of your initial discussions with the White House and Department of Justice about your nomination to the Western District, did anyone discuss with you the possibility of elevating you to the Third Circuit? If so, who and what was the nature of that discussion?**

I understand that I previously received some consideration for a prior vacancy on the Third Circuit.

7. While serving as an attorney in the Justice Department, you were counsel of record on the federal government opposition to a motion for a temporary restraining order and preliminary injunction filed by the ACLU in the case *American Civil Liberties Union v. Wright*. In defending the Trump Administration’s policies denying reproductive health care to unaccompanied minors — and claiming they did not constitute an undue burden on a woman’s right to choose — you wrote: “Given the constitutionally legitimate interest that the Federal Defendants have in promoting childbirth, in refusing to facilitate an abortion, and in not providing incentives for pregnant minors to illegally cross the border to obtain elective abortions while in federal custody, as well as the irreversible nature of abortion, both the balance of hardships and the public interest favor denial of plaintiff’s motion.”

The judge in the case ultimately denied the ACLU’s motion, but did so based on lack of venue and the fact that the deadline to amend pleadings had passed.

Why did you make an argument about undue burden rather than focusing exclusively on questions of venue and the deadline to amend pleadings?

The referenced case, *ACLU of Northern California v. Azar*, involved an Establishment Clause challenge to a competitively-awarded grant to a faith-based organization during the Obama administration. As a career attorney at the Department of Justice, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies. The issue of access to abortion was tangential to the Establishment Clause challenge, as made clear in the Court’s summary judgment opinion upholding the constitutionality of the Obama-administration grant: “Discovery has clarified that this case is not about the government or any religious organization denying access to abortion or contraception. There is no evidence in the record that any unaccompanied minor or trafficking victim who wanted an abortion or contraception during the time period relevant to this case was unable to obtain them.” *ACLU of N. Cal. v. Azar*, 2018 WL 4945321, at *1 (N.D. Cal. Oct. 11, 2018).

The October 2017 brief referenced in Question 7 was in response to an attempt to bring an unrelated plaintiff with an unrelated claim into the ongoing Establishment Clause challenge near the close of discovery and to obtain a preliminary injunction requiring the government to facilitate the plaintiff’s access to an abortion within a week. In seeking a preliminary

injunction, plaintiff cited to the undue burden standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Accordingly, the referenced brief addressed the aspects of the undue burden test cited by plaintiff.

8. In Questions for the Record (QFRs) submitted to you by Senator Booker in relation to your nomination to the Western District, Senator Booker asked whether you believed there is implicit racial bias in the criminal justice system. You responded: “I have not studied the issue in depth, but the conclusion that members of the criminal justice system have acted with implicit social cognition on the basis of race would not surprise me.” You also stated during your hearing that you were familiar with “a little bit” of the scholarship on implicit bias.

- a. **Please identify the specific article(s) or other forms of scholarship on implicit racial bias with which you are familiar.**

I have not studied the issue in depth. When my wife was in graduate school, she alerted me to literature on implicit social cognition. After I was asked about this topic by Senator Hirono at my nomination hearing on April 25, 2018, I wanted to learn more about it, and shortly afterwards, I reviewed four articles related to the topic: Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, PSYCHOLOGICAL REVIEW, Vol. 102, No. 1, 4-27 (1995); B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?* to appear in B. Gawronski & B.K. Payne (Eds.), HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS; Brian A. Nosek, Carlee Beth Hawkins & Rebecca S. Frazier, *Implicit social cognition: from measures to mechanisms*, TRENDS IN COGNITIVE SCIENCES, Vol. 15, No. 4 (Apr. 2011); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, SOCIAL ISSUES AND POLICY REVIEW, Vol. 6, No. 1 (2012).

- b. **Please explain the difference between “implicit racial bias” and “implicit social cognition on the basis of race.”**

I am not sure that there is a difference. My familiarity with the topic, including the articles I have more recently read, use the term “implicit social cognition.” In responding to a question about implicit racial bias from Senator Hirono at my nomination hearing on April 25, 2018, I wanted to make sure that we had a common understanding; from Senator Hirono’s clarification, I believe that we did.

9. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is difference than judicial selection in past years....”

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

I was not asked about my “views on administrative law” in connection with my nomination. As a career attorney at the Federal Programs Branch of the Civil Division of the Department of Justice from January 2003 until October 2018, I discussed case-related issues of administrative law with colleagues and clients.

- 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?**

As a career attorney at the Federal Programs Branch of the Civil Division of the Department of Justice from January 2003 until October 2018, I discussed case-related issues of administrative law with colleagues and clients. Similarly, for several years as an adjunct professor at Duquesne University School of Law, I have taught a three-credit survey course in administrative law. I cannot recall every conversation that I have had on any issue related to administrative law, nor do I know the affiliations of everyone with whom I ever have spoken about administrative law, but to my recollection, no one affiliated with either of those organizations asked me about my “views on administrative law” in connection with my nomination.

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

In teaching and in practicing in this area, I have come to appreciate – consistent with many federal statutes – those aspects of administrative law that promote political accountability, transparency, and other democracy-enhancing features. As a judge, I would observe and apply all binding Supreme Court and Third Circuit precedent, including administrative law precedent.

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

The Supreme Court has made clear that if a statute is ambiguous, as statutes can be, *see, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015) (examining whether the term “tangible object” as used in the Sarbanes-Oxley Act includes undersized red groupers caught by fishermen in the Gulf of Mexico), then it is permissible for a court to look to legislative history to understand the meaning of the ambiguous term, as both the plurality and the dissent did in *Yates*. *See id.* at 1084 (plurality op.) (Ginsburg, J.) (citing to legislative history); *id.* at 1093 (Kagan, J., dissenting) (“And legislative history, for those who care about it, puts extra icing on a cake already frosted.”).

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

No.

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

I received these questions on Thursday, June 13, 2019. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, June 17, 2019. Each answer herein is my own.

Written Questions for Peter Joseph Phipps
Submitted by Senator Patrick Leahy
June 12, 2019

1. You were sworn in as a district court judge late last year, and you began discussing this Third Circuit vacancy with the White House just three months later.

(a) What have you learned during your seven months on the bench that would help you as a Third Circuit judge?

I believe my qualifications for the Third Court are enhanced by my eight months of service on the district court, but my qualifications extend well beyond that. On the district court, I have presided over more than a hundred hearings and ruled on several hundred motions. Due to the volume of cases that were transferred to me, I have had the opportunity to adjudicate issues at all stages of litigation, across a broad spectrum of subject matter, in a wide range of procedural postures – from temporary restraining orders, to motions to dismiss, to discovery disputes, to summary judgment, and to trial. Those experiences have provided me with additional insight into the creation of the record for potential appeal in each of those cases.

Consistent with my judicial experience, the American Bar Association has rated me as well-qualified to serve on the Third Circuit. In addition, my prior experiences have prepared me well for the Third Circuit: from my legal education at Stanford Law School, to my clerkship for Chief Judge R. Guy Cole, Jr. of the U.S. Court of Appeals for the Sixth Circuit, to my work as a litigator in private practice, to my five years teaching administrative law at Duquesne University School of Law as an adjunct law professor, to my fifteen years of experience as a career public servant and litigation attorney in the Federal Programs Branch of the Civil Division of the U.S. Department of Justice, during which I was entrusted by three different administrations of both political parties with some of the most high-profile, complex, and sensitive litigation involving the United States.

2. While at the Justice Department, you defended the Air Force in a constitutional challenge to the “Don’t Ask, Don’t Tell” statute and regulations in place at the time. Since then, “Don’t Ask, Don’t Tell” has been rescinded, the Supreme Court has recognized a constitutional right to same-sex marriage, and numerous circuits have found sexual orientation and gender identity to be protected under federal anti-discrimination laws.

(a) If confirmed to the Third Circuit, will you apply federal law equally to LGBTQ individuals?

My commitment as a judge is to apply the law impartially to the cases and controversies before me, to afford everyone in court dignity and respect, and to treat everyone equally under the law, including LGBTQ individuals.

The referenced case, *Witt v. United States Air Force*, involved a challenge to a now-repealed federal statute, 10 U.S.C. § 654, that established the Don't Ask, Don't Tell policy. That statute was passed by Congress and signed into law by President Clinton in 1993. Afterwards, the Don't Ask, Don't Tell policy was implemented by Democratic and Republican administrations, until Congress passed and President Obama signed legislation repealing 10 U.S.C. § 654 in 2011.

As a career attorney at the Department of Justice, I had no role in the creation of the Don't Ask, Don't Tell statute and policy. In my role as a career attorney, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies.

The decision to defend the constitutionality of the statute and policy at trial was made by President Obama's Attorney General Eric Holder in consultation with Solicitor General Elena Kagan and the Department of Defense. Attorney General Holder stated in an April 24, 2009 letter to the Senate Legal Counsel, which referenced correspondence regarding the case from the General Counsel for the Department of Defense (Hon. Jeh Johnson) to the Solicitor General (Hon. Elena Kagan), that "the appropriate course" was to "to defend the constitutionality of 10 U.S.C. 654 on remand in the district court." Copy available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/04-24-2009.pdf>. Following the trial, my duties included negotiating and drafting a settlement agreement with the plaintiff.

3. Also during your time at DOJ, you defended an HHS regulation allowing faith-based organizations to refuse to provide emergency contraception to unaccompanied minors entering the country and victims of foreign human trafficking, even though otherwise required by provisions of the grant funding.

(a) Do you believe that faith-based organizations should be able to refuse to provide legal medical care – in this case emergency contraception – to unaccompanied minors and victims of human trafficking, some of whom may have been raped during their journeys?

The referenced case, *ACLU of Northern California v. Azar*, involved an Establishment Clause challenge to a competitively-awarded grant to a faith-based organization during the Obama administration. As a career attorney at the Department of Justice, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies. The issue of access to emergency contraception and abortion was tangential to the Establishment Clause

challenge, as made clear in the Court’s summary judgment opinion upholding the constitutionality of the Obama-administration grant: “Discovery has clarified that this case is not about the government or any religious organization denying access to abortion or contraception. There is no evidence in the record that any unaccompanied minor or trafficking victim who wanted an abortion or contraception during the time period relevant to this case was unable to obtain them.” *ACLU of N. Cal. v. Azar*, 2018 WL 4945321, at *1 (N.D. Cal. Oct. 11, 2018). Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

- (b) If you believe faith-based organizations should be able to exercise “conscience rights,” do you also believe that faith-based organizations should be able to refuse care to LGBTQ individuals?**

Please see my response to Question 3(a).

4. Chief Justice Roberts wrote in *King v. Burwell* that

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’”

- (a) Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

As an inferior court judge, my first and foremost obligation is to binding precedent on the meaning of any statutory term. Beyond that, I believe that looking to the text and structure of a statute is a salutary method of analysis, as the Supreme Court has repeatedly recognized.

5. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

- (a) Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?**

The independence of the federal judiciary is established in Article III of the Constitution. Consistent with the Free Speech and the Free Press Clauses of the First Amendment, judges may from time to time be subject

to subtle and not-so-subtle criticism, but that does not erode the independence of the federal judiciary.

- (b) While anyone can criticize the merits of a court’s decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

Please see my response to Question 5(a).

6. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.)

- (a) **Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?**

In *Webster v. Doe*, 486 U.S. 592 (1988), the Supreme Court held that due to national security concerns, the plaintiff’s case under the Administrative Procedure Act could not proceed, but the Supreme Court permitted the plaintiff’s constitutional claims to proceed, explaining that “where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.” *Id.* at 603 (quotations omitted).

7. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

- (a) **If this president, any future president, or any other executive branch official refuses to comply with a court order, how should the courts respond?**

Separation-of-powers principles rely in part on comity and respect among the three co-equal branches of government. Accordingly, each branch should exhibit respect and deference to each other. If a party does not comply with a court order, the opposing party may seek injunctive relief or other remedies from the court to enforce that order.

8. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

- (a) **Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

The Constitution states that Congress has the power to declare war as well as the power of the purse to make or deny appropriations. As observed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Id.* at 536.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

- (b) **In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?**

The Supreme Court has acted to enjoin Executive Branch actions, even during time of war, because no one is above the law. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent in this area.

- (c) **Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

Please see my answer to Question 8(b).

9. **How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?**

On occasion, a conflict arises in court as to the Executive Branch's expertise in national security. *See, e.g., Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). If such an issue arises, as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

10. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

- (a) **Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has applied the Equal Protection Clause to classifications that discriminate against women. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

11. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

No.

12. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?

Article I, section 9, clause 8 provides that “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.”

13. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

(a) When is it appropriate for a court to substitute its own factual findings for those made by Congress or the lower courts?

As a general rule, appellate courts do not engage in fact-finding; rather they evaluate the record on appeal. Federal Rule of Appellate Procedure 10(a) addresses the composition of the record on appeal. Under that rule, “[t]he following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk. See also Fed. R. App. P. 32(b) (providing requirements for the appendix). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent.

14. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?

Each of those amendments contains an enforcement clause, *see, e.g.*, U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2. Those enforcement clauses provide Congress the ability to enforce the amendment by appropriate legislation.

15. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

- (a) **Do you believe the Constitution protects that personal autonomy as a fundamental right?**

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Lawrence v. Texas*.

16. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

- (a) **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

The Supreme Court has summarized the importance of adhering to precedent in its observation that “*Stare decisis* – in English, the idea that today’s Court should stand by yesterday’s decisions, is ‘a foundation stone of the rule of law,’” and that “[r]especting *stare decisis* means sticking to some wrong decisions.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). Adhering to prior precedent, while not an “inexorable command,” constitutes “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent.

17. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

- (a) **How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I’m interested in specific examples, not just a statement that you’ll follow applicable law.**

I would apply conflict rules and ethical standards to assess whether a recusal is required or would be beneficial to the integrity of the judiciary. For instance, I would recuse myself from any case in which I have participated as an attorney. In addition, the Western District of Pennsylvania has a pre-screening process to avoid case assignments with a judicial conflict. I have identified five entities for pre-screening, which include my wife's employer and institutions with which I have a financial account. As a sitting judge, I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

18. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

(a) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Footnote 4 of *Carolene Products* is one of the most significant footnotes in constitutional law due to its role in the development of tiers of constitutional scrutiny. Specifically, the footnote contemplated more exacting judicial scrutiny in certain spheres, such as the right to vote, while the opinion itself employed rational basis review for economic legislation. For context, the full sentence quoted above from footnote 4 states, “It is unnecessary to consider now whether legislation which restricts those political process which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” *United States v. Carolene Prods.Co.*, 304 U.S. 144, 152 n.4 (1938).

19. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

- (a) **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Yes, it can be.

20. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

As a sitting judge, it is not appropriate for me to comment or opine publicly on this speculative and hypothetical scenario about a President's ability to self-pardon. See Canons 2 and 5, Code of Conduct for United States Judges.

21. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Constitution confers to Congress certain enumerated powers, including the two identified in this question. The Supreme Court has addressed the scope of those powers on a number of occasions. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

22. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

- (a) **What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the plaintiff's request for a searching inquiry into the justifications for Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, because such an inquiry would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S. Ct. at 2409. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent in this area.

23. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion?**

I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court, in articulating the undue burden standard, quoted two passages from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): (i) “a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends,” *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,” *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Whole Woman's Health*. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

24. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

(a) Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?

The Supreme Court developed the modern doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent on qualified immunity.

25. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology,” such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

- (a) **In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), recognized that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). In a similar vein, Congress has enacted the Electronic Communications Privacy Act, which imposes several statutory restrictions above and beyond those required by the Fourth Amendment on searches involving certain types of electronic communications. *See* 18 U.S.C. § 2518. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

26. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President’s request to provide funding for the wall.

- (a) **With the understanding that you cannot comment on pending cases, are there situations in which you believe a president can lawfully allocate funds for a purpose previously rejected by Congress?**

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court explained that “a fundamental principle of appropriations law is that where ‘Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements. . . .’” *Id.* at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen 307, 319 (1975)). Because there may be litigation implicating this question, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge

should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

27. Can you discuss the importance of judges being free from political influence or the appearance thereof?

Judicial independence is incredibly important, and this has been long and continuously recognized: from Federalist No. 78, which observed that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution,” to Canon 1 of the Code of Conduct for United States Judges, which provides that “[a]n independent and honorable judiciary is indispensable to justice in our society.”

**Nomination of Peter Joseph Phipps
to the United States Court of Appeals for the Third Circuit
Questions for the Record
Submitted June 12, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

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

As requested, I read the story and watched the video before responding to this request.

- 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.

As a sitting judge, it is not appropriate for me to comment or opine publicly on factors relating to the nomination and confirmation process for judges. *See* Canons 2 and 5, Code of Conduct for United States Judges.

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

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? If you do, please describe the circumstances of that advocacy.

No, I do not.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government

in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

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?

Every metaphor has its limitations, but yes, I think that Chief Justice Roberts' metaphor provides a helpful understanding of the judicial role. For inferior court judges, the metaphorical strike zone is typically well-defined, either by precedent, statute, regulation, or rule. Much like an umpire, a judge is bound to abide by each of those authorities and not to implement his or her personal preferences.

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

In ruling, a judge should not consider practical consequences unless directed to do so by controlling law. For instance, in ruling on a motion for a preliminary injunction, a judge should consider several practical consequences, such as 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. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

In referencing and relying upon the "reasonable jury" standard, the Supreme Court has made clear that summary judgment determinations are objective, not subjective. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (explaining that "the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard" and that "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

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?

There is some role for empathy to play in a judge's decision-making process. For instance, a judge can be empathetic in exercising his or her discretion in setting court dates and schedules so as to avoid unduly burdening parties, counsel, witnesses, victims, or jurors. Empathy, however, does not supersede a judge's obligation to follow the law.

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

Several components of a judge's experience can affect the judge's decision-making process, such as a judge's knowledge, education, training, and ability to respect all persons and to treat them with respect and dignity. A judge's personal preferences, however, have no place in a judge's decision-making process; a judge should follow the law.

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

No judge, including myself, has walked in everyone else's shoes. My commitment as a judge is to apply the law impartially to the cases and controversies before me, to afford everyone in court dignity and respect, and to treat everyone equally under the law.

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, it is not.

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 Seventh Amendment "preserved" the right to jury trial as it existed at common law. The right was revered at common law, as Blackstone opined that right to a jury trial "has been, and I trust ever will be, looked upon as the glory of the English law . . . [and] it is the most transcendent privilege which any subject can enjoy or wish for, that he not be affected either in his property, his liberty or his person, but by unanimous consent of twelve of his neighbors and equals." Blackstone Commentaries, Book 3, Chapter 23. The Supreme Court has also espoused the virtues of the right to trial by jury: "It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & Pac. R.R. Co. v. Stout*, 657, 664 (1873). In short, the Seventh Amendment right to trial by jury is incredibly important.

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

Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

- 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?

As a general rule, appellate courts do not engage in fact-finding; rather they evaluate the record on appeal. Federal Rule of Appellate Procedure 10(a) addresses the composition of the record on appeal. Under that rule, “[t]he following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk. *See also* Fed. R. App. P. 32(b) (providing requirements for the appendix).

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

Yes, it could.

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

This issue arises often in the context of legislation enacted pursuant to one of the enforcement clauses of a constitutional amendment, *see, e.g.*, U.S. CONST. amend. XIV, § 5 & amend. XV, § 2, and the Supreme Court has generated a body of precedent with respect to several pieces of individual-rights legislation. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (in the context of the Americans with Disabilities Act of 1990); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003) (in the context of the Family and Medical Leave Act of 1993); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (in the context of the Age Discrimination in Employment Act of 1967); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (in the context of the Religious Freedom Restoration Act of 1993); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (in the context of the Voting Rights Act of 1965). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including precedent in this area.

10. 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.

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

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

Please see my response to Question 10.b.1.

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

Please see my response to Question 10.b.1.

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

Please see my response to Question 10.b.1.

- 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 10.b.1.

- 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 10.b.1.

Senate Judiciary Committee Hearing on
“Nominations”
Questions for the Record
June 12, 2019
Senator Amy Klobuchar

Questions for Judge Peter Phipps, nominee to be U.S. Circuit Judge for the Third Circuit

- How important is adhering to precedent, even precedent that you believe may have been wrongly decided?

The Supreme Court has summarized the importance of adhering to precedent in its observation that “*Stare decisis* – in English, the idea that today’s Court should stand by yesterday’s decisions, is ‘a foundation stone of the rule of law,’” and that “[r]especting *stare decisis* means sticking to some wrong decisions.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent.

- While working at the Department of Justice, you defended the U.S. Air Force’s Don’t Ask, Don’t Tell policy, which prevented LGBT service-members from serving openly. In light of your participation in that case, will you commit to following the precedent created by the Supreme Court’s decision in *Obergefell v. Hodges*?

Yes, as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Obergefell v. Hodges*.

The referenced case, *Witt v. United States Air Force*, involved a challenge to a now-repealed federal statute, 10 U.S.C. § 654, that established the Don’t Ask, Don’t Tell policy. That statute was passed by Congress and signed into law by President Clinton in 1993. Afterwards, the Don’t Ask, Don’t Tell policy was implemented by Democratic and Republican administrations, until Congress passed and President Obama signed legislation repealing 10 U.S.C. § 654 in 2011.

As a career attorney at the Department of Justice, I had no role in the creation of the Don’t Ask, Don’t Tell statute and policy. In my role as a career attorney, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies.

The decision to defend the constitutionality of the statute and policy at trial was made by President Obama’s Attorney General Eric Holder in consultation with Solicitor General Elena Kagan and the Department of Defense. Attorney General Holder stated in an April 24, 2009 letter to the Senate Legal Counsel, which referenced correspondence regarding the case from the General Counsel for the Department of Defense (Hon. Jeh Johnson) to the Solicitor General (Hon. Elena Kagan), that “the appropriate course” was to “to defend the constitutionality of 10 U.S.C. 654 on remand in the district court.”

Copy available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/04-24-2009.pdf>. Following the trial, my duties included negotiating and drafting a settlement agreement with the plaintiff.

**Nomination of Peter Joseph Phipps, to be United States Circuit Judge
for the Third Circuit
Questions for the Record
Submitted June 12, 2019**

QUESTIONS FROM SENATOR COONS

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

I would look to the Supreme Court and the Third Circuit for the governing framework, starting with cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes, the Supreme Court has considered that factor.

- 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?

Yes as to the first question. As to the second question, as an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent, and in the absence of any controlling precedent, I would look to precedent 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*).

As an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent, including *Lawrence* and *Casey*.

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 has applied the Equal Protection Clause to race-based classifications and to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (gender-based classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race-based classification); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender-based classification).

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?

On several occasions, the Supreme Court has addressed the proper means for interpreting and applying the Fourteenth Amendment, and as an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent regarding the Equal Protection Clause.

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?

I understand that *United States v. Virginia* was not the first time that the Supreme Court struck down a gender-based classification relating to educational opportunities. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). I do not know why there was not an earlier challenge to Virginia Military Institute's former male-only admission policy.

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

In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). As an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent regarding the Fourteenth Amendment.

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

Because there may be litigation implicating this issue, as a sitting judge, I respectfully

refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

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

The Supreme Court found a right for married couples to use contraceptives in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and later in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court overturned a conviction under a law banning the distribution of contraceptives, without regard to marital status. As an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent in this area.

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

The Supreme Court has repeatedly recognized such a right. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Casey v. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). As an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent in this area.

- 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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down a state criminal law based on the liberty interest protected by the Due Process Clause for “two adults who, with full and mutual consent from each other engaged in sexual practices. . . .” *Id.* at 578. As an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent in this area.

- 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?

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, and when applicable precedent makes it appropriate to consider such evidence, I will do so in accordance with controlling precedent.

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

Under Rule 702 of the Federal Rules of Evidence as well as precedent in the *Daubert* / *Joiner* / *Kumho Tire* line of cases, expert opinions from these disciplines may be admissible into evidence.

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

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 1.

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

This is a topic of academic debate among legal scholars. As an inferior court judge, I would follow all binding Supreme Court and Third Circuit precedent regarding *Brown* and its progeny.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”?
- Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited June 7, 2019).

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?

Yes, *see, e.g.*, U.S. Const. art. 1, § 3, cl. 3 (requiring Senators to be at least thirty years old), and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent regardless of whether that precedent is based on the original public meaning of a constitutional provision.

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

Please see my response to Question 6.c.

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

I would observe and apply all relevant Supreme Court and Third Circuit precedent that identifies the appropriate sources to use to discern the contours of a constitutional provision.

7. Can unnecessary delays in access to reproductive care constitute an undue burden on the constitutional right to abortion?

In *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court, in articulating the undue burden standard, quoted two passages from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): (i) “a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends,” *Whole Woman’s Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,” *Whole Woman’s Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). As an inferior court judge, I will fulfill my duty to observe and apply

all binding Supreme Court and Third Circuit precedent, including *Whole Woman's Health*. Because there may be litigation implicating this question, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

8. Every year, federal courts of appeals are the final word in thousands of criminal cases of great consequence – defining the scope of the Sixth Amendment’s right to counsel, the Fourth Amendment’s protection from unwarranted searches and seizures, a prosecutor’s obligation to disclose evidence to a defendant under *Brady*, and the voluntariness of a confession and *Miranda* rights, among other critical issues. Please describe your experience with evaluating these issues.

I encountered issues of criminal procedure in my fifteen years as a career public servant at the Department of Justice in matters involving parallel civil and criminal proceedings, as well as in cases involving statutes that imposed both civil liability and criminal penalties. In addition, I worked on several matters involving questions of criminal procedure as an appellate law clerk, and I previously handled a suppression hearing in state court. Beyond those experiences, as a district judge, I maintain an active docket of criminal cases.

Peter Joseph Phipps
United States Court of Appeals for the Third Circuit
Questions for the Record
Submitted June 12, 2019

QUESTIONS FROM SENATOR BOOKER

1. Senator Casey has not returned a blue slip on your nomination to the Third Circuit. If you're confirmed, you would be part of a major break from the longstanding Senate tradition—prior to the Trump Administration—of respect for the views of home-state Senators through the blue slip process.
 - a. Senator Casey has stated that he does not support your elevation to the Third Circuit in part because he does not believe “six months on that bench is sufficient experience or preparation.” He continued, “Like justices of the Supreme Court, circuit court judges are often asked to decide questions of law that can have an enormous impact on Americans’ lives, and I have significant concerns about Judge Phipps’ judicial and constitutional philosophy.”¹ What is your response to Senator Casey’s stated concerns about your nomination?

I am grateful to Senator Casey for supporting my nomination to the district court in 2018, after I was recommended to him and Senator Toomey by the bipartisan judicial advisory panel for the Western District of Pennsylvania, and for respectfully considering my nomination to the Third Circuit. I am serving as a district court judge today because of his support. Senator Casey has always been unfailingly gracious to me, including noting in his statement about my Third Circuit nomination that I am “a person of strong character, great intellect and integrity.” I am similarly grateful that as part of my confirmation to the district court, I received a voice vote both from the Senate Judiciary Committee and from the full Senate.

I believe my qualifications for the Third Court are enhanced by my eight months of service on the district court, but my qualifications extend well beyond that. On the district court, I have presided over more than a hundred hearings and ruled on several hundred motions. Due to the volume of cases that were transferred to me, I have had the opportunity to adjudicate issues at all stages of litigation, across a broad spectrum of subject matter, in a wide range of procedural postures – from temporary restraining orders, to motions to dismiss, to discovery disputes, to summary judgment, and to trial. Those experiences have provided me with additional insight into the creation of the record for potential appeal in each of those cases.

Consistent with my judicial experience, the American Bar Association has rated me as well-qualified to serve on the Third Circuit. In addition, my prior experiences have prepared me well for the Third Circuit: from my legal education at Stanford Law School, to my clerkship for Chief Judge R. Guy Cole, Jr. of the U.S. Court of Appeals for the Sixth Circuit, to my work as a litigator in private practice, to my five years teaching administrative law at Duquesne University School of Law as an adjunct law professor, to my fifteen years of experience as a career public servant

and litigation attorney in the Federal Programs Branch of the Civil Division of the U.S. Department of Justice, during which I was entrusted by three different administrations of both political parties with some of the most high-profile, complex, and sensitive litigation involving the United States.

- b. Do you think the Trump Administration meaningfully consulted with Senator Casey about your nomination?

Yes.

- c. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over Senator Casey's objection to your nomination?

No.

2. In October 2017, you were the counsel of record on a brief for the federal government against a suit “challenging the government’s obstruction of access to abortion” for undocumented, unaccompanied minors.² The suit was “based on the government’s new policies promulgated in March 2017 that prevent shelters from taking any actions facilitating access to abortions—including transportation to medical appointments—without signed approval from the Director” of the Office of Refugee Resettlement.³ As the presiding magistrate judge told you at a hearing, “You’re not being asked to do anything. . . . You’re not being asked to spend money. You’re really not being asked to transport. You’re just really being asked to stay out of the way.”⁴

Responding to the argument that the Trump Administration’s policies constituted an undue burden, you argued in this October 2017 brief that, “given the constitutionally legitimate interest that the Federal Defendants have in promoting childbirth, in refusing to facilitate an

¹ Tim Ryan, *Trump Nominates Six for Federal Court Seats*, COURTHOUSE NEWS SERV. (May 3, 2019), <https://www.courthousenews.com/trump-nominates-six-for-federal-court-seats>.

² Order Denying Motions for Leave To Amend and a Temporary Restraining Order at 1, *Am. Civil Liberties Union of N. Cal. v. Burwell*, No. 16-cv-03539-LB (N.D. Cal. Oct. 11, 2017), 2017 WL 4551492, at *1.

³ *Id.*

⁴ Sudhin Thanawala & Nomaan Merchant, *Judge Won’t Order Officials To Allow Texas Abortion*, STATESMAN (Oct. 11, 2017), <https://www.statesman.com/news/20171011/judge-wont-order-officials-to-allow-texas-abortion>.

abortion, and in not providing incentives for pregnant minors to illegally cross the border to obtain elective abortions while in federal custody, as well as the irreversible nature of abortion, both the balance of hardships and the public interest favor denial of plaintiff's motion."⁵

In an important decision from the previous year joined by Justice Kennedy, *Whole Woman's Health v. Hellerstedt*, the Supreme Court had explained that the "correct legal standard" for the undue burden test is to "weigh[] the asserted benefits against the burdens."⁶ Your brief did not cite *Whole Woman's Health*.

- a. Do you believe your brief's arguments were fully consistent with *Whole Woman's Health*? Please explain your answer.

The referenced case, *ACLU of Northern California v. Azar*, involved an Establishment Clause challenge to a competitively-awarded grant to a faith-based organization during the Obama administration. As a career attorney at the Department of Justice, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies. The issue of access to abortion was tangential to the Establishment Clause challenge, as made clear in the Court's summary judgment opinion upholding the constitutionality of the Obama-administration grant: "Discovery has clarified that this case is not about the government or any religious organization denying access to abortion or contraception. There is no evidence in the record that any unaccompanied minor or trafficking victim who wanted an abortion or contraception during the time period relevant to this case was unable to obtain them." *ACLU of N. Cal. v. Azar*, 2018 WL 4945321, at *1 (N.D. Cal. Oct. 11, 2018).

The October 2017 brief referenced in Question 2 was in response to an attempt to bring an unrelated plaintiff with an unrelated claim into the ongoing Establishment Clause challenge case near the close of discovery and to obtain a preliminary injunction. In seeking a preliminary injunction, plaintiff cited to *Whole Woman's Health* once – only as a reaffirmation of the *Casey* principle, and not for the proposition cited above. Accordingly, the referenced brief addressed the aspects of the undue burden test cited by plaintiff as set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

- b. The analysis under *Whole Woman's Health* would seem to include, in this context, weighing the potential harms to Jane Doe resulting from a further delay against any claimed benefits from that delay.⁷ Do you believe your brief's arguments, and the government's actions in this litigation, addressed this consideration?

Please see my response to Question 2.a.

3. What is the most difficult experience you have had making an oral argument before a federal court of appeals, and why?

Oral argument in *Miami-Luken, Inc. v. U.S. Department of Justice*, No. 17-cv-3614 (6th Cir.)

was challenging because it arose in the context of an attempt by the U.S. Drug Enforcement Administration to revoke the registration of a corporation that had illegally distributed millions of dosage units of oxycodone and it involved a jurisdictional issue of first impression: the meaning of the term “final decision” in 21 U.S.C. § 877. My client prevailed on this case in the court of appeals.

4. What is the most difficult experience you have had writing a brief for a federal court of appeals, and why?

Brief writing in *NCAA v. Christie*, Nos. 13-1713, 13-1714, & 13-1715 (3d Cir.), was challenging because these consolidated cases arose in the context of an issue of great public interest – the legality of sports betting in New Jersey – and because the appeal implicated three significant issues of constitutional law: the Tenth Amendment; the equal footing doctrine; and the Commerce Clause. My client prevailed on this case in the court of appeals, but ultimately did not prevail at the U.S. Supreme Court.

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

I tend not to label myself because the term “originalist” may mean different things to different people. As an inferior court judge, my first and foremost obligation is not to any specific interpretative method, but to binding precedent. Beyond that, the Supreme Court has indicated that that looking to the original public meaning of the terms in the Constitution is a salutary method of analysis in some cases. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were based on their respective understandings of the original public meaning of the Second Amendment.

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

For reasons similar to those articulated in my response to Question 5, I tend not to label myself in light of the different meanings that people may ascribe to the term “textualist.” As an inferior court judge, my first and foremost obligation is to binding precedent on the meaning of any statutory term. Beyond that, the Supreme Court has indicated that looking to the text and structure of a statute is a salutary method of analysis in some cases. In addition, in a 2015 lecture on statutory interpretation, Justice Kagan said, “we’re all textualists now.”

7. 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.

⁵ Federal Defendants’ Opposition to Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction at 1-2, *Am. Civil Liberties Union of N. Cal. v. Wright*, No. 3:16-cv-03539-LB (N.D. Cal. Oct. 9, 2017), 2017 WL 6040927.

⁶ 136 S. Ct. 2292, 2310 (2016).

⁷ See, e.g., Plaintiffs' Reply in Support of their Motion for a Temporary Restraining Order at 3, *Am. Civil Liberties Union of N. Cal. v. Wright*, No. 3:16-cv-03539-LB (N.D. Cal. Oct 10, 2017), 2017 WL 6040932 ("Time is of the essence. Defendants' actions have already delayed Ms. Doe's ability to access abortion, and forced her to continue her pregnancy for weeks. Each week of delay pushes Ms. Doe needlessly further into her pregnancy, which increases the risks and complexity of the procedure. Each day that Ms. Doe is unable to get the health care she needs and effectuate her very personal decision about her pregnancy, while enduring hurdle after hurdle erected by the government, is taking an enormous emotional toll. Eventually Ms. Doe will be pushed so far into her pregnancy that she will be forced to carry the pregnancy to term against her will.").

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

I would consider the arguments presented by parties in briefing, and I recognize that the Supreme Court has made clear that when a statute is ambiguous, it is permissible for a court to consider legislative history.

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

Yes, consistent with my response to Question 7.a, I would evaluate arguments presented by the parties regarding legislative history.

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

I view judicial restraint as the opposite of judicial activism, and yes, as defined, I believe that judicial restraint is an important value for all judges to possess.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁸ Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁹ Was that decision guided by the principle of judicial restraint?

Citizen United is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹⁰ Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I

respectfully refrain from further responding to this question.

9. 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.¹¹ 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.¹²

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 9.a.

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

Please see my response to Question 9.a.

⁸ 554 U.S. 570 (2008).

⁹ 558 U.S. 310 (2010).

¹⁰ 570 U.S. 529 (2013).

¹¹ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹² *Id.*

10. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹³ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁴ 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.¹⁵ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁶

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

I have not studied this issue in depth, but the conclusion that members of the criminal justice system have acted with implicit social cognition on the basis of race would not surprise me.

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

I have not studied this issue in depth, but generally yes.

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

I have not studied the issue in depth. When my wife was in graduate school, she alerted me to literature on implicit social cognition. Prior to my nomination to the Court of Appeals, I reviewed four articles related to this topic: Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, PSYCHOLOGICAL REVIEW, Vol. 102, No. 1, 4-27 (1995); B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?* to appear in B. Gawronski & B.K. Payne (Eds.), HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS; Brian A. Nosek, Carlee Beth Hawkins & Rebecca S. Frazier, *Implicit social cognition: from measures to mechanisms*, TRENDS IN COGNITIVE SCIENCES, Vol. 15, No. 4 (Apr. 2011); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, SOCIAL ISSUES AND POLICY REVIEW, Vol. 6, No. 1 (2012).

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.¹⁷ Why do you think that is the case?

Those disparities concern me, and in recognition of the depth of this interdisciplinary issue, I look forward to updates and explanations that the Sentencing Commission may provide – those would be very important to me.

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.¹⁸ Why do you think that is the case?

Those disparities concern me, and I look forward to updates and explanations on this significant issue as they become available – those would be very important to me.

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

In addition to ensuring the correctness of the sentencing guidelines range and the rulings on any departures, appellate judges can review the record to ensure a meaningful evaluation of statutory factors, *see* 18 U.S.C. § 3553(a), that consider the individual circumstances of the defendant to ensure that the sentence is “sufficient, but not greater than necessary.”

11. 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.¹⁹ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁰

¹³ 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>.

¹⁴ *Id.*

¹⁵ 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>.

¹⁶ *Id.*

¹⁷ 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.

¹⁸ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹⁹ 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>.

²⁰ *Id.*

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

I have not studied this issue in depth, but I recognize that it is difficult to distinguish causation from correlation, especially on a multivariate issue such as this one.

- 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 11.a.

12. 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.

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

Appellate courts generally review the record from district courts and the briefs of the parties without the occasion to address parties or witnesses directly by name in open court. If there is a need to use a pronoun to refer to a plaintiff, defendant, or witness in a written opinion, I would review the record and the parties' briefing to assess the appropriate pronoun.

14. Do you believe that *Brown v. Board of Education*²¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, I believe *Brown v. Board of Education* was correctly decided. As I have noted before, *Brown* corrected an abominable wrong in our nation's history by ending the false doctrine of separate but equal that was established in *Plessy v. Ferguson*.

15. Do you believe that *Plessy v. Ferguson*²² was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, *Plessy v. Ferguson* was an abominable wrong in our nation's history. In *Brown v. Board of Education*, the Supreme Court correctly ruled in a unanimous decision that *Plessy* was not correctly decided.

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

No.

17. 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.”²³ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself, *see* 28 U.S.C. § 455. In my experience, I am not aware of an instance in which a judge was recused or disqualified based on his or her race or ethnicity.

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.”²⁴ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court explained that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* at 693. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Zadvydas*.

²¹ 347 U.S. 483 (1954).

²² 163 U.S. 537 (1896).

²³ 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>.

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

**Questions for the Record from Senator Kamala D. Harris
Submitted June 12, 2019
For the Nomination of**

Peter J. Phipps, to the U.S. Court of Appeals for the Third Circuit

1. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortion. After the law passed, the number of those abortion providers 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, should courts consider whether the law would disproportionately affect poor women?**

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court, in articulating the undue burden standard, quoted two passages from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): (i) "a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Whole Woman's Health*. Because there may be litigation implicating this question, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." See also Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 1.a.

2. 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?**

The Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), explained that the right to marry derived from both the Due Process Clause and the Equal Protection Clause: “[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.” *Id.* at 2602. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Obergefell*. Because there may be litigation implicating this question, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- 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?**

Please see my response to Question 2.a.

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

Please see my response to Question 2.a.